

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

24827-20-21

Child's Name

[A.M.]

Date of Birth

[redacted]

Parents

[redacted]

Counsel for Parents

Heather Hulse, Esquire
30 Cassatt Avenue
Berwyn, PA 19312

Local Educational Agency

Tunkhannock Area School District
41 Philadelphia Avenue
Tunkhannock, PA 18657

Counsel for LEA

Christopher Bambach, Esquire
331 E. Butler Avenue
New Britain, PA 18901

Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

08/27/2021

Introduction

This special education due process hearing concerns the educational program and placement of A.M. ("student"), a student who resides in the Tunkhannock Area School District ("District").¹ The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")² as a student who requires special education.

In April 2021, the student's parents filed the special education due process complaint which led to these proceedings. The complaint alleged that the District had, over prior school years, denied the student a free appropriate public education ("FAPE"). Parents also alleged that the then-current programming was inappropriate and needed to be addressed through a final decision and order.

Over the ensuing months, the parties engaged in resolution discussions, but those did not bear fruit. In mid-July 2021, the hearing officer and counsel engaged in a hearing-planning conference call. With an extensive record needing to be developed for the past denial-of-FAPE claims, but a more near-term decision needing to be issued for the current-

¹ The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§14.101-14.162 ("Chapter 14").

programming issue, the complaint was bifurcated into two processes, one for the retrospective claims (at a separate ODR file number) and one for the current-programming claim (at the instant file number). This process took priority, but a mutually-available hearing date, given the schedules of the parties and counsel, could not be secured until late August 2021.

[Redacted]. Both parents disagree with the last-proposed individualized education program (“IEP”), issued by the District, but each parent has slightly different views on what makes the program inappropriate and, more starkly, different views on what the student’s placement should be.³

The student’s father’s concerns appear to be geared to the student’s behavioral needs, needs which at this time the father feels are best addressed in a more specialized setting outside of the District. The student’s mother’s concerns seem to be geared to academic concerns, especially supports in reading, with a placement at the District.

The District finds itself proposing a program for the student where two cross-currents meet. First, the parents, between themselves, both feel the

³ Notes of Testimony [“NT”] at Father’s Testimony and at Mother’s Testimony. The hearing was held in one session on Monday, August 23rd. The student was without an agreed-upon placement. With the school year commencing at the District on Wednesday, August 25th, this hearing officer informed the parties that it was his intention to issue this decision in only a handful of days, such that the final transcript would not be available for exact citation. Reference or citation is therefore made in a general way to the testimony of witnesses where that testimony supports the assertion or fact-finding.

District's proposed program is inappropriate, although, as indicated above, each finds the District's program to be inappropriate for different reasons. Second, as set forth below, in the prior school year (2020-2021) the student had been in a specialized placement outside of the District. As the IEP team collaborated through the summer, a potential return to that placement was envisioned. But, ultimately, the placement did not have space to accommodate the student. Therefore, a different placement was necessary with very little time available to the parties.

Without an agreement between parents and the District, and with differing views even between parents, as to the student's program and placement, special education due process must provide guidance to the parties about the student's educational programming.

Issue

What should the student's program and placement be in the 2021-2022 school year?

Findings of Fact

All evidence in the record, both exhibits and testimony, was considered. Specific evidentiary artifacts in findings of fact, however, are cited only as

necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. In the 2020-2021 school year, the student attended a specialized school as a result of the student's behavior needs. This follows multiple prior school years where the student has been in specialized settings. (Joint Exhibit ["J"]-40, J-45, J-53, J-54, J-56, J-58; NT at District Special Education Administrator's Testimony ["NT-Administrator"], NT at Father's Testimony ["NT-Father"]).
2. The IEP most recently offered by the District was proposed on Friday, August 20th, based on IEP meetings in May and July 2020, as well as developments regarding the non-availability of the specialized placement the student attended in the 2020-2021 school year. (J-58; NT-Administrator).
3. The IEP team did not have an opportunity to consider the August 20th IEP. (J-58).
4. The student was most recently re-evaluated by the District in December 2020. (J-45).
5. The December 2020 RR found that the student was eligible for special education as a student with an emotional disturbance and specific learning disabilities in basic reading and oral reading fluency. (J-45).

