

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: N.A.

Date of Birth: [redacted]

Date of Hearing: July 29, 2014

CLOSED HEARING

ODR File No. 14862-1314AS

Parties to the Hearing:

Representative:

Parent[s]

Anthony T. McBeth, Esquire
406 North Front Street
Cameron Mansion
Harrisburg, PA 17101

Steelton-Highspire School District
250 Reynders Street
Steelton, PA 17113

Christopher J. Conrad, Esquire
Marshall Dennehy Warner Coleman
and Goggin, P.C.
100 Corporate Center Drive, Ste. 101
Camp Hill, PA 17011

Date Record Closed:

August 4, 2014

Date of Decision:

August 18, 2014

Hearing Officer:

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

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a teenaged student in the Steelton-Highspire School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parent filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing convening over a single session, at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District's proposed placement for the 2014-15 school year is not intensive enough to be appropriate for Student. The District maintained that its proposed special education program and placement is appropriate for Student.

The District also moved to dismiss the complaint on the basis that the issue presented was moot.

For the reasons set forth below,⁴ I deny the motion to dismiss, but find in favor of the District on the merits, although the IEP team will be directed to convene shortly after the start of the 2014-15 school year to develop a plan to monitor Student's academic and behavioral performance.

ISSUES

1. Whether the District's proposed placement for Student in itinerant emotional support for the 2014-15 school year is appropriate; and
2. If the proposed program and placement are not appropriate, should the hearing officer order a more restrictive placement with a partial hospitalization component?

FINDINGS OF FACT

¹ In the interest of confidentiality and privacy, Student's name and gender, and any other potentially identifiable information, are not used in the body of this decision to the extent possible.

² 20 U.S.C. §§ 1401 *et seq.*

³ 29 U.S.C. § 794.

⁴ The testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

1. Student is a teenaged student who is a resident of the District. Student is eligible for special education on the basis of an emotional disturbance. (Notes of Testimony (N.T.) 21-22 (stipulation of counsel); Hearing Officer Exhibit (HO-) 1 p. 8)
2. Student first began receiving special education services with emotional support in elementary school. (N.T. 24-26)
3. Student has been diagnosed with anxiety and depression, Attention Deficit/Hyperactivity Disorder (ADHD), Combined Type, Oppositional Defiant Disorder, and Mood Disorder NOS. (N.T. 30, 48-49; Parent Exhibit (P-) 2)
4. In July 2011, Student sustained a head injury. Following that accident, Student began to exhibit mood swings as well as increased defiance, agitation, frustration, and short-term memory difficulties. (N.T. 28-29, 33)
5. Student's Parent met with the District following the head injury to discuss the accident and the potential for increased difficulties for Student at school. Student received itinerant emotional support at school following the head injury. (N.T. 28, 32-33, 34-36, 47)
6. Student receives thirty hours per week of therapeutic support staff services (TSS) at school. Student also has services of a behavior specialist consultant (BSC). (N.T. 37-38, 45)
7. Student has several treating physicians, including a psychiatrist, psychologist, and several medical doctors. (N.T. 44-45)
8. The Parent met with the District prior to the start of the 2013-14 school year to discuss Student's needs. Student would be starting seventh grade in a new school building. (N.T. 29-31, 36-38, 46)
9. The District conducted a re-evaluation of Student and issued a draft Re-evaluation Report (RR) in October 2013. A meeting convened to discuss the draft RR, which included specific learning disability as an eligibility category for Student. That eligibility category was removed after a determination was made by the District that Student was not eligible on that basis, although the Parent disagreed. Student was determined to be eligible for special education based on an emotional disturbance. (N.T. 40-43, 81-84, 109-10, 113; School District Exhibit (S-) 3; HO-1)
10. The October 2013 RR included background information, input from the Parent, and results of previous cognitive assessments. Student's intellectual functioning was reportedly in the average to low average range. (HO-1 pp. 2, 7)
11. Academic achievement was assessed using the Woodcock-Johnson Tests of Academic Achievement – Third Edition. The RR reported Student's scores on the

