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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION DUE PROCESS HEARING

Name of Child: D.J.
ODR #6214/05-06 KE

Date of Birth: xx/xx/xx

Dates of Hearing:
March 3, 2006 (9:00 am to 3:20 pm)
April 10, 2006 (5:00 pm to 8:50 pm)
April 25, 2006 (9:30 am to 4:05 pm)
May 5, 2006 (9:30 am to 4:00 pm)

CLOSED HEARING

Parties to the Hearing:
Parent

Representative:
David Painter, Esquire
McAndrews Law Firm
30 Cassatt Avenue
Berwyn, Pennsylvania 19312

Ms. Susan Levy
School District of Philadelphia
440 N. Broad Street, 3rd Floor
Philadelphia, Pennsylvania 19130

Karl Romberger, Esquire
Fox, Rothschild, O'Brien & Frankel
1250 S. Broad Street Suite 1000
Lansdale, Pennsylvania 19446

Date Last Transcript Received:

May 10, 2006

Date Record Closed

May 27, 2006

Date of Decision:

June 1, 2006

Hearing Officer:

Linda M. Valentini, Psy.D.

Background

Student is [a pre-teenaged] eligible student who resides in the School District of Philadelphia (hereinafter District). He began school in a private kindergarten, moved to public school for first and second grades, went to a charter school for third grade, and repeated third grade in a parochial school. Following an evaluation through Elwyn, Student enrolled in the District, and an IEP providing for learning support was completed over the summer prior to his starting the 4th grade (2004-2005). Following a private educational evaluation¹ completed during the next summer, the District recommended an emotional support program located at a school different from the one he attended the previous year. Thus for 5th grade (2005-2006) he was placed within the District in an emotional support classroom operated under contract by [redacted] (hereinafter CC), a mental health agency.

Parent, Student's mother, (hereinafter Parent) asked for this hearing because she believes that Student's IEP was not appropriately implemented, and she believes that he is therefore entitled to compensatory education for the 2005-2006 school year, continuing until the District appropriately implements Student's IEP. The District contends that it offered Student FAPE during the period in question and that it was not given the opportunity to address the Parents' concerns as Student has rarely attended school since December 2005.

The IEP itself is not at issue in this hearing.

Issues

1. Is the School District's manner of implementing the IEP for Student appropriate and representing FAPE?
2. If the School District is not offering Student FAPE, is he entitled to compensatory education and in what amount?
3. If the manner in which the School District is implementing the IEP is not appropriate, what changes need to be ordered by the hearing officer?

Findings of Fact

1. Student is [a pre-teenaged] old eligible student who resides in the District.

¹ This evaluation and an FBA completed in October 2005 grew out of a previous settlement agreement. (NT 19-20)

2. Student's mother received no prenatal care and he was born weighing 5lb. 13oz. As an infant/toddler Student was described as aggressive, and he did not speak until he was approximately three years old. He had surgery for an umbilical hernia at age five and had his adenoids and tonsils removed at age six. He has allergies, including hay fever. (P-4)
3. In December 2004 and May 2005 Student was seen at Children's Hospital of Philadelphia, Department of Endocrinology due to symptoms of precocious puberty. (P-4)
4. Student has no contact with his father. (P-4)
5. Student has experienced difficulty with social skills and social judgment since early childhood, though reportedly more frequently at school than at home. (P-5)
6. Student has attended six schools since kindergarten: a private kindergarten, two public schools in the District for first and second grades², a charter school for third grade, a Catholic school for a repeat of third grade and a public school, [redacted], for fourth grade. [Redacted], for fifth grade, was Student's seventh school. He has never attended his neighborhood school, as upon his re-enrollment in the District the Parent refused to have him attend there as well as refusing to allow him to attend another offered school. (NT 76-77, 863-865; P-4)
7. Behavior problems, including fighting, occurred in each setting, though to a lesser degree at the parochial school. However, on his report card from the Catholic school the teacher noted that Student's "attitude towards classroom rules, his teacher and classroom needs to improve... he is defiant and increasingly difficult to handle. He disrupts the class and needs to be reminded constantly to do his work and be respectful"³. (NT 87-88; P-4)
8. In March 2004 a physician at [redacted] noted symptoms of attention deficit hyperactivity disorder but did not give him the diagnosis as per mother's report the symptoms were absent in the home. (P-4)
9. A community mental health/mental retardation center provided an evaluation in 2004 as well, and noted that he was prescribed Adderall and Risperdal⁴. His mother never administered the medication, however, because she read the insert describing possible side-effects and viewed news reports alleging that medication does children more harm than good. Student has never been afforded the opportunity for a trial of medication. (NT 38-39, 120, 129; P-4)
10. While at the Catholic school a psychoeducational evaluation was performed through Elwyn due to concerns that Student could not keep pace with the class