6. At approximately the same time—the late fall or early winter of 2020-- an independent speech and language evaluation report (“independent S&L report”) was issued. (J-40).
7. The focus of the parents’ disagreement with the August 20th IEP fall into discrete categories: addressing the student’s specific learning disabilities/academic needs, behavioral & emotional support, executive functioning, and the student’s educational placement. (NT-Father, NT at Mother’s Testimony [“NT-Mother”]).

Specific Learning Disabilities/Academic Needs

8. The student has been identified as a student with specific learning disabilities in basic reading and oral reading fluency. (J-45).
9. The District uses a statistically-significant discrepancy model for determining specific learning disabilities. It is beginning to incorporate a multi-tiered system of support (“MTSS”) for intensive regular education intervention for students who are academically struggling. (J-60; NT-Administrator).
10. As part of a District re-evaluation in May 2016, when the student was [redacted] years old, the student underwent a cognitive

assessment [redacted]. The assessment yielded a full-scale IQ of 94. (J-45).

11. The student's identification as a student with specific learning disabilities in basic reading and oral reading fluency is supported by achievement testing results in the December 2020 re-evaluation. (J-45).
12. Decoding sub-tests in achievement testing, as well as phonological testing in the independent S&L evaluation, indicate that the student's needs in oral reading fluency may be rooted in significant decoding deficits. (J-40, J-45).
13. Achievement testing in the December 2020 re-evaluation report also indicates that the student may have needs in composite written expression generally, including spelling. (J-45).
14. The August 20th IEP contains a reading fluency goal and a mathematics goal. (J-58).
15. The District proposes that the student be evaluated for reading level in its MTSS programming and begin to receive intensive regular education support in reading, with monitoring thereafter within the MTSS program. (J-58; NT-Administrator).

16. The District administrator who testified at the hearing was not precisely familiar with the newly-adopted MTSS curriculum/interventions, and the schedule for the delivery of MTSS programming had not yet been developed. (NT-Administrator).
17. The District's proposed instruction in reading and language arts includes 80 minutes per day in the regular education language arts curriculum and 40 minutes per day in the MTSS curriculum. (NT-Administrator).
18. For some students identified with the need for reading support outside of regular education reading supports, the District utilizes a comprehensive, research-based, multisensory and interactive reading program geared to intensive phonological and sound-symbol understanding/decoding ("intensive decoding reading program") taught by District teachers who are specifically trained within the program. (NT-Administrator).
19. The student's mother, particularly, would like to see the student's reading instruction that includes services through the District's intensive decoding reading program. (NT-Mother).

Behavioral & Emotional Support

20. The student has been identified as a student with an emotional disturbance. (J-45).
21. Although the record in the instant matter, by necessity, is not as expansive as it might be, it is clear that the student's needs in emotional regulation and behavioral intervention predominate in terms of the student's needs. (J-45, J-53, J-54, J-56, J-58; NT-Administrator, NT-Father, NT-Mother).
22. At the specialized placement where the student attended the 2020-2021 school year, the student received 30 minutes per day of group social work support. (J-58 at page 16; NT-Administrator).
23. The student had a positive behavior support plan ("PBSP"), based on a functional behavior assessment ("FBA"), as part of the programming being implemented at the specialized setting. (J-45, J-58).
24. The District proposes through the August 20th IEP to provide a weekly individual social work session of 20 minutes and twice-weekly group social work support for 30 minutes. (J-58).
25. A referral and intake process is underway for community-based mental health services that may include a component in the educational setting. (NT-Administrator).

Executive Functioning

26. The August 20th IEP proposed by the District includes a goal for organization (“planning and routine”). (J-58).
27. This goal was drafted by the District’s special education administrator in light of assessment data for executive functioning contained in the December 2020 re-evaluation. (J-45; NT-Administrator).
28. The executive functioning assessment included ratings from two educators at the specialized placement where the student attended in the 2020-2021 school year as well as ratings from each of the parents. (J-45).
29. The most consistent rating, indicated by all raters, was the emotional regulation index, rated as clinically significant by the student’s mother and at-risk by the educators and the student’s father. (J-45).
30. This index includes sub-scales for shift (mother: clinically significant, one educator: significant, father: at-risk) and emotional control (mother: clinically significant, both educators: at-risk). (J-45).

31. In the planning/organizing sub-scale, the educators did not indicate any elevated rating. The parents each rated the student with identical scores, in the at-risk range. In testimony, neither parent voiced deep concern for the student's needs in planning/organizing/routine. (J-45).