- Mathematics and Reading subtests and Broad Reading composite as within the average to low average range. (HO-1 pp. 2-3, 7)
12. Student's performance on state and district assessments was reported to be rather variable, with 6th and 7th grade scores generally below grade expectations. Teacher input was also variable, with indications that Student exhibited weaknesses in reading comprehension, some expressive language skills, and organizational skills. (HO-1 pp. 3-4, 7)
 13. Behaviorally, Student's teachers reported that Student was frequently off-task, requiring redirection and prompting throughout the school day, and had difficulty completing and turning in assignments. However, Student did at times exhibit appropriate focus and attention in the classroom. (HO-1 p. 4)
 14. A number of recommendations were included in the RR, including District personnel's establishment of personal relationships with Student, availability of an area for emotional support/calming, and regular counseling, as well as accommodations to address attentional and focusing difficulties. (HO-1 pp. 8-10)
 15. Student's Individualized Education Program (IEP) team met in November 2013. Student's TSS worker and BSC attended the meeting, as did a caseworker with a local community agency providing mental health and services. (N.T. 110; S-1)
 16. The November IEP reflected teacher input into Student's behaviors and grades. Student's teachers rather unanimously reported difficulty with organization, using Student's agenda book, managing time, completing classwork and homework assignments, and needed extra time. At the end of the first quarter marking period, Student had "D" grades in three classes and "B" and "C" grades in most other classes. (S-1 pp. 6-7)
 17. Student reportedly used the resource room, or spent time with the TSS worker, to take a break as needed during the fall of 2013. Three disciplinary incidents were reported in the November IEP, involving defiance, inappropriate language, and disruption, for which Student received detention or a conference with the principal. (S-1 p. 8)
 18. Two goals were contained in the November IEP, addressing organizational skills and appropriate use of breaks. Items of specially designed instruction included resource room access, a homework log, accommodations for tests and assignments, preparation for changes to routine, opportunities for breaks and calming, and cues and prompts for attention and redirection. A Positive Behavior Support Plan including a Crisis Plan were part of this IEP. (S-1 pp. 17-18, 25-26)
 19. The November IEP recommended a continuation of itinerant emotional support. The Parent approved the Notice of Recommended Educational Placement (NOREP) for itinerant emotional support. (N.T. 111-12; S-1 p. 22, S-2, S-3 p. 3)

20. Student's IEP team convened again in January 2014 to address the Parent's concerns with Student's reading skills and lack of homework completion. Student's behavior was discussed, including several recent incidents requiring discipline (non-compliance and classroom disruption), and the team developed a behavior chart after teachers identified behaviors of concern: attendance, homework, and respect of peers and teachers. The chart provided a daily rating of those behaviors and weekly reinforcement for attaining an 80% average on all behaviors using a 2-point scale. The IEP was revised to update the Present Levels and make some adjustment to several of the items of specially designed instruction: testing accommodations, classroom strategies for prompting and redirection, a revised homework log, and a daily check-in in the resource room. (N.T. 115, 156-62; S-5, S-6, S-7)
21. Student's medication was changed around January 2014. (N.T. 49, 159-60, 162)
22. The Parent requested an Independent Educational Evaluation (IEE) at public expense in January 2014. The District ultimately agreed to fund the IEE, and that evaluation was scheduled to take place after the due process hearing. (N.T. 162, 171-72, 205-08; S-5 p. 1, S-15)
23. During the 2013-14 school year, Student started off doing well, then began to experience difficulties with mood and frustration and was disciplined on several occasions. Student frequently failed to complete assignments and turn in homework, and Student's grades suffered as a result. Student went through periods over the course of the school year when Student performed better than at other times. (N.T. 27, 47-50, 52, 71-71)
24. During the 2013-14 school year, Student had access to the resource room anytime Student needed a break, as well as for testing accommodations. Student rarely took the initiative to go to the resource room, although the emotional support teacher saw Student at least once a week. (N.T. 112-13, 143-44)
25. Student had a homework sheet during the 2013-14 school year which Student's teachers were to initial each day. (N.T. 49-52, 111)
26. Sometime in the spring of 2014, the Parent asked that the homework sheet and behavior charts no longer be utilized for Student as she did not believe Student was successful using them. (N.T. 49-52, 201)
27. In February 2014, Student's treating psychiatrist made a recommendation that Student be placed in a school-based partial hospitalization program. The Parent provided that recommendation, which named a specific program location, to the District. (N.T. 52, 54-55, 167-68; P-2)
28. Student's IEP team met in March 2014 to discuss the psychiatrist's recommendation as well as an option to increase the emotional support provided to Student. The Parent did not believe that Student should receive additional emotional support at the District school, largely because Student did not want to be in special education

