

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: D.S.

Date of Birth: [redacted]

Dates of Hearing:

August 29, 2011

October 7, 2011

CLOSED HEARING

ODR File No. 2076-1112KE

Parties to the Hearing:

Parent[s]

Central Greene School District
250 S. Cumberland Street
Waynesburg, PA 15370

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pamela E. Berger, Esquire
434 Grace Street
Pittsburgh, PA 15211

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Dickie, McCamey & Chilcote, P.C.
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October 24, 2011

November 8, 2011

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a middle school-aged student in the Central Greene School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the basis of other health impairment. Student's Parents filed a due process complaint against the District in July 2011, asserting that the proposed placement for the 2011-12 school year was inappropriate under the IDEA and Chapter 14 of the Pennsylvania regulations implementing the IDEA. The Parents subsequently clarified that the remedy they sought was continuation of a private placement at public expense for the 2011-12 school year.³

The case proceeded to a due process hearing convening over two sessions, at which the parties presented evidence in support of their respective positions. For the reasons which follow, I conclude that the Student may be returned to the District pursuant to a plan of gradual transition which permits evaluation of and, if necessary, adjustment to that transition process.

ISSUE

Whether the program and placement proposed by the District for the 2011-12 is appropriate for Student, including whether that placement is the least restrictive environment for Student?

FINDINGS OF FACT

1. Student is a middle school-aged Student who resides in the District and is eligible for special education by reason of an other health impairment (OHI). [redacted]. (Notes of Testimony (N.T.) 24-25)
2. Student was diagnosed with failure to thrive at the age of five weeks, and was provided with early intervention services prior to the age of three, including speech/language therapy and occupational therapy. (N.T. 25-26)
3. Student has a sensory integration disorder, which includes difficulties with auditory processing and processing speed, and sensitivity to light, smell, touch, and loud noise including loud voices. Student requires wait time to process information, and can be easily distracted. Student currently takes medication for Attention Deficit Hyperactivity Disorder (ADHD). (N.T. 29-30; 41-43, 47-48, 75-76, 102-04, 156, 183, 186-87, 194, 218, 225-26)
4. Student entered kindergarten at the age of five and began to demonstrate difficulty sitting still at school. Student was diagnosed with ADHD around that time and a behavior intervention plan (BIP) was also created. (N.T. 26-27, 28)

¹ In the interest of confidentiality and privacy, Student's name and gender, as well as other potentially identifying information, are not used in the body of this decision.

² 20 U.S.C. §§ 1401 *et seq.*

³ To ensure a complete record, the Parents' complaint and addendum dated August 26, 2011 are marked and hereby admitted as Hearing Officer Exhibit 3.

5. In first grade, an Individualized Education Program (IEP) was developed for Student (2008-09). By third grade, Student's problematic behaviors had significantly increased even with the support of a paraprofessional or therapeutic support staff (TSS) person. Student was disciplined with in-school suspension on a number of occasions and began attending school only for half days. (N.T. 28-30, 49, 93, 155)
6. The Parents engaged the services of an advocate at the end of Student's third grade year. (N.T. 30-31)
7. In the spring of 2009, The District began a re-evaluation of Student. The Parents, however, requested an Independent Educational Evaluation (IEE), to which the District agreed. (N.T. 99-100; School District Exhibit (S) 1, S 2)
8. The IEE was completed by a private psychologist in April and May 2009. The IEE reported that cognitive assessments had consistently revealed above average to superior range intelligence. This psychologist administered the Woodcock-Johnson Tests of Cognitive Abilities – Third Edition and the Woodcock-Johnson Tests of Achievement – Third Edition. Student's scores on the cognitive measure were consistent with previous testing. Student demonstrated strengths in visual processing ability and long-term retrieval, with relative weaknesses in processing speed and auditory processing. With respect to academic achievement, Student attained scores which were commensurate with cognitive ability in reading, mathematics, and oral language; however, the private psychologist concluded Student was eligible for special education on the basis of difficulties with attention as well as auditory processing and processing speed weaknesses under the OHI category. (J 11)
9. The IEE recommended individualized and small group instruction, accommodations to address the auditory processing and processing speed weaknesses, and strategies to improve Student's self-awareness. This psychologist also suggested various approaches to reading instruction for Student, as well as accommodations and adaptations. He also made recommendations for a PBSP and evaluation for speech/language and occupational therapy needs. (J 11)
10. For Student's fourth grade year (2009-10), Student attended a private school. There was no plan developed to transition Student to the private school, which was not a successful placement for Student. The Parents arranged for Student to have counseling following a negative experience at the private school which resulted in Student having a distrust of [redacted]. (N.T. 31-33, 53-54)
11. The District issued a Re-evaluation Report (RR) in the summer of 2010, which included information from the IEE, an occupational therapy evaluation, an assistive technology evaluation, and a speech/language evaluation. The RR concluded with a determination that Student was eligible for special education on the basis of OHI as well as a need for [redacted]. Strengths in mathematics operations, verbal comprehension, perceptual reasoning, and working memory skills were noted, as well as weaknesses in the areas of self-control, completion of assignments, following and complying with directions, and appropriate behavior in the school environment. (S 1)