² The change from one school to another was a disciplinary transfer. (NT 862)

³ The Parent attributes these behavior problems to Student's difficulty with academics. (NT 88)

⁴ The Parent asserts that he was never prescribed Risperdal. (NT 127-128)

- work, had reading difficulties, was inattentive and displayed inappropriate classroom behavior⁵. (P-4)
11. Cognitive testing (WISC-III) results were Verbal IQ 97, Performance IQ 74, Full Scale IQ 84. He evidenced reading difficulties in the areas of phonics and reading comprehension, with possible causes including visual problems, attention difficulties and social-emotional factors. A recommendation for placement in a learning support program was made, and Student reenrolled in the District. (P-4)
 12. From September 2004 to April 2005 Student received weekly vision therapy at [redacted]. He was noted to have made significant improvement in visual memory and visual-motor integration, but continued having weakness in visual form perception. He chronically refuses to wear his prescribed glasses. (NT 41; P-5)
 13. Having re-entered the District in September 2004, in November 2004 Student was given a TSS worker in the learning support classroom at [redacted]⁶. (NT 89, 867)
 14. An FBA was conducted in late November 2004 in the learning support environment. Three problem areas were delineated: calling out, verbal/physical challenges, and refusal to comply with directives. (P-4)
 15. A school psychologist observed Student in a class consisting of five learning support students, a teacher, a classroom aide, a TSS worker for one of the other students and a TSS worker for Student. In the small setting with the one-to-one TSS support Student required prompting for nearly every directive, but proved capable of doing the work. It was concluded that he required an emotional support component to his program as he met several criteria for the classification of emotional disturbance. (P-3, P-4)
 16. On 1-28-05 Student was seen at Children's Hospital of Philadelphia, Emergency Room following an incident at school [redacted]. (P-4)
 17. In a March 2005 CBR, a licensed psychologist reported the observation of Student's TSS worker that "Student provokes other peers" and noted that in a previous report Student was said to "fight back to no end" if a peer hits him. The March 2005 CBR also notes that the Parent "does not allow him outside since he will be involved in physical confrontations". (P-11)

⁵ Note that in testimony the Parent said that at the Catholic school there was, "no fighting, no cursing, no out of control", "I mean the things that he has picked up (in the public school) and is starting to exhibit now, I didn't know my son could say and do some of these things. But he's, you know, become a product of his environment." (NT 87)

⁶ The Parent alleges that Student was given a TSS because the learning support classroom was an "out-of-control, chaotic environment". However, this hearing officer is aware through her work as a licensed clinical psychologist that TSS workers are provided to students through the mental health stream when their individual behavior presents a "medical necessity" in order to prevent the student from harming self or others and/or to keep the student in the community at a lower level of medical (psychiatric) care. (NT 89)