Placement

32. Through the August 20th IEP, the District proposes to educate the student in a full-time emotional support classroom at the District for all academic subjects, with the student engaging in the regular education environment for lunch, recess, special area classes (art, music, gym, library, etc.), assemblies, and other special school events. (J-58; NT-Administrator).

33. The student's father does not feel that the District is prepared to educate the student given the student's significant behavior needs. The student's father would like to explore the possibility of a different specialized setting, perhaps on a split-day basis. This might also include programming, in his view, at the school district where he resides, which is not within the District. (NT-Father).

34. The student's mother supports a District-based placement. (NT-Mother).

35. At the conclusion of the hearing on August 23rd, through an oral order on the record, this hearing officer ordered that the District arrange for transportation of the student on August 25th to the District school identified in the August 20th IEP so that the student would engage with, and like, peers and others in the community with back-to-school experiences. This oral order was explicit that it was not a final program/placement determination, pending issuance of this final decision. (NT – Hearing Officer's Order & Directive).

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. Where particular emphasis was accorded to a witness's testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

Discussion

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Here, the varied disagreements of the parents with the District's August 20th IEP, the disagreements between the parents, and the non-availability of the specialized placement where the student had been attending all require that special education due process provide a definitive sense of the student's program and placement for the 2020-2021 school year. This discussion, each with pertinent directives for the District or IEP team, will mirror the discrete elements of the student's programming and placement as reflected in the August 20th IEP as outlined in the Findings of Fact (although the discussion of placement will come first, as that will be the necessary educational context for the programmatic elements that follow). The order will also contain additional directives to the IEP team.

Placement

The student's placement shall be as outlined in the August 20th IEP, namely a full-time emotional support placement at a District school. This building would be the school building that the student would attend if the student was not identified, so that element of the least restrictive environment is fortuitously in place. There is no need to amend the placement as described in the August 20th IEP.

The student's daily schedule shall remain the same as outlined in the August 20th IEP, although as set forth below, there will be potential adjustments to the student's time in reading instruction and language arts; there will be definitive adjustments to the student's social work services. So those adjustments in the student's schedule will need to be accounted for, but by and large, the student's daily schedule will remain the same.

The mother's position regarding placement largely aligns with the holdings in this decision. The father's position—a split day between a specialized placement and a school district placement—was not deeply explored on this record; indeed, it was never a consideration of the IEP team in any collaborative way. It may be that the student requires a more specialized placement. But the August 20th IEP, with the addition of the revisions encompassed by this order, is reasonably calculated to yield meaningful educational benefit in light of the student's unique

circumstances. On this record, that educational benefit can be delivered at the District's proposed placement.

However, set forth below is a monitoring schedule to make sure that incrementally in the short term, the District is monitoring the student's progress and hoped-for success in the District placement. If it turns out that the District-based placement is not yielding the results that are hoped for, or at a minimum is not delivering FAPE to the student, then the IEP team may need to re-visit the student's programming to consider a more specialized placement. But that is not the case on this record at this time.

Here, too, the District's views of the student need to be noted. Multiple times during the testimony of the District special education administrator, she noted, or implied, that the District was hopeful that the student could be included more often in regular education for academic instruction. That would be an excellent result. But at this stage, having been in specialized settings for some time, a public school setting will be new to the student in many regards. Making sure that the student has structure, and emotional/behavioral supports, and is being provided with instruction that is firmly grounded in special education (and not MTSS, or gradualism in instructional settings) are where the program and placement must begin. The full-time emotional support setting provides that structure. Below are revisions to the August 20th IEP, being ordered to put in place the

emotional/behavioral supports and instructional elements that are also necessary.

Accordingly, the placement outlined in the August 20th IEP will be the student's placement for the 2020-2021 school year.

Specific Learning Disabilities/Academic Needs

Reading Instruction. The District has appropriately identified the student with specific learning disabilities in basic reading and reading fluency. The student's needs in decoding are manifest and provide the underlying foundation for these identified needs. As evidenced by achievement assessments in the December 2020 re-evaluation report, these needs are deep and require a highly structured approach to explicit sound-symbol/phonics instruction. The opinion of the evaluator in the independent S&L evaluation is credited here: As academic demands generally, and reading demands specifically, increase as the student progresses to middle school and high school curriculum, the student's reading comprehension ability is likely to suffer without a stronger base for decoding and fluency being built at this stage in the student's education.

