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Due Process Hearing

MB (#8801/07-08 KE)  
Date of Birth: xx/xx/xx  
Date of Hearing: June 4, 2008  
Closed Hearing

Parties to the Hearing

Parent  
Ms.

Representative  
pro se

Transcript Received  
June 9, 2008

Date of Decision  
June 13, 2008

School District  
Brownsville Area

Representative  
Melinda Dellarose, Esq.

Hearing Officer  
David Y. K. Lee

## **II. BACKGROUND**

Student is a xx-year-old eligible student in the Brownsville Area School District (hereafter District). He was in the 11<sup>th</sup> grade during the 2007-2008 school year receiving special education services with the primary disability category of Emotional Disturbance (hereafter ED). Toward the end of the school year, the District issued a Notice of Recommended Educational Placement (hereafter NOREP) for a full-time emotional support program. The parent disagreed with the NOREP and requested a due process hearing.

## **III. FINDINGS OF FACT**

1. Student, whose date of birth is xx/xx/xx, is a student in the District. (D. #1 @ 3.)

2. Student was evaluated when he was a 9<sup>th</sup> grade student and was found to be eligible for special education services with the disability category of Specific Learning Disability (hereafter SLD) but was subsequently changed to ED. (N.T. 65-67. D. #2 @ 1.)

3. Student's 10<sup>th</sup> grade Individualized Education Program (hereafter IEP) dated January 24, 2007, showed Learning Support (after LS) services in English, Social Studies, Math, and Physical Science. (H.O. #2 @ 5.)

4. "Type of Support" for Student's primary exceptionality was identified as "Emotional Support". (H.O. #2 @ 12.)

5. The 10<sup>th</sup> grade IEP contained three annual goals that involved behavior as well as a separate Behavioral Plan (hereafter BP). (N.T. 27-28. H.O. #2 @ 8, 10, & 14-15.)

6. A notation, dated November 16, 2007, attached to Student's 10<sup>th</sup> grade IEP, indicates that "Student has not improved since the beh. plan has been implemented". (N.T. 56-57. H.O. #2 @ 15.)

7. A Behavioral Contract (hereafter Contract) was then drawn up on the same day with signatures of Student, his mother, and school personnel. (N.T. 23-25, 51-52. D. #3 @ 1.)

8. The 10<sup>th</sup> grade IEP was revised on January 24, 2008, when Student was then in the 11<sup>th</sup> grade. (H.O. #2 @ 18.)

9. As an 11<sup>th</sup> grade student, Student was no longer receiving LS in English and Social Studies, and Math was taught in an inclusion setting. (N.T. 37-38, 54. H.O. #2 @ 19.)

10. The annual goals regarding behavior and the BP, however, remained unchanged. (H.O. #2 @ 24-25, 31-32.)

11. An IEP team meeting was held on March 3, 2007, during which an alternate education placement was discussed but no action was taken. (N.T. 69-70. H.O. #2 @ 33.)

12. The Reevaluation Report, dated May 2, 2008, recommends "a change in placement to IU 1 Campus at [redacted] in the PATHS program (hereafter PATHS)". (N.T. 21-22. D. #2 @ 4.)

13. The subsequent IEP dated also May 2, 2008, is an exact copy of the previous IEP with the exception of a handwritten sentence - "All supplementary aids and services have been considered by the IEP". (D. #1 @ 16.)

14. A NOREP was also issued on May 2, 2008, proposing "Full-Time Emotional Support" was disapproved by the parent and a Due Process Hearing was requested. (H.O. #3 @ 1.)

15. A due process hearing session was held on June 4, 2008.

#### **IV. ISSUES**

Is the District's proposed change of placement for Student appropriate? (N.T. 8.)

#### **V. DISCUSSION AND CONCLUSIONS OF LAW**

##### Burden of Proof

The parent was *pro se* in these proceedings. Although it was checked that the Due Process Complaint Notice was requested by the parent, it was submitted to the Office for Dispute Resolution by the District following the IEP meeting of May 2, 2008. (F.F. #14.) The issue before this Hearing Officer is clearly that of a change of educational placement proposed by the District. Even though it appeared on paper that the parent was the moving party, it should properly and reasonably be the District. The District is seeking relief since the proposed change of placement cannot occur without parent consent. The burden of proof thus falls on the District.<sup>1</sup>

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<sup>1</sup> See Schaffer v. Weast, 546 U.S. 49 (2005).