- classes. The Parent also understood that Student did not go to the resource room for emotional support when Student needed to. (N.T. 55-57, 60, 63-64, 90, 115-16, 162, 165-67, 193; S-9, S-12 p. 24)
29. The IEP team reviewed the behavior chart at the March 2014 IEP meeting. The team discussed Student's new concerning behaviors, such as significantly increased distractibility and refusal to leave the classroom when requested. Student demonstrated more difficulty in English, mathematics, and science classes. The team revised the behavior chart to provide for a rating for each class and additional categories of behavior to be rated. The team also discussed increasing the level of emotional support so that Student would be in the resource room for home room and for those classes in which Student had the most difficulty. The Parent disagreed with this suggestion. (N.T. 55-57, 63-64, 117-20, 140-43, 144-45, 162-66; S-10)
 30. Student's IEP was revised in March 2014 to update the Present Levels including two new incidents of discipline resulting in suspensions (refusing to listen to authority, threatening others, and use of profanity) and a medication change. A new behavioral goal was added to address interactions with peers and teachers as reported on the behavior chart. (N.T. 163-64; S-12)
 31. In early March 2014, the Parent filed a complaint with the Bureau of Special Education (BSE) challenging the District's decision not to pursue a partial hospitalization placement for Student, referencing the discussion for an increase in the level of support to be provided at school. (S-13)
 32. The Parent did not approve the NOREP for supplemental emotional support following the March 2014 IEP meeting, and requested a due process hearing. However, after that meeting, Student did begin to check in with the emotional support teacher twice each day. (N.T. 120, 140-41, 168-69; S-11, S-18, S-20)
 33. Student's IEP team met again in April 2014, but the Parent did not attend. The team discussed Student's attendance, grades, and behavior progress, and further considered the recommendation for the partial hospitalization program. Student's grades were markedly improved over the prior quarter, as was Student's behavior in the classroom. Student's IEP was revised to update the Present Levels and add the psychiatrist's recommendation. The team at that time determined that no change in placement or an increase in the level of support was indicated. (N.T. 122-125, 178-80; S-21, S-22, S-24, S-25, S-26)
 34. Student had a neuropsychological evaluation in late March 2014 with a report issued in April. The neuropsychologist diagnosed Student with ADHD and noted Student's lack of insight into Student's behavioral problems. This report made recommendations for addressing Student's behavior at school as well as testing and instructional accommodations. The Parent provided a copy of this report to the District sometime after it was provided to her. (N.T. 100-01; S-23)

35. The parties convened another IEP meeting in June 2014 to discuss the neuropsychological evaluation and review Student's educational and behavioral progress. Student's IEP was again revised to reflect updated Present Levels, and new items of specially designed instruction were added to permit use of headphones during independent work and to provide graphic organizers and study guides, as well as additional resource room support as needed for projects. The District team members agreed that Student's behaviors and grades had improved overall since January, with only one new disciplinary referral for making a threat to a peer resulting in a conference with the principal; the team also determined that itinerant emotional support services were appropriate. Because Student's IEP in March had inaccurately reflected that Student's level of service was supplemental emotional support, the District issued a new NOREP to correct that error. The Parent approved this NOREP. (N.T. 61-62, 63-65, 94-97, 126-30, 181-83, 197-99; S-28, S-29, S-30, S-31, S-32)
36. By signing the June 2014 NOREP for itinerant emotional support, the Parent did not intend to discontinue pursuing the pending due process complaint. (N.T. 65-66)
37. Student passed all classes taken during the 2013-14 school year, although Student had some "D" grades. Student was given the opportunity to make up work for a few classes, which Student did. (N.T. 71, 77-78, 135-36)
38. The Parent believes that Student needs a school-based partial hospitalization program because Student would be provided with both educational and therapeutic services. She does not believe that Student would resist attending this type of program, which she understands is more restrictive than the District's proposed placement. (N.T. 58-60, 70, 72, 91-93)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, 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); *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 Parent who requested this hearing. Nevertheless, application of this principle 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, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be credible, and the testimony was largely uncontradictory. It should also be noted that the Parent, as well as the District personnel, all presented as dedicated individuals who care about Student and Student’s education, despite their conflicting positions at the hearing.

IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to a student who qualifies 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 v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995). 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 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. The IEP need not "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). And, "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).

Also critical is the IDEA obligation for eligible students to 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.* All local education agencies are required to make available a "continuum of alternative placements" to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a). FAPE and LRE are related but separate concepts. *A.G. v. Wissahickon School District*, 374 Fed. App'x 330 (3d Cir. 2010).

