

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 Hearing Officer

DECISION

ODR No. 2577 1112 KE

Child's Name: E.Z.

Date of Birth: [redacted]

Dates of Hearing: 1/11/12; 1/24/12, 1/25/12

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney: None

School District

Downingtown Area
540 Trestle Place
Downingtown, PA 19335-2643

School District Attorney

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Date Record Closed:

March 1, 2012

Date of Decision:

March 15, 2012

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student, a resident of the District, is eligible for special education services due to autism spectrum disorder and intellectual disability. Student presently attends an autistic support program operated by the Chester County Intermediate Unit (CCIU).

Parents became dissatisfied with Student's placement during the 2010/2011 school year, contending that Student regressed in both behavior and academic skills during that school year, is not currently making meaningful progress, and now requires a different placement.¹

The due process hearing was conducted over three brief sessions in January 2012. For the reasons that follow, I find that the District did not respond quickly and appropriately when changes in staff and the physical location of the program Student attends adversely affected Student's progress during the 2010/2011 school year. Nevertheless, based on evidence that implementation concerns have been effectively addressed during the current school year, and in the absence of any evidence to establish that there is another placement available that would appropriately meet Student's needs, or a description by Parents of the components of such a placement Parents' request for an order requiring the District to find or develop an appropriate program for Student denied based upon the evidence produced at the due process hearing.

¹ There was some controversy concerning the statement of the issues on the record after the parties' opening statements. While acknowledging that Parents alleged regression in the current placement, the District contended that Parents' due process complaint did not allege any deficiencies in Student's program in terms of challenging Student's IEPs, other than the most recent functional behavioral assessment and behavior plan. (N.T. pp. 31—41)

As the record in this case developed, it became obvious that Parents were not using the terms "program" and "placement" strictly as contemplated in the IDEA statute and regulations to designate the goals and services specified in Student's IEP (program) and the type and level of support specified in Student's NOREPs, *i.e.*, supplemental autistic support (placement). *See* P-17, p. 1.

Rather, Parents were using those terms in the more general sense of describing the setting and location for Student's IDEA program and placement, challenging primarily whether the services specified in Student's IEP can appropriately be delivered (implemented) within the context of the curriculum (program) provided, generally, to students enrolled in the specific autistic support class Student presently attends (placement). References to "program" and "placement" throughout this decision generally reflect Parents' use of those terms.

ISSUES

1. Does Student's current placement afford Student a reasonable opportunity to make meaningful progress toward Student's IEP goals?
2. Was Student's placement and the implementation of Student's IEP inappropriate at any time from the beginning of the 2010/2011 school year through the present, including by reason of the District' failure to assure that progress monitoring reports provided to Parents were timely, complete, accurate, and otherwise appropriate?
3. Should the School District be required to find or create an alternative placement for Student?
4. Are the current functional behavior analysis (FBA) and the behavior plan based on it appropriate for Student?

FINDINGS OF FACT

1. Student is a [teen-aged] child, born [redacted]. Student is a resident of the Downingtown Area School District and is eligible for special education services. (Stipulation, N.T. pp. 19, 21)
2. Student has a current diagnosis of autism and intellectual disability (ID) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1)(i), (6)²; 22 Pa. Code §14.102 (2)(ii).
3. Student is currently enrolled in an autistic support program operated by the Chester County Intermediate Unit (CCIU). (Stipulation, N.T. p. 20)
4. During the 2009/2010 school year, the IU autistic support program Student attended was located at the Downingtown Education Center. Parents were pleased with that setting, particularly the small class size, and with Student's progress during that school year. (N.T. pp. 26, 90, 276—278)
5. In the 2010/2011 school year, Student's program merged with [redacted],³ also an IU autistic support program, located in a different building shared with an alternative education center. [Redacted] includes community-based experiences, academic

² Under the current federal regulations, the disability category found at 34 C.F.R. § 300.8(a)(1), (c)(6) is designated "Mental Retardation" (MR). That category no longer exists in the Pennsylvania Special Education Regulations, having been replaced by the term "Intellectual Disability" (ID) in January 2012. The term ID will be used in this decision.