18. Another CBR was completed in September 2005. The evaluator notes that mother reported “usually at home, he is manageable...He threw tantrums when mother said ‘no’ but did not destroy property”. (P-11)
19. An independent psychoeducational evaluation was conducted by Dr. B during the summer of 2005. On cognitive testing (WISC IV) Student scored a Full Scale IQ of 79 (8th percentile), a Verbal Comprehension Index of 93 (32nd percentile), a Perceptual Reasoning Index of 82 (12th percentile), a Working Memory Index of 80 (9th percentile) and a Processing Speed Index of 78 (7th percentile). The evaluator found these scores to be consistent with those obtained previously on the WISC III. (P-4)
20. On the Woodcock Johnson III Test of Achievement Student scored as follows: Broad Reading standard score 80, Broad Written Language standard score 81, and Broad Math standard score of 87. (P-4)
21. On the Woodcock Johnson III Test of Achievement Student achieved an oral expression standard score of 97, a vocabulary standard score of 95, an oral language standard score of 85, a listening comprehension for stories standard score of 82, a listening comprehension score for following directions of 88, and a phonemic awareness standard score of 79. (P-4)
22. On the Wide Range Assessment of Visual Motor Ability Student was able to copy designs at a standard score level of 82, to match similar shapes at a standard score level of 90, and to place pegs on a grid quickly at a standard score level of 83. (P-4)
23. When he received the independent assessment Student had just completed 4th grade. On the Woodcock-Johnson III Test of Achievement Academic Skills was at a standard score of 87 (3.4 grade level), Academic Fluency was at a standard score of 78 (3.0 grade level), Academic Applications was at a standard score of 84 (3.5 grade level), and his knowledge of phoneme/grapheme relationships was at a standard score of 89 (no grade level assigned). (P-4)
24. On the Beck Youth Inventory Student’s self-reported behaviors resulted in average scores on all inventories, indicating no areas of clinical concern.⁷ (P-4)
25. On the Achenbach Child Behavior Checklist the Parent’s endorsements resulted in no scale rising to the level of clinically significant concern⁸. (P-4)
26. Despite the self and the parental rating scale results, a review of Student’s records led the independent evaluator to conclude that “significant concerns exist in the

⁷ The validity of his responses was questionable as he failed to rate items that most students his age would acknowledge as being at least sometimes true.

⁸ Given his history of problematic behavior the validity of these results is in question.

- area of emotional functioning” and that “his reactions to frustration, teasing and directives are so troubling that Student is likely to get into serious trouble at some point if significant steps are not taken to help him learn to control his anger”. The evaluator noted that “these problems have existed to varying degrees in each of the schools Student has attended, and therefore cannot be blamed primarily on environmental factors”. (P-4)
27. The independent evaluator recommended among other things emotional support, social skills training, a well-structured classroom, intense psychotherapy⁹, possible medication management and a strong alliance between the Parent and the school that allows Student to see that everyone is following the same plan. (P-4)
 28. The evaluator did not specify an emotional support class as opposed to a learning support class, but believes that the environment in which Student is educated needs to address all his needs. (NT 308-309)
 29. The evaluator found that Student has a specific learning disability and an emotional disturbance and cannot say which is primary and which is secondary; they both impact his functioning. (NT 344)
 30. Student becomes angry a lot more quickly than other people but can control his impulses and anger better in a one-to-one situation. His predisposition to anger, according to the evaluator, dates back to earliest times. (NT 209, 322, 335, 352)
 31. Student’s knowledge of social conventions and his social skills are deficient. (NT 318-319, 335)
 32. Because he needs to function in a group he will be able to work better in a framework where there is someone right there to reinforce the positive and the negative and to address the issues as they come up. (NT 317)
 33. The Parent disagrees with the independent evaluator’s conclusion that Student requires emotional support because she does not think that Student has an emotional problem. (NT 42)
 34. At the end of the 2004-2005 school year the District had sought to place Student in regular education for math but the Parent did not approve. (NT 870, 920)
 35. The District issued a NOREP for a full time emotional support program in August 2005. At a September 13, 2005 IEP meeting the Parent agreed to try the placement at [redacted]. (NT 44; S-14, S-20)
 36. The emotional support classroom at [redacted] is operated by [redacted], a mental health agency, under contract with the District. [Redacted] staff in the classroom

⁹ Student began outpatient psychotherapy in 2003. (NT 38)

