

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: J.H.

Date of Birth: [redacted]

Date of Hearing: July 31, 2009

CLOSED HEARING

ODR No. 10022/08-09 KE

Parties to the Hearing:

Parent[s]

Altoona Area School District
1221 6th Avenue
Altoona, PA 16602-2427

Representative:

Pro Se

Carl Beard, Esquire
Andrews & Beard
3366 Lynnwood Drive
Altoona, PA 16603-1311

Date Record Closed: August 8, 2009

Date of Decision: August 20, 2009

Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

Student is [a pre-teenaged] student with autism residing in the Altoona Area School District (District) whose Parent disagrees with the District's March 4, 2009 proposed individualized education plan (IEP) and educational placement for Student. The District proposes to increase the restrictiveness of Student's placement by providing regular education language arts instruction in a one-to-one setting rather than in the regular education language arts classroom. Student's Parent does not agree with this proposal but has not stated why she disagrees. Based upon past history, however, it appears that Parent believes that Student requires full inclusion in all regular education settings.

The record establishes that Student requires the academic rigor of the regular education language arts curriculum, but in a more restrictive environment with fewer opportunities for Student to engage in inappropriate, counter-productive attention seeking, task avoidance and peer disruption behaviors. Accordingly, the District's proposed IEP and educational placement are appropriate and shall be implemented.

ISSUE

Is the District's March 4, 2009 proposed program and placement appropriate?

FINDINGS OF FACT

1. The parties do not dispute that Student qualifies as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 as a student with autism. (S1, p.3)¹
2. On or about August 18, 2008, the District proposed an educational program and placement for Student consisting of itinerant learning support in an autism support classroom, and participation in the regular education setting, with appropriate supports and up to a limit of 1.5 hours per day, in homeroom and in the regular education language arts classroom. (S1; S20; S21)
3. Student's Parent rejected the District's proposal and requested a due process hearing, believing that Student needed a full-time regular education placement, and rejecting the District's various alternatives, including 1.5 hours of language arts instruction in the regular education environment or even a half-day program of instruction in the regular education environment. (S1,p.5)
4. On December 16, 2008, a special education due process hearing officer determined that a full-time placement in a regular education classroom was not appropriate for Student and ordered implementation of the District's August 18, 2008 proposed IEP.² (S1, pp.11-13) The hearing officer also ordered observation and evaluation of Student in the regular education setting, with an evaluation report to be issued no later than 60 calendar days from Student's first day in the regular education setting. The IEP team also was ordered to meet within 10 calendar days after the

¹ References to "NT" are to the transcript of the hearing in this matter. References to "S" and "HO" are to the District, and Hearing Officer exhibits, respectively.

² The hearing officer's reference in his Order to "student's August 8, 2008 IEP" appears to be a typographical error. (S2,p.15)

- issuance of the behavior analyst's report to consider the report's recommendations.
(S1,p.15)
5. On January 12, 2009, the District placed Student in a regular education 5th grade homeroom and language arts program for a maximum of 1.5 hours per day. (S33; NT 20, 39) The language arts class contained 19-20 students, and 3 adults. (NT 63, 66) During the Language Arts class, Student's disruptive behaviors included overturning desk, throwing shoes, books, pencils, hitting people, and yelling and singing. (NT 28-29; S1,p.7) Student would sometimes be removed from the regular education classroom to avoid physical harm to self or others. (NT 44, 89)
 6. Meanwhile, a behavior specialist conducted an assessment during the spring 2009 semester. Data were collected regarding frequency and duration of Student's behaviors from January 12 through February 2009. (S35,p.3; NT 104)
 7. On March 1, 2009, the District issued a Behavioral Assessment Report (BAR). (S35) The function of Student's distracting behaviors were concluded to be social reinforcement (attention) and task avoidance. (S35,p.3) This was based upon observation that Student's distracting behaviors occurred more often in settings where social reinforcement was limited or controlled and work demands high (such as in a regular education classroom during instruction.) (S35,p.5; NT 117) Student's distracting behaviors occurred less often both in less structured, less demanding settings where social reinforcement was easily accessible, and in the autistic support classroom where positive reinforcement is applied more frequently and Student's behaviors are extinguished more easily. (S35,pp.5,7) The BAR concluded that, due to Student's social skills deficits, Student engages in the

distracting behaviors because Student has not yet learned alternative, more appropriate behaviors that will attain the social reinforcement Student seeks.

