

This is a redacted version of the original hearing officer decision. Select details may 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

DUE PROCESS HEARING

Name of Child: R.S.
ODR #6008/05-06 AS

Date of Birth: xx/xx/xx
Date of Hearing: December 20, 2005

CLOSED HEARING

Parties to the Hearing:
Parent

Representative:
Pro Se

School District of Philadelphia
440 N. Broad Street, 3rd Floor
Philadelphia, Pennsylvania 19130

Kenneth Cooper, Esquire
Office of General Counsel
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Date Transcript Received and Record Closed: December 28, 2005¹

Date of Decision: January 11, 2006

Hearing Officer: Linda M. Valentini, Psy.D.

¹ The hearing officer excluded Christmas Eve and Christmas Day from the 5-day period in which the transcript was due.

Background

Student is a [teenaged] eligible student enrolled in the School District of Philadelphia (hereinafter District) and since September 2003 attending [Redacted] High School (hereinafter High School), a school that is not her regional neighborhood high school but which provides a “magnet” program for students interested in certain subjects, in Student’s case, the law. Student has been classified as having an emotional disturbance and at High School she receives itinerant emotional support. Almost from the beginning of her time at High School she has had a great many behavioral problems² and, following a reevaluation in June 2005, in September 2005 the District recommended a higher level of special education services, namely a part-time emotional support class in High School, her regional neighborhood high school, which also offers a ‘law academy’. Student’s mother, Parent, declined to approve the Notice of Recommended Educational Placement (NOREP), preferring that her daughter remain at High School and contending that Student did not receive appropriate emotional support services at High School. The District requested this hearing so that the dispute over what level of programming Student requires and the location of that programming can be resolved.

The hearing officer excluded Christmas Eve and Christmas Day from the 5-day period in which the transcript was due. Nevertheless, the decision is rendered on Day 39 of the 45-day period beginning on the 31st day after the hearing request was received at the Office for Dispute Resolution.

Issue

May the School District of Philadelphia change Student’s special education placement from itinerant emotional support to part-time emotional support, with the understanding that if the level of intervention were changed the location of the intervention would also change, from High School (a non-neighborhood-region school) to High School which is located in Student’s neighborhood-region?

Findings of Fact

1. Student is a [teenaged] eligible student residing in the School District of Philadelphia.
2. Student attends High School which is not her neighborhood regional high school.

² At the Parent’s request Student was exited from special education during junior high school. Although through a rostering error she spent one month in learning support classes in her freshman year at High School, the Parent’s intervention corrected this mistake and she re-entered regular education. Behavior problems led to the institution of a 504 service plan that remained in effect until a reevaluation reinstated her classification as an eligible student and she began receiving itinerant emotional support services.

3. Student enrolled at High School because it has a magnet program, the Law Academy, in which she has interest. High School offers three elective classes related to the law. Student is currently enrolled in one of these electives. (NT 50)
4. Student had behavioral and adjustment problems from as early as first grade when she was in a [private] school that she attended from preschool through third grade. She was asked to leave that school because of her behavior problems. (S-7)
5. Student entered public school in fourth grade and was placed in an emotional support program. (S-7)
6. In 1999 a private psychologist found that Student externalized blame and responsibility on to others, most often her teachers, when she became frustrated. She expressed her frustration verbally and sometimes physically. (S-7)
7. When Student arrived at High School she was put into learning support classes until the beginning of October by mistake although there was a "drop NOREP" from the sending school that was eventually located. (NT 25-28, 194)
8. Despite the drop NOREP's being unsigned, the Parent represented to High School that she had fought to have her daughter removed from special education classes and did not want her in special education classes. Student had not had special education services since 2000. (NT 28; S-7)
9. Student had behavior problems from her entrance into High School. These included verbal aggression (profanity), intimidation of students and some teachers, failure to respond to directions from staff and leaving the classroom. (NT 155-156, 161-162, 168-169)
10. Because of Student's behavior problems, in January 2004 the District and the Parent worked out a 504 Service Plan, as at the Parent's request she was no longer in special education and the Parent did not want her in special education. (NT 24-25)
11. The 504 Service Plan included an abbreviated class schedule, independent home study for credit and credit for summer school. (NT 24)
12. Despite this plan Student did not do well either academically or behaviorally at High School for the remainder of the 2003-2004 school year. (NT 29)
13. In May 2004 the District issued a Permission to Evaluate form by mail and hand-delivery through Student. As it had not been signed by September 2004 the District communicated with the Parent who then signed the form. (NT 30)