- are authorized to implement Student's IEP. IEP meetings are attended by District staff and [redacted] staff. (NT 798-800, 892-894; P-7)
37. After the first day of school at [redacted] (9-14-05) Student came running to his mother's car and told his mother that she had to get him out of there because the students were cursing and fighting. He went back to [redacted] and/or was absent for several days,¹⁰ but resumed attendance at [redacted] a week later. (NT 46-47; S-5)
 38. Student has a history of telling his mother part of the truth about an incident but not the whole truth. (NT 512-513, 544)
 39. On one of his few days at [redacted] (2005-2006 year) TSS notes say, "Client displayed his distaste for being at [redacted]". The TSS opined that Student did not respond well to having structure and rules and (didn't take) well to (the teacher) telling him exactly the guidelines and being authoritative". (NT 490-491; P-16)
 40. As regards [redacted], the TSS notes say that "Student is very paranoid. He believes he is in a hostile environment". He thought the principal was "out to get" him. (NT 491-492; P-16)
 41. At [redacted] during the brief time he attended there, Student antagonized peers, for example, commenting when an MR student passed gas. (NT 493; P-16)
 42. During the time he was at [redacted], as was the case during the previous year at [redacted], Student had one-to-one support with a TSS worker supplied by CC and funded through the mental health system. The TSS worker was well known to Student, having worked with him throughout the previous summer and for some portions of the 2004-2005 school year. (NT 361-362, 367; P-5)
 43. Other than for a brief period when another student had a TSS, Student was the only student in the [redacted] emotional support class who required a TSS worker. (765)
 44. The TSS worker found that once Student settled back into [redacted] his behavior was acceptable although Student reportedly believed he did not belong at [redacted]. He did his work and interacted more with the class. (NT 369, 392)
 45. In the [redacted] CC class Student was provided with an individual and a class-wide behavior system. The CC team followed both the mental health treatment plan and the IEP. (NT 417-430, 447-449)

¹⁰ The record is unclear. Compare NT 48 and NT 51; also see NT 490; S-5, NT 52 and 53.

46. The CC team met frequently to revise the behavioral approach to Student and to the class as a whole. The TSS sought frequent consultation from the clinical supervisor of specialized services. (NT 414, 526)
47. A previously agreed upon independent FBA was completed by Dr. H at [redacted] on 10-20-05. The independent behavior specialist conducted a structured observation of Student and found that in general his behavior was appropriate and similar to that of his peers. He successfully responded to the teacher's questions and did not engage in any behaviors that were disruptive or oppositional. Staff reported to the evaluator that Student had engaged in problem behavior less frequently than he had the previous year. (NT 565-567; P-5)
48. The independent behavior specialist observed that the level of instruction in the emotional support classroom seemed to be quite appropriate. Student seemed to be able to engage and effectively complete the work that was assigned. (NT 623)
49. The independent behavior specialist recommended that "current staff continue to use the behavior supports they have developed themselves and found to be effective with Student". (NT 567-570; P-5)
50. The independent behavior specialist recommended "to the extent possible, minimize or eliminate multiple changes in class placement, school placement, and instructional and support staff assigned to Student." (P-5)
51. The independent behavior specialist recommended that Student be given a social skills curriculum that takes into account his cognitive and academic skills profile, his strengths and weaknesses, to provide one-to-one instruction with adult modeling the appropriate social skill and reinforce his practice of that skill through role play and eventually in a small group. (NT 572-573)
52. The FBA was reviewed at an October 27, 2005 IEP meeting at which a "Behavior Summary" (undated) prepared by CC's clinical supervisor of specialized services, Mr. F was also reviewed. The Behavior Summary noted that, "Student continues to make major behavior gains in improving in all areas behaviorally. He has progressed with his goals from his IEP and his (wraparound services) treatment plan...continues to display excellent behavior in class with the support of the TSS...consistently reducing target behaviors...continues to display replacement behaviors at a higher rate than target behaviors". (P-6)
53. In the Behavior Summary the clinical supervisor of specialized services notes areas of positive behavior change in the areas identified by the wraparound treatment goals to be: respectful towards adults and peers, improve(d) positive social skills/interactions with adults and peers, increase of time (he) can function independently, fewer TSS interactions for redirection, complies with adult directives and class rules. (P-6)

