

*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

Child's Name: I.Q.

Date of Birth: [redacted]

Dates of Hearing:

June 2, 2014

June 3, 2014

June 4, 2014

June 24, 2014

June 25, 2014

### CLOSED HEARING

ODR Case # 14777-1314AS

Parties to the Hearing:

Parent[s]

Allentown School District  
31 South Penn Street  
Allentown, PA 18105

Date Record Closed:

Date of Decision:

Representative:

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July 14, 2014

August 5, 2014

Hearing Officer:

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

[Student] (“student”) is a [teenaged] student residing in the Allentown School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (IDEA)<sup>1</sup>. The student has been identified under the terms of IDEA as a student with deafness/hard of hearing. Throughout the student’s educational history, the student has attended a hearing support program staffed by the local intermediate unit (IU) provided support for students with deafness/hard of hearing. At times, this IU program has been housed in District schools and at other times, including the most recent and upcoming school years, housed in a neighboring school district.

In February 2014, the District recommended that the student attend a District school where the District would directly provide services for deafness/hard of hearing. Parent objected to the District-based placement, arguing that the student should remain in the IU-operated placement in the neighboring school district.

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<sup>1</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162.

For the reasons set forth below, I find in favor of the District although there will be a directive to the student's individualized education plan (IEP) team regarding a particular matter.

## **ISSUES**

Are the District-based program and placement appropriate for the student?

## **FINDINGS OF FACT**

### **Chronology & Programming**

1. The student has bilateral severe-to-profound sensorineural hearing loss in both ears. In the right ear, the student utilizes a cochlear implant. In the left ear, the student has no measurable hearing. (School District Exhibit [S]-12; Notes of Testimony [NT] at 227-232).
2. The student is an auditory/oral communicator and relies on the cochlear implant, a FM system, visual cues of other speakers, and speech reading (including reading facial expressions, gestures, and body language) for receptive communication. (S-12).
3. For the entirety of the student's education, the student has attended an IU-operated program for support for deafness/hard of hearing. In grades K-5, the program was hosted in District

- buildings. In grades 6-8, the program was hosted in the buildings of the neighboring school district. (NT at 232-236).
4. In March 2012, in the spring of the student's 7<sup>th</sup> grade year, the student's IEP team met to discuss the student's educational programming. The District recommended, and the parent approved, the proposed IEP and a continuing placement in the IU classroom at a middle school in the neighboring school district. (S-1).
  5. The March 2012 IEP was the last agreed-upon IEP for the student. (S-1, S-14, S-17).
  6. In June 2013, the student's IEP team met to discuss the student's educational programming. (S-4).
  7. The IEP team did not agree on the student's IEP and placement, and at the parent's request, the District agreed to re-evaluate the student. (S-6).
  8. In July 2013, as the result of a mediation agreement, the District agreed to fund a number of independent evaluations, including speech and language, psycho-educational, and assorted hearing evaluations. (S-9).
  9. As the 2013-2014 school year began, the student entered high school for 9<sup>th</sup> grade at the IU-operated program in a high school in the neighboring school district.

10. In September 2013, the independent evaluators issued reports for consideration by the student's IEP team. (Parent's Exhibit [P]-11, P-13, P-15; S-10, S-11, S-12).
11. In early December 2013, the IEP team met to discuss the student's IEP and placement in light of the private evaluations. The District recommended support for deafness/hard of hearing at a District school. (S-13, S-14).
12. In February 2014, the IEP team met again to discuss the student's IEP. (S-15).
13. The present levels of academic performance in the February 2014 IEP indicate that, to the point the data indicated, the student was succeeding academically in the 2013-2014 school year in the IU-operated program at the neighboring school district. (S-16 at pages 8-13).
14. The present levels of functional performance in the February 2014 IEP indicate that the student was performing satisfactorily in functional areas such as socialization, behavior, speech and language, activities of daily living, and health. (S-16 at pages 13-17).
15. The February 2014 IEP identified student needs in written language (including writing and editing conventions), vocabulary, math problem-solving, and comprehension skills, in addition to articulation, and increasing self-advocacy skills. (S-16 at page 19).

16. The February 2014 IEP contains four goals: one in listening comprehension, one in speech and language, one in self-advocacy, and one in reading comprehension. (S-16 at pages 26-28).
17. The February 2014 IEP contains a communication plan contains the use of a FM system as assistive technology. (S-18).
18. The February 2014 IEP provides for 160 minutes per month of speech and language services, monthly audiological support services for the maintenance of the student's assistive technology, individual/small group counseling 45 minutes per week, and 360 minutes per month of individual hearing support. All other time will be spent in the regular education environment. (S-16 at pages 32-33).
19. The District continued to recommend a placement at a District-based program. Parent explicitly rejected this recommendation and requested special education due process, the request which ultimately led to these proceedings. (S-16, S-17).
20. In March 2014, parent filed a special education due process complaint. (Hearing Officer Exhibit-2).