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). Relevant to this matter, the obligation to provide FAPE to a child with a disability is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). The Parent did not raise different claims under the IDEA and Section 504, and the inter-related issues presented will be addressed under both statutes together.

The District’s Motion to Dismiss

The District sought outright dismissal of the Parent’s complaint by reason of the signed NOREP on June 5, 2014 (S-30). However, both the Parent and a District witness testified, logically, that this NOREP was issued to memorialize the level of support to which the parties had agreed in the spring of 2014; and, the Parent provided a credible explanation that her signature on that document did not mean that she wished to withdraw or discontinue her due process complaint. The parties’ disagreement over how to meet Student’s needs had not been resolved at the time of the hearing. Accordingly, the Motion to Dismiss must be denied.

The Parent’s Claims

The Parent contends that Student requires placement in a partial hospitalization program that will afford Student both academic and therapeutic services. The record, however, fails to support this assertion. The only indication that Student has a need for this type of intensive emotional support is a written statement by Student’s treating psychiatrist that fails to specify in

any detail the basis for that recommendation. Tellingly, this psychiatrist does not mention whether and to what extent he sought input from the District; rather, the evidence reflects that his exclusive sources of understanding of Student's academic and/or behavioral needs and performance at school were Student, the Parent, and Student's TSS worker. (N.T. 85-86) Moreover, one of the considerations which he apparently found significant to his recommendation was Student's emotional difficulties at home. (P-2)

The record reflects that Student's need for emotional support varied over the course of the 2013-14 school year, as did Student's academic performance. Nevertheless, there is no evidence from which to draw the conclusion that Student requires the very restrictive level of intensive services provided in a partial hospitalization program in order to receive FAPE. As noted above, school districts are also obligated to provide a continuum of services, and placement outside of the regular education environment must occur only if the nature or severity of the disability is such that education in regular classes, with appropriate of supplementary aids and services, cannot be satisfactorily achieved. Here, the evidence is preponderant that Student can derive meaningful educational benefit, and can be successful, in the regular education environment, with the provision of an appropriate level of emotional and other supports, as proposed by the District most recently in June 2014. The record does establish that Student did, at times, need more support than at others. However, the District recognized and responded to that need when it recommended an increase in the level of emotional services in March when Student demonstrated difficulties with the then-current amount of support; and, in April, again responsively determined that itinerant services remained appropriate. Here, the evidence fails to demonstrate that Student must take the significant leap along the continuum of special education options from regular education with itinerant or supplemental emotional support services to a

wholly segregated placement with a therapeutic component. While this hearing officer can appreciate the Parent's well-intentioned efforts to advocate for a specialized environment for Student, simply put, the evidentiary record taken as a whole does not establish that such a placement is necessary to meet Student's needs.

The IEP team will, however, be directed to convene shortly after the start of the 2014-15 school year, with the Parent, to develop a plan to monitor Student's academic and behavioral performance and make revisions to Student's IEP as necessary.⁵ Student has, both historically and recently, demonstrated significant variability in performance in each of these areas, and careful, responsive, and ongoing consideration must be given to addressing those fluctuations over the course of the school year. There must therefore be continual assessment of how Student is performing and the Parent must be part of any team determinations that more or less support, academic or emotional, is necessary, and how it will be provided. Additionally, there are a variety of ways of providing increased support in either or both of these areas without moving Student into the resource room for significant portions of the school day. The team is encouraged to discuss all available options that would appropriately address Student's needs without causing an increase in Student's reluctance to avail Student's self of special education and related services at school.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that Student does not require a partial hospitalization placement in order to

⁵ This discussion is not meant to imply that the District would not provide appropriate review of Student's academic and behavioral performance throughout the school year. However, this directive permits the Parent, together with the District, to review and assess the level of support Student is receiving, and its effectiveness, on a regular basis.

have Student's emotional support and other educational needs met at the start of the 2014-15 school year.

ORDER

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

1. The District's Motion to Dismiss is denied.
2. Student does not require a partial hospitalization placement for the 2014-15 school year, and the District is not required to provide such a placement for Student as part of its FAPE obligation to Student.
3. Student's IEP team shall convene within ten school days of the date of this Order to develop a plan for monitoring Student's academic and behavioral performance so that Student's IEP may be revised as necessary, consistent with the above discussion.
4. Nothing in this decision precludes the parties from mutually agreeing to alter the IEP meeting requirement in Paragraph 3 of this Order, or the content of Student's IEP.

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: August 18, 2014