54. In the Behavior Summary the clinical supervisor of specialized services notes that Student had met the IEP target of “refusal to comply with directives” by complying 95% of the time in class and that he had met the IEP target of “verbal and physical abuse towards others” by being 98% in compliance since the start of the school year. (NT 142-147; P-6)
55. On November 10, 2005 another IEP meeting was held, and yet another IEP meeting was held on November 22, 2005 to finalize the IEP. The Parent approved the resultant NOREP on December 8, 2005. (NT 59-60, 908-909; S-18, S-19, P-7)
56. At the November 22, 2005 IEP meeting the IEP team decided that accompanied by his TSS Student would receive some supplementary guided reading instruction from a learning support teacher in a group of six or seven students every day from 8:30 to 10:00 a.m. The independent behavior specialist participated in this IEP meeting and was part of making the decision. Student only attended approximately eight reading sessions due to absences and being withdrawn from school by the Parent. (NT 259-261, 263, 658-659, 829, 907)
57. During the learning support reading class, although he did respond to questions independently at the last session, for the previous sessions he did not participate with his peers, his body language suggested an I-don't-have-to-be-here attitude, he made faces, and he smirked when another student was redirected. (NT 268-275)
58. The IEP team recommended that after he was integrated into the reading class he might spend some further time in the learning support class for math. (NT 662)
59. The gradual transition to more learning support class time was to facilitate and support Student's gradual acclimation to the learning support class and increase his comfort in shifting from one setting to another setting. (NT 662-663)
60. On November 29, 2005 the regional special education director sent a memo to Dr. H memorializing the services that Dr. H would be contracted to provide to the District and CC personnel “to facilitate implementation of [Student's] IEP: offer coaching sessions that focus on reinforcement strategies to increase the likelihood the student will demonstrate the desired replacement behaviors; schedule ongoing Behavior Plan reviews to enhance student's compliance with school rules/regulations; and share materials with relevant staff. A meeting to review Student's progress was scheduled with Dr. H for January 24, 2006. (NT 874-876; S-18)
61. Due to the pending due process hearing and the expectation that Dr. H would be called by the Parent as a witness the District suspended the scheduling of sessions between Dr. H and school personnel. (NT 576-577)

62. During the month of November the Parent spent all day in Student's classroom for two weeks after which the principal sent her a letter dated November 21, 2005 wherein he asked that she not visit the classroom without an appointment as her continued presence had the potential to compromise the confidentiality of the other students. (NT 60; P-23)
63. The Parent disapproved of the behaviors of the students and observed that the classroom teacher seemed to have difficulty managing the classroom. The Parent reported her concerns to the principal frequently. (NT 61-62)
64. Although Student had some incidents of misbehavior in mid-October, and used profanity frequently, overall a "Daily Timeline of Events/Behaviors" compiled by Mr. B, CC emotional support supervisor, reflected the behavioral improvement noted by the clinical supervisor of specialized services, Mr. F and his status as recorded by the independent behavior specialist, Dr. H until approximately mid-November when there were more incidents of disruptiveness including profanity and refusal to follow directives. (NT 119; S-5)
65. Charting of data collection sheets shows that up to and including November Student was able to demonstrate replacement (positive) behaviors but in November there was also an increase in problem (negative) behaviors. In December there was a significant increase in problem (negative) behaviors and a significant decrease in the replacement (positive) behaviors. However, the analysis is quantitative not qualitative and does not take into account factors such as the day of the week or what things may have been going on outside the school setting. (NT 592-599, 655-656; P-16, P-17)
66. The independent behavior specialist believed that the [redacted] emotional support classroom was working and was appropriate for Student in September and in October. He does not know if it was appropriate or not in November, and believed that when he observed on December 19th it was not appropriate. (NT 615)
67. By the beginning of December 2005 (December 1, 2005) a CBR noted that, "Student continues to be verbally and physically aggressive towards his teachers and peers...He refuses to comply with directives given by the teacher". Cursing on a daily basis and verbal threats toward peers was reported.¹¹ (P-11)
68. The December 2005 CBR also notes that, "Student has tantrums in the home. He refuses to comply with mother's wishes. He will refuse to talk to his mother for at least three days if she confronts him about his behaviors". (P-11)

¹¹ As both Dr. H and Mr. F had noted improvement through October 2005 and the Parent was in the classroom for two weeks in November, this has to have been behavior of fairly recent resurgence.

