

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: P.P.

Date of Birth: [redacted]

ODR No. 00587-0910 AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Pleasant Valley School District
One School Lane, Rte 115

Glenna M. Hazeltine, Esquire
King, Spry, Herman, Freund & Faul,
LLC

Brodheadsville, PA 18322-2002

One West Broad Street
Suite 700
Bethlehem, PA 18018

Date of Resolution Session

Waived

Date of Hearing:

May 13, 2010

Record Closed:

May 17, 2010

Date of Decision:

May 30, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a late teen-aged student, who at the time of the hearing was enrolled in the eleventh grade in the District but whose residence is and has been unknown to this hearing officer. (NT 6-1 to 9-24, 37-24 to 39-15.) At relevant times, the Student was eligible for special education with an exceptionality of Specific Learning Disability. (NT 33-5 to 34-21.)

Parents requested due process by filing a Complaint Notice (complaint) in November or December 2009. (S-8.) The exact date is unclear because there are two documents with multiple dates on them. *Ibid.* The District filed three successive challenges to the sufficiency of these documents and an amended version which I allowed. (S-9, S-12, S-14, S-15, S-19.) On March 11, 2010, the Parents filed an amended complaint, which I found to be sufficient on March 22, 2010. (S-19.)

The Parents complained of inappropriate prolonging of the registration process, slander, defamation, inappropriate disciplinary action, inclusion of the Student in an IEP meeting contrary to Parents' wishes, a verbal "attack" on the Student, and that the District provided the student with inappropriate levels of work difficulty in reading comprehension and mathematics, including direction of the Student to answer only one question per day in mathematics. (S-19.) The Parents requested money damages and compensation, which I interpreted to include compensatory education. (NT 56-5 to 24, 36-17 to 25; S-19.) The Parents also requested private tutoring and payment for higher education. (NT 36-17 to 25.)

The District moved to dismiss the Parents' claims by filings on December 31, 2009, January 11, 2010 and February 22, 2010. (S-10, S-11, S-13.) I partially granted the District's motions on February 12, 2010, dismissing allegations of slander and allegations of inappropriate disciplinary action that did not amount to a change of placement. (NT 36-8 to 25, 44-20 to 48-19, 52-4 to 55-1, 55-8 to 22; S-12.) I also dismissed claims for damages and for pain and suffering. *Ibid.* I reserved decision pending a hearing on all other claims in the complaint. (S-12; S-16.) The hearing in this matter commenced on May 13, 2010, and was completed the same day. The entire District document book was admitted into evidence. (NT 153-10 to 154-8.) The record closed on May 17, upon receipt of the transcript.

ISSUES

1. Did the District deprive the student of a free appropriate public education, during the 2009-2010 school year, by teaching Student in the SOAR to Success reading comprehension program at a level that was below Student's level of academic achievement, by failing to teach Student writing, and by instructing Student to answer only one question per day in mathematics?
2. Did the District deprive the student of a free appropriate public education, during the 2009-2010 school year, by inviting Student to an IEP meeting contrary to the Parents' wishes and by yelling at Student during the meeting?
3. Should the hearing officer order the District to pay compensatory education for any part of the 2009-2010 school year?

FINDINGS OF FACT

1. The Student registered in the District in August 2009 and was assigned to eleventh grade regular education and vocational-technical school, while the District waited to receive the Student's IEP from [a neighboring school district]. (NT 62-1 to 65-2, 117-10 to 119-15.)
2. The District promptly tested the Student's reading comprehension level with the Qualitative Reading Inventory. The Student was functioning at a fourth grade level in both decoding and comprehension. (NT 116-17 to 118-10; 126-17 to 127-3.)
3. After four days in regular education mathematics with a grade level curriculum, the Student's assigned IEP case manager reported that Student was struggling in the District's regular education classes in mathematics. (NT 119-1 to 119-21.)
4. After mathematics testing, the District transferred the Student to a learning support classroom for mathematics and reading. (NT 120-2 to 11, 122-1 to 123-18.)

5. The Parent mistakenly believed that the Student was being given work below Student's level and that Student had been told to answer only one mathematics question per day; on the contrary, while the Student may have been given a probe and instructed to answer only one question on it, this did not reflect the level or pace of Student's instruction. (NT 71-2 to 23, 134-14 to 136-6.)
6. On September 20, 2009, the Parent attended an IEP meeting and the Student was invited to attend and did attend, because Student had not passed the courses at the Vocational/Technical school, and it was deemed appropriate to ask Student if Student wanted to continue there. (NT 80-5 to 12, 125-1 to 125-23.)
7. The Parent requested that the District provide a reading program to the Student. (NT 125-8 to 126-15.)
8. The Student remained in the meeting and the District personnel did not ask the Student to leave; the Student participated in the meeting and stated that Student did not want to return to the Vocational/Technical school. (NT 80-19 to 84-16, 86-22 to 87-8, 125-1 to 23.)
9. The Student's schedule was rearranged to allow Student to participate in learning support classes as well as regular education academic classes; the Student agreed to withdraw from Vocational/Technical school in the afternoons to allow for this additional programming. (NT 123-6 to 124-8, 146-9 to 152-10.)
10. The Student was assigned to an additional learning support class and was provided a curriculum called the SOAR program, in which Student received remedial instruction in reading, as well as mathematics instruction. (NT 70-3 to 71-2, 123-3 to 124-8.)
11. The Parent objected to the Student's class assignment because she believed that Student was receiving a grade level of curriculum that was below the Student's level of achievement in reading, writing and mathematics. (NT 71-22 to 77-9.)
12. The student was placed in an appropriate level for the SOAR reading program, and was instructed adequately in writing. (NT 134-1 to 13.)