³ [Redacted].

instruction and a life-skills component. (N.T. pp. 26, 91, 92, 277—279, 387, 395—398; P-17, p. 1)

6. The staff and peer group also changed. Student had two different teachers during the 2010/2011 school year, at least one of them with little experience as a teacher. A different special education teacher who joined the program in October of the current school year has remained with the class. Student's class now includes six other students with varying ability levels, but because of differing schedules for community experiences, there are rarely more than 3—4 students in the classroom at the same time. (N.T. pp. 26, 91, 92, 278, 384, 385, 395, 396, 561)
7. As the 2010/2011 school year progressed, Parents noted a decline in Student's progress, an increase in aggressive behaviors and anxiety at home, and were dissatisfied with the progress reports they received. After reviewing underlying data, Parents concluded that Student's IEP goals were not properly implemented during the last school year, that many of Student's academic skills declined, and that academic progress was not improving during the current year, based on progress reports from the first quarter of the current school year. (N.T. pp. 26—29, 285, 286, 306—338; P-14, P-15 pp. 2—30, S-12 pp. 7—17)
8. Parents are not certain why Student's incidents of aggressive behaviors increased during the 2010/2011 school year, but have noted that aggression at home is no longer occurring. (N.T. pp. 368, 369)
9. In March 2011, the District's director of special education for high school students sent a written memo reminding staff of the importance of progress monitoring reports prepared and provided to the parents of eligible students in full compliance with the IDEA statute and regulations. (N.T. pp. 50, 51; P-2 pp. 21, 22)
10. After an IEP meeting in October 2011, Parents summarized the discussion of their concerns about implementation of Student's IEP and progress monitoring during the prior school year, noting that no progress was reported with respect to 4 goals and regression on 5 goals, that Student's negative behaviors had increased, and that the [redacted] staff acknowledged failing to provide data for some of Student's IEP goals. (N.T. pp. ; P-3, pp. 129—131)
11. District and IU staff acknowledged that progress monitoring reports demonstrate that Student did not make progress toward all IEP goals during the 2010/2011 school year, and that factors such as the change in location and staff due to the merger with [redacted] adversely impacted Student's progress in that year. (N.T. pp. 84, 142—160, 166—179; P-15 pp. 2—30, S-12, pp. 7—17)
12. Student has always exhibited aggressive behaviors, *e.g.*, [redacted], directed toward both peers and staff, as well as at home, but aggressive behaviors at school diminished to the point no longer being a significant staff concern by June 2011. Aggressive behaviors

occur most frequently when Student is asked to terminate a preferred activity, during new routines or activities, or when well-known routines are interrupted. (S-10, p. 4)

13. Of greater concern in the context of interfering with learning in the school setting are repetitive, stereotyped rituals. Student is particularly likely to engage in those behaviors when facing new expectations, unclear staff direction or when a persistent pattern of behavior is allowed to continue too long. The behaviors are thought to be an attempt to create a predictable and safe environment. (S-10, pp. 4—6)
14. At the end of the 2010/2011 school year, a functional behavioral assessment (FBA) was completed by a behavioral specialist who observed Student and provided FBAs and behavior plans in the past. A de-escalation/crisis intervention plan was developed based upon the FBA. In addition to recommendations for dealing with commonly encountered behaviors, the behavior plan includes a de-escalation/crisis-intervention plan that provides for a staff member who completed nonviolent crisis intervention training to implement physical management. (S-10 pp. 1—17)
15. Parents are opposed to permitting a crisis intervention plan for Student that includes physical restraint under any circumstances, although the proposed plan provides for physical intervention only as a last resort, if Student's behaviors present an immediate and significant risk of injury to self or others. (N.T. pp. 123, 124, 379—381; S-10, pp. 15—17)
16. Parents acknowledge that in rare circumstances, physical contact may be needed to protect Student from extreme danger, and are not opposed to blocking Student's attempts to engage in physical aggression, or to escape contact, such as removing Student's hand. Parents also acknowledge that physical restraint has never been used with Student in the IU programs. (N.T. pp. 298, 371, 372, 376)
17. Student's educational program is delivered in accordance with the SCERTS⁴ model, which is directed toward teaching children with autism in the natural environment, incorporating social communication, emotional regulation and transactional supports to assure that the child is calm, engaged, available for learning, an active responder and that the child's needs are accommodated by adapting the environment as necessary. To foster motivation, all activities are expected to be meaningful, purposeful, developmentally and functionally appropriate. (N.T. pp. 95—98, 104)
18. To implement the SCERTS model, it is essential that the child's team, including Parents and educational staff provide regular input into a child's functioning in all areas and environments the child encounters, since the key to the SCERTS model is integrating personal skill development fully into the daily plan for the child, including academic instruction and all other aspects of the day. Student's team meets every other week. (N.T. pp. 101—105, 350, 418)