69. Although at the time of the December 2005 CBR the evaluator recommended mobile family therapy in the home with a female therapist the mother reportedly did not want a mobile therapist in the home. (P-11)
70. CC's classroom staff had turnover during the latter part of the time Student was attending school: the teacher changed once near the end of Student's attendance in the class, the teaching aide changed once at the latter part of November and the mental health tech changed four or five times. (NT 234-235, 677-682, 763-764)
71. The original teacher assigned to the [redacted] CC classroom had difficulty with organization and consistency in following a classroom management system. The District's special education case manager met with her to assist her and also met with the CC supervisory personnel regarding this issue. The District's special education case manager does not have the same concerns about the teacher currently in place in the [redacted] classroom since January. (NT 820, 823-825)
72. For about two weeks at the end of December 2005 the clinical supervisor of specialized services took over the lead teacher role in the CC classroom because he saw a need to "restructure the class, restructure behavior management, begin to make the changes in preparing for a teaching change". The emotional support supervisor assisted in the classroom as well. By the middle to the end of December the classroom had settled back down and was "pretty orderly". (NT 219, 221, 253, 690-691, 715, 745-746)
73. With the Parent's prior knowledge Dr. H, the independent behavior specialist, made a classroom observation on Monday December 19th, the week before the winter break, during the period that the classroom was being restructured. It also happened to be a day when another student was in crisis and needed to be assisted by the mobile crisis team. Based on his single observation of the classroom that day he recommended a change to a full time learning support classroom. (NT 219-221, 578-580, 583, 636-637; P-9)
74. On the day that he observed in December Dr. H did not know how many days the finalized IEP of November 22nd had been implemented. The IEP had been implemented at most four days. (NT 638; S-5)
75. Classroom staff has not had the opportunity to assess Student's response to the new staff configuration in the classroom due to his infrequent attendance. (NT 693-694)
76. Student was absent on 9/27/05, 10/18/05, 11/2/05, 11/7/05, 11/18/05, 11/22/05, 11/23/05, 12/7/05, 12/8/05, 12/14/05, 12/20/05, 12/21/05, 12/22/05, 12/23/05, 1/3/06, 1/4/06, 1/5/06, 1/6/06, 1/11/06, 1/12/06, 1/13/06, 2/1/06, 2/6/06, 2/7/06, 2/8/06, 2/9/06, 2/10/06, 2/14/06, 2/16/06.¹² (S-5)

¹² At [redacted] (2004-2005) Student was absent a total of 26 days. (NT 101)
At the Catholic school (2003-2004) Student accrued 27 absences by the second trimester. (NT 109; S-18)

77. As of the middle of April Student had been in school one day since March 2006¹³. The Parent reportedly removed Student from school because he does not have a TSS worker.^{14 15} (NT 78, 339)
78. Pursuant to a June 9, 2000 consent decree¹⁶, the District is required to provide a substitute TSS worker when a student's TSS worker is unavailable. Had Student attended school on the days he did not have a TSS worker from CC, the District would have supplied a worker. (NT 880-881; S-31)
79. Three trained [redacted] subs are available to work with Student at [redacted]. (NT 883, 902-904, 921)
80. At a Resolution Meeting held on February 14, 2006 the Parent agreed to visit the [redacted]¹⁷ program at [redacted] and the emotional support classrooms at [redacted]. She did not find any placement to be an appropriate placement as she believed Student would have to leave the [redacted] program in 12 months and then go back to [redacted] and the [redacted] classroom was run by CC. Her reasons for disapproving [redacted] are unknown. (NT 74-75, 883-886; P-27)
81. The Parent was offered the opportunity to transfer Student to any school within the Southwest Region of the District. (NT 102, 835, 868)
82. On February 15th and 16th the Parent confronted other parents and staff members outside the [redacted] building telling them among other things that the school was not safe. [Redacted] has never been identified as being an unsafe school or an unsafe building. (NT 886; S-1)
83. The TSS worker who was with Student over an extended period of time does not consider [redacted] to have been an unsafe or dangerous environment for Student. (NT 530-531, 551)

At the charter school (2002-2003) Student was absent 20 days and went home early on 12 occasions by the end of the third marking period. (NT 107-108)

¹³ The District has initiated truancy proceedings. (NT 887-888)

¹⁴ The relationship between Student and his long-time TSS worker deteriorated to the point where Student threatened to have his brother do something to (harm) him. Student would make comments to the TSS about suing the school district. On 12/19/05 this TSS worker left the case. A new TSS worker started on 1/9/06 but did not continue on the case. Another TSS worker started on the case on 1/18/06 and left the case on 1/30/06. A new TSS began on 2/15/06¹⁴. (NT 518, 529; S-5)

¹⁵ The emotional support staff supervisor testified that CC does not want to put an inexperienced TSS worker on the case and the seasoned TSS workers do not want to accept the case because of "incidents that have taken place, involvement by the Parent". Additionally the TSS workers, who are fee-for-service, are not paid when a child does not attend school. (NT 695-696, 748, 750)

¹⁶ Robert Kellner et al v. School District of Philadelphia, Civil Action No. 98-CV-6190 before the United States District Court for the Eastern District of Pennsylvania.