12. Student attended a regional privately-operated learning center for a summer Extended School Year (ESY) program in 2010. The learning center is licensed by the Pennsylvania Department of Education as a private academic school for supplemental education, and focuses on remediation in areas of need. It offers a variety of services and the time students go to the center can vary from once a week to full-time. (N.T. 86, 133, 246, 250, 262)
13. For fifth grade, the District and the Parents agreed that Student would attend the learning center for Student's educational program. The August 26, 2010 Notice of Recommended Educational Placement (NOREP) stated that Student would "temporarily receive [Student's] education" at the learning center, and that a meeting would convene in September to complete an IEP for the learning center placement and develop a plan to transition Student back to the home school in the District. The Parents approved the NOREP. (N.T. 33-34, 35-36, 50-51, 57-58, 133; Joint Exhibit (J) 1, J 2)
14. At the time the decision was made for Student's placement at the learning center in the fall of 2010, Student's strengths included reading comprehension, vocabulary, visual information processing, and mathematics. Noted needs included communication, social skills, behavior, focusing attention, and written expression. (J 2)
15. No meeting occurred in September 2010, but Student did begin to attend the learning center. There was no plan to transition Student to the District from the learning center. (N.T. 36-37, 39, 54)
16. A Functional Behavior Assessment (FBA) was conducted by the learning center in October 2010. Behaviors of concern were academic work refusal, noncompliance, shutting down, and not complying with directions. The FBA hypothesis on the function of these behaviors was to avoid and escape tasks. (N.T. 200-02; J 3)
17. The learning center developed a Positive Behavior Support Plan (PBSP) which targeted behaviors to comply with staff requests by following school rules, complete academic work, and follow staff directives the first time a request was made. A number of intervention strategies including sensory breaks, choices, and a reinforcement system based upon classroom behavioral expectations were made part of the PBSP. Daily academic and behavior logs would also be kept and reviewed. (J 4)
18. The IEP team met in November 2010 to develop an IEP including a PBSP. The Parents did not agree with this IEP. (N.T. 37-38, 79-80, 93, 197; J 5 at 3, J 7)
19. In January 2011, the District re-issued a NOREP after the IEP team determined that Student would remain at the learning center. (N.T. 40-41; J 12)
20. The IEP team met in March 2011 and discussed transitioning Student back to the District, but decided not to make any change to the placement for that school year, and no specific transition plan was developed. The IEP was further revised at that meeting. (N.T. 38, 40, 93, 134-35, 148-49, 163-64, 197, 199-200; J 12; S 4)