⁴ Social Communication, Emotional Regulation and Transactional Supports.

19. The [redacted] program incorporates a behavior mentor system. A highly trained 1:1 assistant is assigned to each student in the program to provide academic and behavioral assistance, as well as serve as social and community models. Although a mentor is assigned to every student daily, the mentors rotate among the students from day to day. (N.T. pp. 92—94, 419)
20. Student’s current teacher provides direct 1:1 instruction to Student using research-based reading and math programs, and also uses a current events newsletter to further the SCERTS model for using natural environment experiences. Student’s behavior mentor provides opportunities to practice and reinforces skills taught. (N.T. pp. 391—395)
21. Student has the opportunity for regular, supported contact with typically developing peers by inclusion in a District high school art class that began in January 2011. (N.T. pp.)
22. The teacher described the methods used daily to assure implementation of IEP goals and collect progress monitoring data. (N.T. pp. 400—407, 411—417; S-17)
23. Student’s progress increased, and Student reached the level of progress necessary to attain a number of IEP goals between the first and second quarters of the current school year. The teacher attributes much of the recent progress to increases in Student’s engagement in learning activities, fewer instances of dysregulation in general and with respect to transitions between activities in particular. The teacher also how she incorporates activities, tools and devices that are motivating to Student into presenting lessons and while practicing skills. (N.T. pp. 430—482, 566; S-12 pp. 28—47)
24. Parents are not aware of any school or program other than [redacted] that incorporates the SCERTS model. (N.T. p. 366)

DISCUSSION AND CONCLUSIONS OF LAW

Legal Standards

Before considering the facts in light of the parties’ contentions, it is helpful to set out the familiar legal framework that governs consideration of the issues in dispute.

The legal obligation of to provide for the educational needs of children with disabilities has been summarized by the Court of Appeals for the 3rd Circuit as follows:

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “free appropriate public education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP “must be ‘reasonably calculated’

to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.' ” *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)).

Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009)

Due Process Hearing/Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, one of two elements that comprise the burden of proof. Consequently, in this case, because Parents have challenged the appropriateness of the District's program/placement, Parents must establish that the District's proposal is not reasonably calculated to assure that Student is receiving a meaningful educational benefit in the current setting.

The Supreme Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding. In general, both parties present evidence in support of their respective positions at a due process hearing. Parents are required to meet the burden of persuasion by a preponderance of the evidence, *i.e.*, enough relevant and persuasive evidence to convince the hearing officer that the District is violating the IDEA statute. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). The

burden of proof analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in “equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

Parents in this case presented a thorough analysis of Student’s lack of progress during the 2010/2011 school year, and the record, therefore, supports Parents’ contention, at least partially, that the District did not effectively assure appropriate implementation of Student’s IEP during 2010/2011 school year through its contracted provider. (FF 7, 9, 10, 11) The significance of that evidence, however, is limited in this case because Parents seek only a prospective remedy for the District’s past actions. The violations that occurred in the 2010/2011 school year can support Parents’ claim for present and future relief only if the record supports the conclusion that Student’s IEP continues to be improperly implemented and/or that the situation that existed last year is reasonably likely to recur. In that respect, Parents did not sustain their burden of proof, because the record establishes that whatever problems led to a lack of progress and regression in some respects during the 2010/2011 school year have been corrected to the extent that Student is now receiving a meaningful educational benefit and the opportunity for significant progress. (FF 20, 21, 22, 23)

Change of Placement

The primary issue in this case is whether the District should be ordered to provide a new placement for Student, either by locating an existing program that could appropriately implement Student’s IEP, including use of the SCERTS methodology, or by creating such a placement. Because the decision in this case depends so heavily on the evidence relating to current reports that demonstrate Student’s achievements and progress during the current school year, it is important to address again, and more fully, Parents’ objection to including evidence developed

well after the due process complaint was filed in this case, specifically the progress reports for the second quarter of the current school year, found at P-12, pp. 28—47.