¹⁷ [Redacted] classroom are funded through the mental health stream and frequently include students for whom

84. Student himself has engaged in physical behavior with others in the classroom. For example, even with a TSS present he [redacted]. (NT 553, 700-701)
85. Student's history in the learning support setting at [redacted] during 2004-2005, prior to coming to the [redacted] emotional support setting for 2005-2006, was an original period of success and progress, with a deterioration of behavior as time progressed with increased frequency and intensity of problem behaviors. There were a number of confrontations with staff and instructors in learning support at [redacted] and in emotional support at [redacted]. Student's behaviors have been consistent throughout his year at [redacted] and his time at [redacted]. (NT 640-641, 826-827)
86. Dr. H believes that the current IEP contains a well-defined and comprehensive behavior support plan that should be implemented, supported by his own continuing involvement. He believes that implementing the IEP for only a few days would not have been sufficient to determine its effectiveness. (NT 643-644, 650; S-7)

Credibility of Witnesses

In reviewing the testimony of all the witnesses and reading the documents entered into evidence, this hearing officer found that the case hinged primarily upon the credibility of the Parent and the Parent's expert witnesses. Other witnesses who testified were found to be credible, and their testimony added to the total consideration.

One of the Parent's expert witnesses, Dr. B, is highly credentialed and conducted appropriate and valid standardized ability and achievement testing, but her emotional/behavioral assessment based on the Parent's and Student's responses to questionnaires was of limited to no value, as both sets of responses appeared to represent notable under-reporting of problems. Her credibility was compromised insofar as she based findings on reports from the Parent (NT 349-352) without interviewing any school administrators or behavioral health providers (e.g. the TSS worker who was with Student during the summer or the BSC), and insofar as she did not integrate physical and familial factors into her hypothesis about the causes of Student's difficulties (NT 351-355). Dr. H was credible, and his testimony was quite helpful. The Parent obviously wants to do the best she can for her child. However, it is notable and undermines her credibility that in no instance does she entertain the possibility that Student could be responsible for his own behavior, attributing his cursing and his physical acting out to his academic struggles, other students' starting with him or setting a bad example, and/or the inability of the District (learning support) and CC classroom staff (emotional support) and BHRS staff to handle the other students. (NT 42-43, 44, 47, 50, 52, 61, 67, 68, 77, 81, 87, 88, 89, 91, 92, 96, 105-106, 107, 108, 114, 115-116, 348) It is also notable that the Parent has never allowed a trial of medication although it was prescribed by Student's physician and again recommended by the independent evaluator, that she has declined mobile

family therapy services in the home (NT 526-527), that she has on more than one occasion alleged that staff has physically abused Student without there being a record of police involvement (NT 77, 78, 86, 96, 102-105, 106, 115) and that she has allowed Student to miss an excessive number of school days going at least back as far as when he was in the charter school (first time in third grade).

Discussion and Conclusions of Law

Legal Basis

Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that "Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. Additionally, the court in Polk held that educational benefit "must be gauged in relation to the child's potential."

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a "free appropriate public education as defined by the Act." Polk, Rowley. The purpose of the IEP is not to provide the "best" education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

Compensatory education is a remedy for a denial of FAPE. An award of compensatory education requires a “finding that a child has received an inappropriate education”. M.C. v. Central Reg. Sch. Dist., 81 F.3d 389 (3d Cir.), *cert denied*, 519 U.S. 866 (1996). However, the court in M.C. recognized that a “school district, however, may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem”. M.C., 81 F.3d at 397.

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion regarding the appropriateness of an offered IEP and program is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. *See* 20 U.S.C. § 1415(i)(2)(C)(iii). In this hearing the Parent bore the burden of proof.

Discussion

The District was required to offer Student an IEP that was reasonably calculated to provide meaningful educational benefit. During the time period addressed in this hearing the District considered the findings of the independent evaluator Dr. B, worked collaboratively with the independent behavior specialist Dr. H and tried to work closely with the Parent. In late October the Parent’s expert witness, Dr. H observed that Student’s program and placement in the CC emotional support classroom was appropriate and that he was receiving educational benefit.