21. Student's IEP team determined that Student was eligible for ESY programming for the summer of 2011, and agreed that Student would be provided those services at the learning center. (J 7)
22. The Parents' and Student's advocate attended all of the IEP meetings during the 2010-11 school year and made many suggestions for the program. (N.T. 97-99)
23. Student attended an orientation at the District middle school with one of the Parents in May 2011 at the encouragement of the District. Approximately 100 students attended, and after each student's name was called, they were given an informational packet. However, Student's name was not called, and there was no packet for Student until one was written for Student later that day. Student visited one of the classrooms in a group of students during the orientation. (N.T. 44, 87-92, 117-18)
24. Student's IEP team convened again in May 2011, this time at the learning center to permit the participation of all of its staff members who worked with Student. The team revised the most recent IEP for Student to change the location from the learning center to the District middle school, and to add a paraprofessional for support as a related service. The team also developed a PBSP. (N.T. 68-69, 93-95, 113, 125, 147-48; J 8, J 9)
25. The May 2011 IEP included information on Student's present levels of academic achievement and functional performance based upon information from the learning center. At that time Student reportedly demonstrated strengths in reading comprehension, listening comprehension, vocabulary, visual information processing, and mathematics. Relative weaknesses/needs included reading fluency and decoding, independent reading comprehension, written expression, social skills, and communication. Student was using assistive technology including text-to-speech software, word-prediction software, a reading pen and smart pen. The IEP noted that Student required a multisensory instructional approach and sensory diet activities throughout the school day. (J 9)
26. Academic and behavioral goals in the May 2011 IEP addressed attention to task, social skills/cooperation, transition, complying with teacher directions, communication/language skills, oral reading fluency, reading comprehension, vocabulary, written expression including writing fluency, typing fluency, and mathematics calculation fluency. Occupational therapy goals addressed independent use of coping skills and visual perception. Program modifications and specially designed instruction were also included. (J 9)
27. The PBSP in the May 2011 IEP addressed work refusal, task avoidance, and noncompliance in following directions. The behaviors were determined to occur most frequently when reading and writing tasks are involved, which were areas of academic need. The PBSP contained goals for cooperating with staff, increasing social skills, transitioning on a first request, complying with directions, and engaging and participating with teachers. The plan also noted that Student required modification in presentation of academic work, sensory breaks throughout the day, positive reinforcement/praise, and a point system for rewards, as well as continuation of the daily academic and behavior log.

The PBSP also included a number of program modifications and items of specially designed instruction. (J 8)

28. The placement proposed by the May 2011 IEP and June 2011 NOREP was for regular education classes for all academic and non-academic classes with the exception of counseling, speech/language therapy, occupational therapy, [redacted], and sensory integration breaks at the District middle school. (J 9, J 10)
29. The Parents did not approve the June 2011 NOREP, stating that the District middle school was not the least restrictive environment for Student; that Student required one-on-one instruction; and that an adequate transition plan was necessary for Student to return to a District school. (J 10)
30. Student's bus ride to the learning center is approximately one hour and fifteen minutes each way. (N.T. 61-62)
31. The learning center serves both full-time and part-time students, and eight students including Student attend full-time. Four of those eight students have IEPs. (N.T. 190, 225, 234-35)
32. The learning center has a large, open room with desks and tables for the teachers and students, and offices and a conference room are located around the perimeter of the room. Teachers work with the students individually and in small groups. There is also space for a speech room, a counseling room, and a sensory room. (N.T. 96, 183-84, 217, 247-48)
33. The learning center is using the District's grade-level curriculum with Student using a multi-sensory approach. Student has Reading, Writing, and Mathematics every day, and Social Studies and Science on alternating days. During the last period, Student has speech or occupational therapy, counseling, or works on the [redacted] program. One day each week, all students participate in a team building activity with one or more peers. Class periods are one hour long. (N.T. 204, 209-12, 224-25, 228-29, 237, 252)
34. Student also receives remediation in Reading using an Orton-Gillingham program. (N.T. 224, 251-52, 257-58)
35. Student attends the learning center from 9:00 a.m. to 3:00 p.m. and uses the sensory room prior to the start of the day. Student works one-on-one with Student's teachers throughout the day with some small group work (generally Science lab once a week and some Social Studies classes). Student uses the sensory room throughout the day whenever Student needs a break, typically at the start of every hour and as needed during lessons. When Student takes a sensory break during individual instruction, the teacher stops and waits for Student to return; during small group lessons, Student is easily able to catch up because the sensory breaks usually last no more than three minutes. (N.T. 42, 77, 183-90, 209, 213-14, 249)