### Testimony

21. The independent psycho-educational evaluator provided a comprehensive independent report. She testified credibly that, in

her opinion, the February 2014 IEP was not appropriate. (P-11; S-11; NT at 48-145).

22. The independent functional hearing evaluator provided a comprehensive report. She testified credibly that, in her opinion, the February 2014 IEP was not appropriate and that the student should remain in the IU-operated placement. (P-13; S- 13; NT at 555-648).
23. The independent speech and language evaluator provided a comprehensive report. She testified credibly that, in her opinion, the student requires extensive speech and language support and that continuation in the IU-operated placement would be most appropriate. (P-15; S-10; NT at 1069-1161).
24. An educational consultant from the cochlear implant team at the Children's Hospital [redacted] testified credibly about her experience with the student's and her opinion of the inappropriateness of the District-based program. (P-14; NT at 351-468).
25. A witness from the Office for the Deaf and Hard of Hearing within the Department of Labor and Industry for the Commonwealth of Pennsylvania testified credibly about her work with the family, the student's needs as a person who is deaf/hard of hearing, and her understanding that the student wished to remain at the IU-operated placement. (P-12; NT at 152-227).

26. The IU teacher for the deaf/hard of hearing, the IU school social worker, and the IU speech and language therapist, all of whom provided direct instruction/services to the student, testified credibly that they felt the February 2014 IEP is appropriate and that the student could receive an appropriate education in the District-based placement. (NT at 649-772, 782-828, 829-290).
27. The IU program supervisor, who oversees the IU deaf/hard of hearing program, testified credibly that based on her knowledge of the student's history in the IU placement and the opinions of the direct IU providers, she feels the February 2014 IEP in a District-based placement is appropriate. (NT at 473-545).
28. The District teacher of the deaf/hard of hearing who will be responsible for delivering hearing support services to the student under the terms of the February 2014 IEP testified credibly. She is a Pennsylvania-certified teacher of the deaf/hard of hearing with 29 years of teaching experience with deaf/hard of hearing students at a variety of ages in a variety of educational placements, including experience with students who have cochlear implants. (NT at 891-943).
29. The student's mother testified credibly and with authentic passion about her belief that the February 2014 IEP is not appropriate for the student, that the District-based placement is inappropriate, and that the student should remain at the IU-

operated placement. One of the mother's concerns, among others, is that the high school building which the District proposes for the student (the high school which the student would attend if not disabled) has been identified as an academically low-achieving school with over 50 documented incidents (as reported in the 2012-2013 school year) each of harassment/intimidation, minor altercations, and disorderly conduct, and over 30 documented incidents each of fighting and threats to staff/students. (P-9, P-10; NT at 227-333).

30. Heavier weight was accorded to the testimony of the student's mother, who obviously knows the student best, and the IU providers who worked directly with the student in an educational setting. (NT at 227-333, 649-772, 782-828, 829-290).

### **DISCUSSION AND CONCLUSION OF LAW**

To assure that an eligible child receives free appropriate public education (FAPE),<sup>2</sup> an IEP must be "reasonably calculated to yield meaningful educational...benefit and student or child progress."<sup>3</sup> "Meaningful benefit" means that a student's program affords the student

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<sup>2</sup> 34 C.F.R. §300.17.

<sup>3</sup> Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

the opportunity for “significant learning”,<sup>4</sup> not simply *de minimis* or minimal education progress.<sup>5</sup>

Moreover, both federal and Pennsylvania law require that the placement of a student with a disability be in the least restrictive environment (LRE), considering the full range of supplemental aids and services that would allow a student to receive instruction and make progress in the LRE.<sup>6</sup> Pursuant to the mandate of 34 C.F.R.

§300.114(a)(2):

“Each (school district) must ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled, and...separate schooling...occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

Additionally, to comply with LRE mandates, the school district must ensure that “unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.”<sup>7</sup>

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<sup>4</sup> Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999).

<sup>5</sup> M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996).

<sup>6</sup> 34 C.F.R. §§300.114-120; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3<sup>d</sup> Cir. 1993).

<sup>7</sup> 34 C.F.R. §300.116(c).

Pennsylvania special education regulations mirror this emphasis on LRE. Where a student “can, with the full range of supplementary aids and services, make meaningful education progress on the goals in...the IEP”, a school district cannot require separate schooling for a student.<sup>8</sup> Similarly, “(a) student may not be removed from...(a) placement in a regular education classroom solely because of the nature or severity of the student’s disability, or solely because educating the student in the regular education classroom would necessitate additional cost or for administrative convenience.”<sup>9</sup>

Here, there is no issue of “separate schooling”. The two placements under consideration by the parties both involve support for a student with deafness/hard of hearing in a largely regular education environment. The District holds the view that its placement is reasonably calculated to yield meaningful education benefit; as such, its proposed placement is calculated to provide the student with FAPE. Parent feels, for various reasons, that the February 2014 IEP, as proposed, and the District-based placement are inappropriate, arguing that the student cannot receive FAPE in the District-based placement. The weight of the record in its entirety supports the conclusion that the District program is reasonably calculated to yield meaningful education benefit. Accordingly, the District’s position prevails.