(S35,p.7) The BAR recommended teaching functional social skills in an autistic support classroom, with the goal of generalizing those skills into more natural settings with regular education peers. (S35,p.7) Finally, the BAR observed that Student's regular education peers were visibly disturbed by Student's behaviors which, if not replaced with more appropriate behaviors, are likely to hinder future positive peer relationships. (S35,p.7-8)

8. On March 4, 2009, the District conducted an IEP team meeting. (S38) Student's parent did not attend the meeting. (S38) The District concluded that Student should continue to receive regular education language arts instruction, but in a more restrictive, one-to-one setting. (S38)
9. The District believes that Student can learn the regular education language arts curriculum. (NT 45, 86) Student excels in spelling, memorization, and reading fluency when the learning process is not interrupted by Student's behaviors. (NT 45) The academic rigor of the regular education language arts curriculum, however, prompts Student to engage in task-avoidance and attention seeking behaviors. (NT 96) Thus, to reduce Student's disruptive behaviors, and thereby reduce interruptions during the more academically challenging tasks involved in learning the regular education language arts curriculum, the District recommends instruction of the regular education language arts curriculum in a one-to-one setting. (NT32, 48, 86, 96) In the one-to-one setting, the instructor can provide both academic challenge and attention to Student while, at the same time,

Student's task avoidance behaviors can be reduced and peer disruption is avoided.

(NT 109, 117)

10. On March 18, 2009, Student's Parent did not approve the District's recommendation. (S39) Student's Parent neither indicated a reason for the disapproval, nor requested either mediation or a due process hearing to resolve the dispute. (S39; S40) On March 31, 2009, the District sent to Student's Parent another Notice of Recommended Educational Placement, to which Student's Parent did not respond. (S40)
11. On May 4, 2009, the District requested a due process hearing to resolve the parties' dispute. (S40)
12. A mandatory resolution meeting was scheduled for May 11, 2009. (S41) Thirty minutes before the meeting, Student's parent informed the District that she would not attend the meeting. (S42) The parties were unable to reschedule the resolution meeting because Student's parent refused to agree to any meeting time. (S43)
13. On June 23, 2009, I conducted a prehearing telephone conference call to discuss preliminary issues, including a request from Student's Parent for continuance of the scheduled July 31, 2009 hearing date. The District's counsel participated in the conference call; Student's parent did not.
14. On June 30, 2009, Student's Parent informed me by telephone that Friday, July 31 was an unacceptable date for the due process hearing because Student's Parent could attend a due process hearing only on a Saturday or Sunday. While I was willing to conduct a weekend due process hearing, Student's Parent also informed me that she intended to bring all of her children to the hearing, and she would

permit no child care while the hearing was being conducted. Under those conditions, I refused to reschedule the due process hearing. (NT 8)

15. On July 31, 2009, I conducted the due process hearing. When Student's Parent did not arrive 15 minutes after the 10:00 a.m. start time, I called the telephone number listed on the due process hearing notice. A male voice on the phone told me that I had the wrong number. I started the hearing at 10:20 a.m. and concluded at 1:35 p.m., during which time Student's Parent neither appeared nor called my cell phone (which is listed on the due process hearing notice, and which Student's parent had called on June 30.) (NT 7-8, 141) Hearing Officer Exhibits HO1 and HO2 are admitted into the record. District exhibits S1-S51 were admitted into the record. (NT 134)

DISCUSSION AND CONCLUSIONS OF LAW

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) If one party produces more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence. In this case, the District bears the burden of persuasion because it seeks to implement its March 4, 2009 proposed program and placement.

An IEP must contain specially designed instruction designed to meet the unique needs of the child and must be accompanied by any necessary related services to permit

the child to benefit from instruction. Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982) It must be reasonably calculated to yield meaningful educational benefit, which requires the opportunity for “significant” learning. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)

Additionally, Congress requires that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. 20 U.S.C. §1412(a)(5)(A); 34 CFR §300.114(a)(2)(i) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114(a)(2)(ii); 22 Pa Code §14.145; L.E. v. Ramsey Board of Education, 435 F.3d. (3rd Cir. 2006); Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993)

The record establishes that Student can learn the regular education language arts curriculum. (NT 45, 86) Although Student excels in spelling, memorization, and reading fluency when the learning process is not interrupted by Student’s behaviors, the academic rigor of the regular education language arts curriculum prompts Student to engage in task-avoidance and attention seeking behaviors. (NT 45, 96) Student’s learning and that of Student’s peers is disrupted by such behaviors when Student encounters academic challenges in a setting where social reinforcement is limited or controlled (such as in the regular education language arts classroom during instruction.) (S35,pp.5, 7-8; NT 117) Student has not yet learned alternative, more appropriate behaviors that will attain the social reinforcement Student seeks. (S35,p.7) In a one-to-one language arts instructional

setting, Student can receive both the language arts instruction and attention that Student needs while, at the same time, Student's task avoidance behaviors can be reduced and peer disruption is avoided. (NT 109, 117) Accordingly, the District's March 4, 2009 proposed program and placement is appropriate.

CONCLUSION

Student requires instruction in the regular education language arts curriculum as well as instruction in social skills and in more appropriate behaviors that can be used effectively in regular education settings. The District's proposed IEP is designed to provide the academic portion of the regular education language arts curriculum that Student requires, while reducing opportunities for Student to engage in inappropriate, counter-productive attention seeking, task avoidance and peer disruption behaviors. Accordingly, the District's proposed IEP is appropriate and shall be implemented.

ORDER

The District's March 4, 2009 proposed program and placement is appropriate and shall be implemented.

Daniel J. Myers

Daniel J. Myers
HEARING OFFICER

August 20, 2009
ODR No. 10022/08-09 KE