36. Student's schedule at the learning center is flexible, but Student is able to follow a schedule more closely this school year than during the 2010-11 school year.⁴ In addition to academics, all students at the learning center have opportunities for recess/socialization. The children also eat lunch together in the conference room. (N.T. 192-94, 225-28, 240-43)
37. Student is generally more alert in the morning, and providing snacks mid-morning and mid-afternoon has helped with Student's stamina and attention. Student can be distracted by activities the other children are engaged in. (N.T. 194-95, 202-03, 217-18, 230, 248-49)
38. [Redacted]
39. Behaviorally, Student can be somewhat aggressive (slamming a door, for example), and Student continues to exhibit the behaviors set forth in the October 2010 FBA although Student has shown improvement during the 2011-12 school year. (N.T. 156, 201-03, 214-15, 220, 231-32, 240-41, 284-85)
40. The District has a new sensory room at the middle school, which Student would be able to go to whenever Student needed to do that. Student's need for sensory breaks would be built into Student's daily class schedule. (N.T. 105-06, 108)
41. The District made arrangements for training by a local educational organization/institute (Institute) on how to set up the sensory room appropriately as well as to train staff. (N.T. 111-12)
42. If Student returns to the District, Student would be provided with a full-time paraprofessional whose responsibilities would include maintaining communication with teachers regarding the time Student misses class and what materials and instruction were covered during those time periods, and ensure that that information is provided to Student during ninth period. The District plans to have the paraprofessional trained by staff at the learning center. (N.T. 108-11, 123-24, 132)
43. [Redacted]
44. The District is prepared to address Student's assistive technology needs. (N.T. 138-39, 157-58)
45. The following exhibits were offered and admitted:
 - Joint Exhibits 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12
 - Parent Exhibit 3
 - School District Exhibits 1, 2, 3, 4, 5, 7

⁴ During the 2010-11 school year, Student was often instructed in the sensory room due to the distractions in the open room. By the end of that school year, Student was only receiving instruction in the sensory room approximately 25% of the day. (N.T. 248, 267)

Ruling was reserved on P 1, P 2, P 2A, P 7 (N.T. 300-02) The District objected to these exhibits on grounds which essentially challenged the weight to be accorded those documents, rather than their admissibility. Accordingly, the District's objection is hereby overruled and those documents are admitted, and have been considered as part of the record.

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);⁵ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. See *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. See generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole was essentially consistent.

IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary*

⁵ The burden of production, "i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). First and foremost, of course, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

The IDEA further requires that eligible students be educated in the "least restrictive environment" which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the school has included the child with non-exceptional children to the maximum extent possible. *Id.*

Student's Program

The Parents assert that the learning center is Student's least restrictive environment. (Parents' closing at 4-5) It is true, as they contend, that what constitutes the least restrictive environment for a particular student must be made on an individual basis. Here, there was testimony that Student requires individual or small group instruction because Student has difficulty focusing on tasks, is easily distracted, and requires a significant amount of differentiated instruction. (N.T. 204-05, 237-38, 277) However, the academic portion of Student's educational program is currently implemented in a large open room in close proximity to peers and other teachers. (Finding of Fact (FF) 32, 35) The District proposes placement in regular education at its middle school, with a full time paraprofessional, for all regular education classes with the exception of counseling, speech/language therapy, occupational therapy, [redacted], and sensory integration breaks. (FF 28, 40, 41) Attention to task and social skills are addressed in the IEP in addition to academic skills and behavior. (FF 26, 27) The paraprofessional's role would provide support for Student for sensory integration needs, missed class instruction during those sensory breaks, and behaviors of concern. (FF 24, 42) There is no reason to suspect that the District would not be able to provide differentiated instruction as necessary. While there was little if any challenge to the IEP itself, the record establishes that both it and the PBSP are responsive to, and comprehensively address, Student's behavioral and attentional difficulties and needs. Viewed as a whole, and based on information known to the IEP team in May 2011, the evidence is preponderant that the District is the least restrictive environment for Student and that it has proposed a program and placement is reasonably calculated to meet all of Student's needs and confer meaningful educational benefit.