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<sup>8</sup> 22 PA Code §14.145(3).

<sup>9</sup> 22 PA Code §14.145(4).

The February 2014 IEP is reasonably calculated to yield meaningful education benefit. The IEP contains adequate present-levels information. Admittedly, the results of the independent evaluations were not included in their entirety verbatim out of the independent reports. This is not, however, a fatal flaw in the IEP. First, the information that was placed in the IEP does not provide a deceptive picture of the student's functioning. Second, the abundance of such independent information would overwhelm the document if included verbatim. It is the considered opinion of this hearing officer that relevant and focused information from the independent evaluations was included to allow for striking a balance between understanding the student's present levels of academic/functional performance and allowing for suppleness in translating that data into programming for the student's needs.

The goals in the February 2014 IEP are concrete and measurable, and are reasonably calculated to provide goal-driven instruction to meet the student's needs. The specially-designed instruction and related services are comprehensive and reasonably calculated to provide the vehicles for the student's instruction and support. Additionally, the qualifications and experience of the District teacher of the deaf/hard of hearing who would be responsible for working with the student to provide hearing support services to the student bolsters the finding that the February 2014 IEP is appropriate.

The February 2014 IEP, then, is appropriate in that it is reasonably calculated to yield meaningful education benefit. One matter, though, must be addressed by the IEP team. The record is clear that if the student's FM system is not working correctly, the student's ability to access sound through the cochlear implant may be diminished; if the student's cochlear implant is not working (due to a dead battery or other technical issue), the student is entirely deaf. The District's teacher of the deaf/hard of hearing testified that she is familiar with such technical issues and testified to the interventions at the District placement that are in place when such events occur. (NT at 899-903, 920-921). These credible assertions aside, the IEP team will be ordered to convene (1) to share information about the precise FM and cochlear technology employed by the student and (2) to make explicit in the student's communication plan (and, consequently, in the student's IEP) exact and detailed protocols for (a) how the student will notify teachers, administrators, and/or other staff about such technical difficulties, (b) the response plan by the District upon such notification, and (c) the training of the student, teachers, administrators, and/or other staff in such protocols.

Most persuasive in the findings underpinning this decision, however, was the testimony of the educators who know the student best, the IU teachers and specialists who worked with the student. These individuals uniformly and credibly testified that they saw no reason why

the student could not make educational progress under the terms of the February 2014 IEP. These witnesses did not advocate for such a position. Indeed, these were third-party witnesses who have no stake in the placement decision. Uniformly and credibly, each testified from her own unique perspective as to why each felt that the student could make educational progress in a District-based placement under the terms of the February 2014 IEP.

The parent produced a powerful array of expert witnesses. Each was persuasive, to a point, for the position that the student needed to remain in the IU-operated placement. But where those witnesses could only surmise or hypothesize, the IU witnesses testified out of their experiences with the student. On balance, and for this reason, the testimony of the IU witnesses was accorded more weight. And, as above, the IU witnesses testified that they found no reason not to support the recommendation that the student could return to a District-based placement.

Finally, it is clear that the parent is concerned about the school culture and climate that the student may encounter at the District placement. The parent's concern comes as no surprise; she is a dogged, passionate, and articulate advocate on behalf of her child. On the evidence presented in the record, the neighborhood school which the student would attend leaves much to be desired. Here, though, there are two points which led this hearing officer to accord that evidence less

weight. First, when the centerpiece of the delivery of FAPE to a student with a disability is individualized, goal-driven special education and related services, the necessary focus, as a matter of fact and law, is on that programming. The record supports a factual and legal conclusion that the District's proposed program is reasonably calculated to yield meaningful education benefit. Second, even though the school climate at the school where the District plans to implement the student's IEP may be problematic in certain ways, or at certain times, or with certain students, the school climate by itself does not negate the appropriateness of the proposed program. The fundamental question is "is the proposed IEP reasonably calculated to yield meaningful education benefit?", not "is the school climate all that it should be?". The second question is understandably an important one for the parent, as it would be for any parent. But the first question is at the heart of special education due process. And so evidence that goes to the first question was accorded more weight than evidence that goes to the second question.

Accordingly, the weight of the record in its entirety supports the conclusion that the District's proposed program and placement, as outlined in the February 2014 IEP, are reasonably calculated to provide meaningful education benefit.

## **CONCLUSION**

The program and placement outlined for the student in the February 2014 IEP are reasonably calculated to yield meaningful education benefit.

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### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the program and placement outlined in the February 2014 IEP are appropriate and are an offer to the student by the District of a free appropriate public education.

On or before Monday, August 18, 2014, the student's IEP team shall convene, as outlined above, to discuss the potential technical issues related to the student's cochlear implant and/or FM system and, based on those deliberations, to craft explicit additions to the communication plan.

Any claim not specifically addressed in this decision and order is denied.

*Jake McElligott, Esquire*

Jake McElligott, Esquire

Special Education Hearing Officer

August 5, 2014