The parent did not present any evidence nor did she call any witnesses. This Hearing Officer requested additional documents<sup>2</sup> to assist in the analysis of the appropriateness of the District's recommendation for a change of placement. (N.T. 99-100.)

#### Supplementary aids and services

The District opined that Student is in need of an alternate placement with more therapeutic support in which to receive his education programming because the BP at the District has not been successful and Student's behavior continues to interfere with his learning. (N.T. 22, 56-57, 76, 80.) Given the focus of the District's position is regarding the behaviors exhibited by Student, the analysis of this Hearing Officer will be on the appropriate<sup>3</sup> supplementary aids and services delivered in the least restrictive environment. The alternate placement involves the removal of Student from the school where he would normally attend if not exceptional which is the least restrictive environment.

Each public agency must ensure that—

- (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment 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.

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<sup>2</sup> Student's grade report for 11<sup>th</sup> grade marked as H.O. #1.  
IEPs for 10<sup>th</sup> and 11<sup>th</sup> grades marked as H.O. #2.  
NOREP marked as H.O. #3.

<sup>3</sup> See Gaskin v. Commonwealth of Pa., 389 F. Supp. 2d 628 (E.D. Pa 2005). Also Girty v. Sch. Dist. Of Grove Valley, 163 F. Supp. 2d 527, 532-537 (W.D. Pa. 2001), *aff'd* 60 Fed Appx. 889 (3d Cir. 2002.)

34 CFR §300.114(a)(2)

- (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
- (b) The continuum required in paragraph (a) of this section must—
- (1) Include the alternative placements listed in the definition of special education under 300.309 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
  - (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

Id. §300.115

10<sup>th</sup> grade

Student's 10<sup>th</sup> grade (2006-2007 school year) IEP, dated January 24, 2007, noted a change in his primary disability category from SLD to ED following a psychiatric evaluation sometime in the middle of 9<sup>th</sup> grade. (H.O. #2 @ 4. F.F. #2.) His educational support was Emotional Support (hereafter ES). (F.F. #2.) It was ascertained that the practice of the District is to instruct students identified as in need of ES at the High School are in LS classrooms. (N.T. 63.) Student was receiving academic support in four subject areas in LS resource rooms. (F.F. #3.) While not an issue before this Hearing Officer, the reason for academic LS is presumed to be a carryover from the previous identification of SLD.<sup>4</sup> The component of Student's ES, other than academic support, was provided on a sporadic basis by the designated ES teacher who was also Student's LS Physical Sciences teacher. The function of the ES teacher was explained as providing a "venting system" and a place to "calm down". (N.T. 22, 37, 68.) Student had exhibited behavioral and peer relationship difficulties in his elementary school years, and was given the diagnosis of Impulse Control<sup>5</sup>, NOS, when he was a 9<sup>th</sup> grade student. (D. #2 @ 1.)

In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and **other** strategies, to address that behavior...

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<sup>4</sup> The record is not at all clear as to the length of time Student was receiving specific education services as a student with SLD. (N.T. 66. D. #2 @ 1.) The RR of May 2, 2008, did have SLD as an additional disability category. (D. #2 @ 4.)

<sup>5</sup> The diagnostic nomenclature of Impulse Control *Disorder*, NOS is presumed although not specifically so noted.

Three annual goals in Student's IEP referenced behavior - "respond with appropriate verbal responses; respond appropriately to redirection; respond appropriately to situations, assignments, or responsibilities in the classroom". (H.O. #2 @ 8, 10.) The BP attached to the IEP was apparently meant as ways for Student to attain those annual goals. (H.O. #2 @ 14-15.) Based on the notation that "Student has a behavior plan that has been followed for each offense" in his IEP (H.O. #2 @ 5.), it is evident to this Hearing Officer that the BP was a carryover from 9<sup>th</sup> grade when it was developed subsequent to the psychiatric evaluation on December 16, 2005 (D. #2 @ 1.). The BP did not include a schedule of review to determine its efficacy. There was no baseline from which to measure progress.<sup>6</sup> The IEP would infer that Student's rating on a Emotional and Problem Behavioral Scale<sup>7</sup>, which was rated by his resource room teacher for Math, was considered to be a Functional Behavioral Assessment (hereafter FBA). (H.O. #2 @ 4.) According to the time-line provided, the school psychologist, in the least, was not involved in the FBA or the development of the BP. (N.T. 68.) In the absence of legal standards for FBAs and BPs, the District is advised to incorporate best practice. Technical assistance may be obtained from, but not limited to, the Intermediate Unit.