14. Student was evaluated by a school psychologist in October 2004 and on December 16, 2004 the IEP team recommended itinerant emotional support and developed an IEP. The NOREP was approved by the Parent. (NT 30-31, 19; S-1)
15. Student's itinerant emotional support took the form of communication with the teachers regarding accommodations for her in their regular education classes (e.g. not confronting her, allowing her to go to the counselor as needed), weekly meetings with the school counselor and a behavior report support plan to be annotated by the teachers and then shared with the Parent. (NT 32, 59)
16. Behaviors addressed in the behavioral support plan included profanity, calling out and yelling in class, being out of her seat and not attending to instruction. (NT 32)
17. During the weekly meetings the counselor was to review the behavior report support plan. However, Student was refusing to carry the report sheet to her teachers, and/or forgetting to do so. Student told the Assistant Principal she "(didn't) want [any]thing to do" with the behavior reports. (NT 33, 67, 172)
18. Student did not go to the counselor as scheduled because she did not like the counselor and also did not like the substitute counselor. (NT 34-35, 66)
19. Because she would not go to the counselor the Assistant Principal offered to see Student on a weekly basis. Student did not go to see the Assistant Principal on a regular basis, only coming to him about ten to fifteen percent of the time on her own. On all other occasions she was brought by security or seen at the request of a teacher. (NT 37, 66, 163)
20. Student has come to the Assistant Principal voluntarily about half a dozen times this school year. She comes when she is agitated, feeling her needs are not being met in the classroom, and feeling the need to be out of the classroom and in a place where she wouldn't feel challenged. (NT 163-164)
21. The Assistant Principal has spoken with the Parent about a dozen and a half times on the phone or in person. (NT 167)
22. The Parent was aware that Student was not cooperating with the itinerant emotional support program components. (NT 37, 169)
23. Ongoing behaviors include walking out of class, yelling at the teacher, intimidating students in the classroom, getting into trouble in the hallways, refusing to follow instructions from the school staff. (NT 38-39)
24. In school year 2004-2005 Student was a "mediocre" student (C to D) in 10th grade English. (NT 79)

25. In English class in 10th grade Student was explosive, hostile, angry and defiant and her behavior impacted negatively on her academics. She used profanity [redacted]. Many of the students were frightened by Student as she intimidated them [redacted]. (NT 79, 84-85)
26. On one occasion the English teacher called security to come to the class because Student was behaving in a threatening manner and appeared more agitated than usual. (NT 86, 90-91)
27. The English teacher attempted to assist Student in the first part of the year by speaking to her mother, moving her seat at least three times, giving her “an inordinate amount” of praise, trying to be as non-confrontational as possible and requesting that the psychologist come in to observe her. (NT 80)
28. The IEP team met on January 21, 2005 because the itinerant emotional support services were not working. (NT 36-37)
29. After the IEP meeting, during which the English teacher learned more about Student, he tried to back away more, give her more space, encourage her more, and avoiding saying things that could provoke her³. These changes in the teacher did not effect any change in Student. (NT 82-85)
30. Student was involved in a serious behavioral incident. The manifestation determination team concluded that Student’s behavior was a manifestation of her disability. A part-time emotional support program was offered at that time and the Parent rejected it. (NT 48-49; S-5)
31. In June 2005 Student was reevaluated and a September 28, 2005 IEP team meeting resulted in the renewed recommendation for a part-time emotional support class as itinerant emotional support had proven not to be effective for Student. (NT 40, 189; S-2, S-3)
32. The part-time emotional support program would afford Student the opportunity to be in an emotional support classroom for part of her day. (NT 41)
33. The Parent did not approve the NOREP. (NT 42; S-3)
34. Over time Student’s behaviors have escalated in frequency and severity. In addition to her previously noted behaviors Student has angry outbursts in class and out of class, and she has assaulted people in the building physically and verbally. Student is not making behavioral/social progress. (NT 42)
35. This year in [a foreign language class] Student functions as a “poor to average” student, although she has the intellectual capacity to understand and learn the subject. (NT 107-108)

³ Even handing Student a paper with a grade she did not like could provoke her. (NT 82-83)