In mid-to-late November Student’s behaviors began to deteriorate. This deterioration could have been the manifestation of his pattern of a behavioral downturn following a “honeymoon” period, it could have been a reaction to his mother’s having spent two weeks full time in the classroom, it could have been a reaction to classroom staff changes, it could have been a reaction to the teacher’s loosening of the classroom behavior management plan and/or the CC supervisory personnel’s restructuring the classroom behavior plan, and/or it could have been a function of hormonal changes associated with his experiencing premature puberty, among a host of other possibilities. All these acute factors probably played some part to exacerbate the chronic factors - temperamental (early displays of aggression and irritability), biological (attention and impulse control deficits, allergies) social (no contact with father, single parent household) and cognitive (low average intelligence, inferred learning disability). By November 22nd however, the IEP team, with input from the Parent’s expert Dr. H, had finalized a revised IEP providing for among other things the initiation of some time in the learning support classroom. The appropriateness of this IEP was not in question at this hearing.

During December 2005, acting on behalf of and in concert with the District, CC recognized the need to make some changes in the staffing and the structure of the emotional support classroom. The changes were not made to address Student’s needs

solely, but as a member of the class Student was expected to benefit from the adjustments to the classroom as well as benefiting from the implementation of the revised IEP that the Parent approved for implementation on December 8th. Assessing difficulties on an ongoing basis and making changes was a responsible and prudent response by the District and CC. The law does not mandate a guarantee that a student's program and placement will be successful. The law does require that a district have a reasonable plan and, if this plan seems not to be working, that a district take steps to fix or change the plan within a reasonable time frame. In fact, there was credible testimony that by the end of December the classroom had been restructured successfully, and that a new teacher had been successfully installed by the beginning of January. Even if this hearing officer were to find that Student was denied FAPE during the month of December, (and she has not been presented with sufficient evidence for such a finding), compensatory education would not be awarded as, at the very least, she would need to allow one month for the District to "respond to a complex problem", particularly one occurring during the weeks before the winter holiday break. Furthermore, Student's historically poor attendance pattern deteriorated even further, to the point that the District was deprived of the reasonable opportunity to see if its carefully revised IEP of November 22nd and the newly structured emotional support classroom would work for Student. It is also important to note that the District was fully committed to ongoing consultation with the independent behavior specialist, Dr. H, until the Parent initiated due process proceedings and was likely to call him as a witness.

The Parent has very high expectations for the schools her son attends. She placed him in a private kindergarten, in a charter school and in a Catholic school, she refused to allow him to go to the public school in the neighborhood where she lives, and she has rejected several other alternatives the District has offered. She considers his pendent placement "dangerous". Like most Parents, she wants what she perceives to be best for her child. Although the law does not entitle Student or any other student to "the best", "appropriate" can be quite ample. It may be that the greatest obstacle to the Parent's being able to succeed in ensuring that Student receives an appropriate education lies in her persistently blaming the schools, the teachers and the other children for what is a longstanding difficulty Student has had with anger management, impulse control and social interactions that has appeared across all settings in which he has been educated and according to credible records also appears in the home.

The District has done what it needed to do to implement Student's IEP appropriately and has tried to timely address areas that were not going well. The District has been accommodating to the wishes of the Parent and must continue to work collaboratively with her. What is of highest importance now is that Student resume attending school, as every day that he is allowed to remain at home will make it all the more difficult for him to return and will put him further and further behind his same age peers academically and socially.

ORDER

It is hereby ORDERED that:

1. The School District's manner of implementing the IEP for Student was appropriate and represented FAPE.
2. As the School District offered Student FAPE, he is not entitled to compensatory education.
3. Student must return to the [redacted] School so that his November 22, 2005 IEP may be implemented in the emotional support setting with, as appropriate, a continuation of the IEP team's plan to have him gradually spend some portion of his time in a learning support class.
4. The District is to resume the consultation relationship with Dr. H, which may include his providing assistance in smoothly transitioning Student back to school, conducting an updated FBA, and/or collaborating on an updated behavioral support plan, as this student has not been in school for virtually the entire second half of this school year.

June 1, 2006

Date

Linda M. Valentini, Psy.D.

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Hearing Officer