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<sup>6</sup> Q. Did you have any ongoing input or awareness as to how the behavior plan was working?  
A. At the time of my arrival, I did not know how well the behavior plan was working. (N.T. 61.)

<sup>7</sup> Reference not given.

## 11<sup>th</sup> grade

Student's 11<sup>th</sup> grade IEP (2007-2008 school year) notes an IEP meeting date of January 24, 2008. (H.O. #2 @ 18.) Prior to that date, a Contract was drawn up on November 16, 2007, because the BP was not deemed successful. (F.F. #6 & #7.) This Hearing Officer notes the Contract presumes that Student has a level of self-awareness and self-regulation to control his behavior. Given the diagnostic descriptor of Impulse Control, it is unlikely that Student would simply be able to "adhere to all school policies and procedures" without support. (D. #3.) It is also unclear if the Contract was meant to replace the BP or if it was to be in conjunction with the BP. (N.T. 61-62, 75-76.) If it was meant to replace the BP, then what was the purpose of having the same BP, word for word, attached? (H.O. #2 @ 31-32.) If it was meant to be in conjunction with the BP, then why was the BP the same, word for word, if it had not been successful? This Hearing Officer notes that the District was of the opinion that the IEP, thus the BP specifically at issue, had been revised several times. (N.T. 22, 61-62, 69.) The BP in fact had remained, from all indications, exactly the same since its inception in 9<sup>th</sup> grade. (H.O. #2 @ 5, 14-15, 31-32. D. #1 @ 17-18.)

Student also was no longer receiving LS in the academic subject area taught by the ES teacher. (F.F. #9.) This change was not noted in his IEP when Student moved from 10<sup>th</sup> to 11<sup>th</sup> grade. Furthermore, the ES teacher no longer provided Student with “emotional support”. (N.T. 37-38.) The ES teacher testified that she did not know of the reason why Student no longer interacted with her and yet Student was “on her roll” for the stated purpose of receiving “emotional support”. (N.T. 9.) An administrator testified to his knowledge of Student not wanting to see the ES teacher anymore for support and made other arrangements for Student to take tests. (N.T. 54.) Facts are not in evidence of coordination among school personnel to provide Student with behavioral support. The ES teacher, apparently in preparation for the present proceedings, compiled summaries to demonstrate Student’s response to the annual goals in his IEP over a six weeks period. (N.T. 26-29. D. #4 @ 6. H.O. #2 @ 33.) The interpretation of the data was less than persuasive. It is also unclear how, and if, the BP was implemented in relation to the data collected.

Therefore, it is the conclusion of this Hearing Officer that the District did not meet its Burden of Proof that Student has been provided with appropriate supplementary aids and services in the least restrictive environment, before making a recommendation for an alternate placement.

In dicta, the parent is admonished not to perceive this conclusion as meaning Student is absolved of all responsibilities for his actions. It is not in the best interest for Student, going into adulthood, to internalize the concept that he can do no wrong and there are no consequences to poor decisions. (N.T. 88-96.)

The District is advised to note the following inconsistencies. A NOREP is issued to indicate the placement where the IEP is to be implemented. Student's NOREP does not identify the PATHS program. Furthermore, it is not logically and reasonable to propose an IEP with the BP to be implemented at PATHS, when it is the same as the one deemed to be unsuccessful. (H.O. #3. D. #1 @ 17-18.)

Accordingly, it is hereby ordered:

**VI. ORDER**

The LEA is not ordered to take the following action:

The LEA is not to place Student in an alternate educational setting for the start of the 2008-2009 school year.

The LEA is ordered to take the following action:

The LEA is to revise Student's BP consistent with the Discussion above.

June 13, 2008

Date

David Y. K. Lee

David Y. K. Lee  
Hearing Officer