The focus of the Parents' claim is that the District did not suggest or take steps to develop a plan for Student to make a gradual transition back to the District. In her testimony, Student's mother explained that her concerns were how the District would plan Student's schedule with recognition that Student's ADHD medication begins to wear off by the afternoon; and how the

instructional time Student misses when Student uses the sensory room will be appropriately addressed, including when that would take place. (N.T. 41-46) She also clarified that she believed that any plan to transition Student back to the District should be gradual, taking place after the end of the first semester, and begin with one half day each week; and she suggested that the plan must be flexible, rather than rigid, so that the IEP team could meet throughout and evaluate how successful the transition was and whether any adjustments needed to be made.⁶ (N.T. 82-86) The Parents seek a determination that Student should remain at the learning center for the remainder of the current school year.

For its part, the District's Director of Special Education acknowledged that no specific plan for Student's transition back to the District had been developed prior to the start of the 2011-12 school year. (N.T. 119-20, 135, 141, 164, 167) She explained that the District recognizes the need for a plan to return Student to the District which would involve staff from the learning center and the Institute to provide training for Student's specific needs, including implementation of Student's IEP and PBSP. (N.T. 141-42) She also suggested that the plan begin at the beginning of a marking period, with Student attending a half day at the learning center and a half day at the District middle school for two or three weeks, then add a class period at the middle school over the next few weeks until eventually, and perhaps within a nine week period, Student would attend the middle school for a full day. (N.T. 142-44)

This testimony of the various witnesses is remarkably consistent in what the parties believe Student needs to transition back to the District. The real question, then, is what time period this transition should take place. It merits emphasis that the District recognizes that there will need to be training of its staff by the learning center, and has indicated its intention to seek additional training and consultation from the Institute. The District's recognition of the necessity for this training is extremely positive and demonstrates a clear willingness to involve a number of professionals in Student's educational program, particularly those who have worked with Student most recently. Nevertheless, this training will take some time, which is a factor which this hearing officer is unable to estimate with any certainty. It also is apparent that both parties recognize that the entire IEP team, including personnel from the learning center and the Institute, will need to be involved in developing the plan of gradual transition back to the District. The IEP team will be directed to reconvene to develop this plan with an allowance for time for training of District staff. The plan will also be required to begin at the start of a new marking period, perhaps at the start of the second semester, and must include a provision that its effectiveness will be monitored and evaluated on a regular basis so that if, for any reason, Student is not showing success in making the transition, the plan may be adjusted. This hearing officer will not direct that the transition plan contemplate completion within any specific period time since that element is impossible to predict. Student has been away from the District for several years and has most recently been educated in an environment much different from a public middle school (FF 30-38), and how quickly Student acclimates to that change is unknown at this time and remains to be seen. Some flexibility in the plan of transition will also allow the IEP team to assess, for example, whether use of the ninth period for Student to make up lost

⁶ Student's treating psychiatrist provided a similar opinion that he would have concerns with Student returning to the District unless (1) the District provides the same accommodations and modifications as are provided at the learning center; and (2) there is a plan of transition rather than an abrupt change in placement. (P 2A)

instructional time is practical and adequate for Student, and whether more individual or small group instruction is necessary for Student to be provided FAPE.

This hearing officer also makes the following observations. It was very apparent that the parties have a positive relationship and that everyone involved with Student has a dedication to and genuine interest in Student's success. It is this hearing officer's sincere hope that the parties are able to put their disagreement behind them in order to continue to work collaboratively in providing an appropriate educational program to Student for the many years which Student will remain in the District.

CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that a transition plan for Student to return to the District must be developed which accounts for time for training of District staff and which is flexible enough to permit revision based upon Student's needs.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

The IEP team, including personnel from the learning center, is to convene within twenty days of the date of this order to develop a gradual transition plan for Student's return to the District. The plan must allow time for the planned training of District staff by personnel from the learning center and the Institute with respect to Student's specific needs, including implementation of Student's IEP and PBSP, as well as how to set up the sensory room. The transition plan shall start at the beginning of a marking period without a specific end, and include flexibility so that the IEP team is able to monitor its effectiveness and made adjustments as necessary with respect to any aspect of the IEP and the transition plan.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: November 8, 2011