Parents' conviction that the District, through its contracted provider, is not delivering Student's IEP services in an appropriate placement is based on evidence that strongly suggests that the [redacted] staff did not effectively and appropriately implement Student's IEP during the 2010/2011 school year. It is understandable that Parents wanted to include in the due process record only the evidence of Student's progress that was available at the time the complaint was filed, and in most circumstances, an objection to after-acquired evidence would be sustained. *See, e.g., Susan N. v. Wilson School District*, 70 F.3d 751 (3d Cir. 1995). Here, however, the considerations that prompted the Court of Appeals to caution so strongly against using current evidence to assess past actions do not apply. In fact, caution must be exercised here in quite the opposite way, since Parents want to use evidence of past violations to drive present and future actions, specifically, a decision concerning Student's placement going forward.

Based upon the evidence supporting inappropriate IEP implementation and lapses in progress monitoring during the 2010/2011 school year, Parents are asking for an order requiring the District to abandon an existing placement in which Student receives services in accordance with the SCERTS model. (FF 17, 18) Parents admitted that such instruction not only afforded Student the opportunity for meaningful progress in all areas of need, but actually resulted in substantial progress prior to the 2010/2011 school year. (FF 4) In essence, Parents' position is that the failure of implementation that occurred during the 2010/2011 school year will most likely continue, so Student needs to be removed from the placement before any more damage is done.

In many cases, such an argument is very compelling, and would be here, but for unique circumstances that counsel extreme caution in making a future decision about Student's placement based upon a lapse in full IDEA compliance that occurred during a limited period in the recent past. Most important, Parents identified no potential alternative placement at all, much less an existing program with a staff that is experienced in implementing the SCERTS methodology that Parents reasonably believe is appropriate for Student, indeed, essential to Student's progress. (FF 24) It is difficult to believe that Parents would even consider agreeing to a placement that could not implement SCERTS, since that is, and for several years has been, an important and very effective component of Student's IEP. Moreover, if there is no other autistic support program that currently implements the SCERTS methodology, a period of intensive staff training would be necessary to effectively implement SCERTS in any placement that is willing to incorporate it. There is no effective way to assure that Student's IEP would be appropriately implemented, and that Student would have a reasonable opportunity for meaningful progress, during the period in which an unknown program with an unknown staff gains the requisite knowledge and experience to effectively implement SCERTS.

Requiring the District to create a program would implicate all of those issues, plus the added issues of finding an appropriate physical location; hiring new staff or transferring staff from existing classrooms/programs in the District; identifying an appropriate peer group and securing the permission of those parents to change placements which they may consider appropriate and effective for their eligible children. Even if ordered to do so, it would take the District a considerable amount of time to create a placement like that. Time and effort involved in doing so would provide no reason to deny Parents' request if it is not reasonably likely that the District can appropriately meet Student's needs by any other means. Consequently, it is essential

that a preponderance of the available evidence supports the conclusion that such an undertaking is the only appropriate means of providing Student with a program and placement that meets IDEA standards.

Here, the evidence relating to the 2010/2011 school year strongly suggested that a combination of unfortunate, but apparently short-lived circumstances led to a period in which Student's current program was not appropriate. The reasons for that unfortunate situation, however, arise in part from the effects of Student's disabilities, in that Student's performance may have been adversely impacted by the need to adapt to a change in the physical location of Student's placement, as well as simultaneous changes in staff and peer group. There is certainly persuasive evidence that Student's negative behaviors increase when faced with new and challenging situations. (FF 12, 13) Although problems most certainly existed with respect to implementation of Student's IEP during the first year in the [redacted] program, given the nature and extent of Student's disabilities, it is reasonable to infer that some transition and adjustment difficulties would arise. If Student's stalled progress/regression in 2010/2011 were due in part to the major changes Student faced in the educational setting, (FF 4, 5), it is also reasonable to infer that a further change of placement would create similar issues in the future, and be detrimental to Student's progress, at least in the short term.