13. During the IEP meeting, the Student made an inappropriate reference to other students with learning differences and was chided for doing so. Student also uttered a statement that the District personnel interpreted as threatening. (NT 87-6 to 91-24, 127-9 to 129-6.)
14. One member of the IEP team raised his voice in response to the Student's utterances. This did not rise to the level of a "verbal attack." (NT 129-23 to 131-25, 136-7 to 138-4.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.¹ The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced a preponderance of evidence² to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of

¹ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

² A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

persuasion, in this case rests upon Student's Parents, who initiated the due process proceeding. If the evidence is in " equipoise", the Parent will not prevail.

APPROPRIATENESS OF EDUCATIONAL PROGRAM

The 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), 20 U.S.C. §1401(9). 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), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his/her program is not likely to produce progress, or if the program affords the child only a "trivial" or "de minimis" educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court's interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity" – it is not required to provide the "optimal level of services." Mary Courtney T. v.

School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

I find that the District offered and implemented an appropriate educational program for the Student's identified academic needs. It placed the Student in regular education classes upon Student's return to the District, in the absence of the IEP from the previous school district. (FF 1.) When it received that IEP, it took steps to implement it, including provision of testing in reading and mathematics when it became aware that the Student was struggling in the regular education English and mathematics courses. (FF 1, 2, 3, 4, 6, 9.) It responded quickly to Student's needs in these areas and assigned an appropriate SOAR reading comprehension level based upon testing data. (FF 2, 4, 5, 9, 10, 12.) It also responded to the Student's desire to withdraw from the Vocational/Technical school and expanded the academic schedule to include Student in other regular education classes, with push-in support from special education teachers. (FF 8, 9.) It discussed and decided all of this at an IEP meeting with the Student's mother's participation. (FF 6, 7, 8.)

I find that the District personnel did not behave inappropriately by inviting the Student to the IEP meeting or by chiding Student for inappropriate behavior. Since withdrawal from the transition placement at the Vocational/Technical school was to be discussed, the District appropriately brought the Student into the meeting to discuss that. (FF 6, 8.) It is not at all clear from this record that the Student's mother ever objected to Student's presence; her account of the events was somewhat contradictory as I heard it. (FF 8.) Regardless, there was a legitimate reason to invite the Student to attend and decisions were made based upon Student's participation. (FF 9.)

It appears that one District representative did in fact speak in a loud tone of voice at the meeting. (FF 14.) However, this was in an effort to speak sternly to an older student who was making remarks interpreted as being threatening, and who had spoken with a seriously inappropriate choice of words. (FF 13.)

In making these findings I rely upon the testimony of the District's special education supervisor. I found this witness to be credible and reliable. I was particularly impressed with her dispassionate demeanor in a hostile hearing room, and her willingness to concede that the Student's mother

reasonably could have interpreted the supervisor's colleague's raised voice at the IEP meeting as "yelling." (NT 131-1 to 25.) However, she also balanced that statement with a flat denial that such raised voice amounted to a "verbal attack." (NT 130-7 to 8.) I rely upon her balanced perception of those events, with regard to which I find in accordance with her testimony. I also rely upon her professional judgment that the Student was placed appropriately and provided an appropriate program that was responsive to Student's needs.

In addition, I reach this finding based upon observing the Student's mother's demeanor and the way she answered questions and made statements at the hearing. I find that the mother embellished her testimony about the IEP meeting and her request to see the Student's classroom. (NT 92-1 to 22, 129-9 to 22, 129-23 to 131-22.) She also came over one hour late to the hearing and left the hearing in anger before it was completed. (NT 6-1 to 9-24, 130-16 to 22, 144-14 to 146-8.) This behavior demonstrated to me that the Student's mother is either not able or not willing to participate fairly in the problem solving process established by the IDEA, which involves working toward consensus with an IEP team on the details of an educational plan. (S-1 through 7, 18.) I also conclude that her perceptions of events are unreliable because she lacks the personal organization and patience needed to come to a fair and balanced interpretation of events.

CONCLUSION

For the reasons set forth above, I find that the District did not deprive the Student of a free and appropriate public education and that no award of compensatory education would be appropriate in regard to the issues stated above.

ORDER

1. The District did not deprive the student of a free appropriate public education, during the 2009-2010 school year, by teaching Student in the SOAR to Success reading comprehension program at a level that was below Student's level of academic achievement, or by failing to teach Student writing, or by instructing Student to answer only one question per day in mathematics.

2. The District did not deprive the student of a free appropriate public education, during the 2009-2010 school year, by inviting Student to an IEP meeting contrary to the Parents' wishes and by yelling at Student during the meeting.
3. The hearing officer will not order the District to pay compensatory education for any part of the 2009-2010 school year.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

May 30, 2010