Therefore, the District must, on or before September 1st, evaluate the student within the District's intensive decoding reading program outlined above to determine the student's current level of performance within the rubrics and leveling of that program. The August 20th IEP shall be revised to

indicate that the student will receive this instruction in place of the MTSS programming proposed by the District (40 minutes per day), with additional daily instruction to be provided in the program as the current level of performance within the program might indicate (with any necessary additional instructional time to come out of the 80 minutes of daily language arts instruction). Once a current level of performance is ascertained, that level of performance shall be utilized as a baseline for a decoding goal in the IEP, with the annual goal to be crafted by a District teacher certified to deliver the intensive decoding reading program.

As a corollary to this new goal and specially-designed instruction in decoding, the third modification/specially-designed instruction notation in J-58 at page 40 (MTSS phonics instruction) shall be removed and replaced with a modification/specially-designed instruction that reflects daily instruction in the intensive decoding reading program as outlined in the paragraph above. The first modification/specially-designed instruction notation in J-58 at page 41 (leveling for placement in the self-paced MTSS program) shall be removed. All other modifications/specially-designed instruction geared to reading shall remain in the IEP as written.

The reading fluency goal shall remain in the IEP, although it shall be revised to indicate that the reading fluency instruction shall take place not through the MTSS regular education intervention, but as part of the intensive decoding reading program instruction, or as part of the delivery of

special education during language arts. This choice is to be left solely in the hands of a District teacher certified to deliver the intensive decoding reading program, as that person is in the best position to judge whether fluency instruction/progress-monitoring can and should, or cannot and should not, be part of the intensive decoding reading program.

Finally, as mentioned above, it may be that at some point in the future, the student's IEP team may determine that the student once again requires a specialized setting. If this happens, it is not a requirement of the student's program that the student receive in the new placement the exact intensive decoding reading program that will be delivered by the District, as that exact program may be unavailable in a new placement. But the student must continue to receive in any new placement some type of intensive decoding reading program, with a comprehensive, multisensory, phonics-based approach focused on sequential instruction geared to intensive phonological and sound-symbol understanding/decoding.

Written Expression & Cognitive Assessment. The issue of whether or not the student should be explicitly identified as a student with a specific learning disability in written expression cannot be definitively determined at this time. It would seem that the results of achievement assessments in the December 2020 re-evaluation report support such a conclusion—the student shows lower than expected achievement scores in the written expression composite (with relatively low scores in the essay composition, sentence

building, and spelling sub-tests). The caveat here, however, is that while the fluency and decoding are clear needs even outside the consideration of the student's cognitive ability, there appear to be splinter skills in sub-areas of written expression which are strong, so it is a slightly mixed picture (with a skew towards the necessity of identification). Thus, updated cognitive assessment would help to understand the achievement scores in the context of the student's cognitive ability. In reality, "would be helpful" is not strong enough—the student's cognitive ability is currently understood in the December 2020 re-evaluation report in terms of an instrument designed for very young children, appropriate at the time it was administered over four years ago, but no longer valid for understanding the student's needs through a discrepancy model.

Therefore, the District will be ordered to undertake an updated cognitive assessment with an instrument valid for the student's age. With these results in hand, the IEP team will be ordered to meet to determine if there is consensus as to whether the student should be explicitly identified as a student with a specific learning disability in written expression. The IEP team may also, at its own initiative, re-visit the student's potential needs in mathematics in light of the results of the updated cognitive assessment. But consideration of those results will be ordered explicitly in terms of written expression.

Notwithstanding this process of assessment and consideration, the last modification/specially-designed instruction notation in J-58 at page 41 (spelling) shall remain part of the student's IEP pending the IEP team's consideration of the updated cognitive assessment vis a vis needs in written expression.