It is essential to carefully consider all available evidence in order to make a reasoned determination whether, after a period of adjustment, Student is "back on track." Parents admitted that they are not certain of the reasons Student's aggressive behaviors increased during the last school year, but tellingly, have noticed a dramatic decrease in aggressive behaviors at home this year. (FF 8) If adjustment issues substantially contributed to Student's lack of progress/regression during the 2010/2011 school year, progress should improve with the

passage of time and familiarity with the new setting and new peers. Similarly, if the teacher whose tenure only began in October of the current school year is appropriately implementing Student's IEP, progress monitoring reports reflecting her teaching rather than the instruction provided by a teacher who is no longer there should demonstrate that Student is making progress toward IEP goals. The evidence of second quarter progress monitoring strongly suggests both conclusions. (FF 6, 20, 22, 23) Since Student is now advancing in academic, social, behavioral and independent living goals, the placement is currently meeting Student's needs, and allowing a reasonable opportunity for meaningful progress. Moreover, many features of the [redacted] program as described by District witnesses, particularly the community-based experiences, are in keeping with the SCERTS philosophy. (FF 17, 19, 23)

Precluding the recent progress reports would have kept such evidence from the record, ignoring the current situation, which is at least as important as the past for making a determination whether Student's placement is currently appropriate and for predicting whether the placement is likely to meet Student's needs in the future. If progress monitoring information for the 2nd quarter demonstrated little progress or regression, the information would support a change of placement for the future as an indication of an ongoing problem, unlikely to be corrected. In this case, however, the opposite is true: Current information supports the conclusion that the problems that occurred in 2010/2011 represented a temporary setback unlikely to recur.

As stated more briefly in ruling on the parties' respective objections to the admission of evidence, (HO-1, p. 2.), because of the nature of the claims in this case, admission of evidence of Student's current progress, although not available prior to commencement of the due process

hearing was proper and because the evidence is highly relevant, was given considerable weight in reaching the decision not to order a change of placement at this time.

FBA, Behavior Support Plan and Crisis Intervention Plan

Parents' global challenge to the FBA/Behavior Support Plan developed for Student at the end of the 2010/2011 school year and updated in September 2011 centers on their contention that the behavior support plan includes techniques and strategies that have proven ineffective and counter-productive for Student. Parents particularly object to the inclusion of the possibility of using physical restraint in the crisis intervention plan. (FF 15)

Parents acknowledged in their testimony that there are circumstance, however rare and unusual, that would require physical intervention to remove Student from a dangerous situation. (FF 16) Parents also testified that other than escaping from or blocking Student's physically aggressive actions, physical interventions had never been used. (FF 16)

Although Parents' reluctance to even consider use of physical restraint with Student is certainly understandable, the evidence concerning Student's recent progress in self-regulation makes it highly likely that the techniques that have not been needed in the past will not be needed in the future. Moreover, there is another perspective to including guidelines for using physical restraint, particularly in light of the emphasis in the crisis intervention plan that it should be used only as a last resort. In the absence of such instructions and guidelines, staff unfamiliar with Student, such as substitutes or new staff, might resort to physical interventions in situations it should definitely not be used, and could employ techniques that are dangerous, even if actually prohibited by the behavior plan. In the moment when very aggressive behaviors are occurring the prohibition might be ignored. That is less likely with staff trained as required by the behavior plan who can intervene safely if necessary.

CONCLUSION

For all the reasons explained above, the currently available evidence does not support an order to find or develop a new placement for Student. Parents and the District should, of course, evaluate Student's academic progress and behaviors in the event the progress noted recently was the anomaly rather than the circumstances that occurred during the 2010/2011 school year.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parents' request that the Downingtown Area School District be required to find or create a new educational placement for [Student], meaning a different classroom/ location where Student's IEP should be implemented, is **DENIED**.

It is **FURTHER ORDERED** that Parents' requests to find the functional behavioral assessment dated and the behavior intervention program based on it, including the crisis intervention plan, inappropriate for Student are **DENIED**.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

March 15, 2012