Behavioral & Emotional Support

FBA & PBSP. The student's most profound needs are centered around emotional support and behavior support in the educational environment. The first thing that occurs to a reader of the August 20th IEP is that the FBA and PBSP were undertaken at the specialized program where the student attended in the 2020-2021 school year. This was proper and necessary, as an understanding of the student's behavior through the FBA and the response to that behavior through the PBSP are based in a specific situational context (i.e., the function of the behavior, and the response, in the educational setting of the specialized program). It is important that a PBSP be part of the student's programming. Therefore, the PBSP shall remain in place as part of the August 20th IEP. However, where the educators at the District, who will be implementing that PBSP and will have first-hand experience with the student's behavior at the District, feel that the PBSP needs to be changed or revised in a material way, the District shall undertake a new FBA, with behavioral assessment of the student undertaken

in the educational environments of the District, and shall create a new PBSP based on the new FBA.

Social Work Services. The August 20th IEP shall be revised to provide more social work support at the District. Specifically, the individual social work services shall be increased to two 20-minute individual sessions weekly; the two 30-minute group sessions weekly shall remain in place. The ability of the student to access individual social work services as needed shall also remain in place.

This decision takes no position on the potential implementation of community-based mental health services in the educational environment. That decision is left in the hands of the IEP team. But any use of such services shall not be used to reduce or to impact the provision of the weekly social work sessions, whether individual or group.

Goals & Modification/Specially-Designed Instruction. Through this order, there are no ordered revisions to the behavior goals (emotional regulation and coping strategies) and no ordered revisions to any of the modifications/specially-designed instruction related to behavior.

District-based Team Meetings. Finally, the father's concerns that the District may not be suited to deliver this IEP, or whether the student's needs might require a more specialized placement, are not entirely ill-founded. Therefore, the District-based members of the IEP team (the student's emotional support teacher, reading teacher, a regular education teacher with

some contact with the student, the District social worker, and a District special education administrator) shall meet weekly to share information, data, and insights regarding the progress of the student under the terms of the August 20th IEP and the student's ability to acclimate to, and be academically and behaviorally successful at, the District. This meeting shall not be made part of the IEP but shall take place weekly and shall include documented attendance, beginning the week of August 30th and continuing through the week of October 18th.⁴ Thereafter, the IEP team and/or the team of professionals outlined above may decide whether, and how often, such a meeting shall continue to take place. Furthermore, as the District-based members of the IEP team conduct these meetings, they may, as they feel it is necessary, include or update the parents in terms of this school-based meeting.

Executive Functioning

The record does not fully support a goal for organization, focused on planning and routine. Therefore, this goal shall be removed from the August 20th IEP. However, critical to the student's executive functioning, and overall behavioral functioning, is helping the student to anticipate and navigate transitions where those might lead to frustration and triggers of anger and

⁴ It is not required as a directive of this decision that notes about the meeting be kept, although if the members of the team wish to memorialize the content of the meeting in writing, they may do so.

aggression. Therefore, the first modification/specially-designed instruction on J-58 at page 38 (regarding advance notice of change/transition) should be a focus for all educators.

The student's mother has a particular concern that the student's IEP contain a goal for self-advocacy. That may be advisable over the medium-term, especially as it would integrate with the student sharing feelings of frustration in an appropriate way. In the short-term, however, the adjustment to the District-based placement and the fluidity of the emotional/behavioral programming in the placement—outlined above—as well as the need for the student to meet and to begin a working relationship with the District social worker (a point aptly made by the District special education administrator) argue against injecting too much that is new into the student's programming. Were it necessary, certainly it would be the basis of a revision. But the record does not support an immediacy for the issue, and inclusion of a self-advocacy goal is left in the hands of the IEP team, to take up at a future point in the school year.

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student's educational placement at the outset of the 2021-2022 school year shall be the full-time emotional support placement at the Tunkhannock Area School District school building outlined in the August 20, 2021 IEP.

The student's IEP shall be revised in accord with the directives in the Discussion section of this decision.

As one of those directives, the Tunkhannock Area School District shall, forthwith, schedule the student for a cognitive assessment, through instrumentation valid for the student's age, to be included in a revised re-evaluation report. This order shall serve as permission to re-evaluate the student in this regard. Thereafter, the student's IEP team shall meet to consider the results of the updated cognitive assessment, explicitly in terms of its impact on an understanding of the student's needs, if any, in written expression and in terms of its impact on an understanding of other needs of the student as the IEP team may determine.

Any aspect of the August 20, 2021 IEP not explicitly addressed in this decision and order shall remain in place.

Any claim related to the student's program and placement for the 2021-2022 school year not specifically addressed in this decision and order is denied and dismissed.

s/ *Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire
Special Education Hearing Officer

08/27/2021