36. Although she seemed interested in [the foreign language] at the beginning of the year her interest has dropped dramatically. Her homework has been turned in zero of eight times and she does not pay attention in class. (NT 107-108)
37. In [the foreign language class] almost every day Student comes late to class, walks around the classroom greeting the students and is very loud so that it interferes with the other students' ability to get down to pre-class work. (NT 108-109)
38. The [foreign language] teacher assigned Student a seat away from students with whom she tends to get into trouble, but she refused to sit in that seat. (NT 109)
39. If Student feel she can't do an assignment she loudly states she can't do it [or otherwise resists]. (NT 112)
40. The [foreign language] teacher has approached Student one to one quietly to offer help. Sometimes Student accepts and other times she does not. (NT 11, 123-124)
41. When the [foreign language] teacher fills out the behavioral report at the end of class Student becomes aggressive and argumentative if she does not like what the teacher is writing and sometimes the teacher gives her a better report just to get her out of the room as another class is coming in. (NT 114, 121-122)
42. Student's behavior interferes many times with the [foreign language] teacher's ability to teach the other students. (NT 110)
43. In the beginning of November 2005 Student was transferred into physical science as she received a 50 on her class grade and a 3 (lowest possible number) in her behavior grade in chemistry class. It was believed that academic demands would be lower for Student in the physical science class as she was having many behavioral problems in the chemistry class. (NT 128-129, 152)
44. Although Student was fine behaviorally the first few weeks in physical science, one day she brought [food] into class and proceeded to eat it. When told there was no eating in class she said 'okay' and put it away. The next day she brought in [other foods] and began to eat them in front of the teacher looking right at him. She left the class when she was given a detention. (NT 133-134)
45. In physical science class Student came in and talked while the teacher was teaching. When she was asked to move to another seat she refused to move. (NT 135-136, 149)
46. In physical science if she is allowed to read the Daily News (a local newspaper) she is quiet and the teacher can teach. (NT 137)

47. Student is receiving failing grades for the current academic period. She is not making academic progress. (NT 44-45; S-4)
48. Student has average intelligence (FSIQ 108) and in the past has proven capable of doing her academic work. She is cognitively capable of grasping and learning all the concepts required for her coursework. (NT 46-47; S-6)
49. Student's behavior is interfering with her cooperating and attending in class and completing her class work. (NT 47)
50. Student is enrolled in one Law Academy elective at this time but is in danger of failing it. She does not complete homework, misses tests and engages in disruptive behavior. (NT 50; S-4)
51. The Assistant Principal believes that High School has exhausted every avenue to help Student at the itinerant level of service. (NT 170-171, 179-181)
52. The psychologist who performed Student's latest evaluation found that although she has average intelligence, she has difficulty understanding her feelings and expressing them appropriately and uses emotional outbursts as her coping mechanism. (NT 190-191)
53. The psychologist found that Student requires a highly structured environment that focuses primarily on her emotional and behavioral functioning. She believes that a part-time emotional support program, as it is the next step on the continuum of least restrictive environments, may address Student's needs. She is certain that the itinerant emotional support Student now receives will not address her needs. (NT 192-193)

Discussion and Conclusions of Law

Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education.

The student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The program must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)].

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” Polk, Rowley. The purpose of the IEP is not to provide the “best” education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989).

In determining the educational placement of a child with a disability...each public agency shall ensure that unless the IEP of a child with a disability requires some other arrangement, a child is educated in the school that he or she would attend if nondisabled. 34 CFR §300.552(c) Each public agency shall ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled; and that special classes, separate schooling, or 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. 34 CFR §300.550(b)(1) and (2)

As the District requested this hearing in order to move Student to a more restrictive educational setting (from itinerant emotional support to part-time emotional support), the District has the burden of proving that it is offering an appropriate program in the least restrictive environment.

Student had behavior problems from her entrance into High School, including verbal aggression (profanity), failure to respond to directions from staff and leaving the classroom. The District and the Parent worked out a 504 Service Plan, as at the Parent’s request she was no longer in special education and the Parent did not want her in special education. Despite this plan Student did not do well either academically or behaviorally at High School for the remainder of the 2003-2004 school year. In spring 2004 the District issued a Permission to Evaluate form but the Parent did not give her consent until September 2004. Student was evaluated by a school psychologist in October 2004 and on December 16, 2004 the IEP team recommended itinerant emotional support and developed an IEP. The NOREP was approved by the Parent. The District offered Student’s teachers recommendations regarding how they should approach her in class and offered Student a behavior monitoring plan to be coordinated between school and home, preferential seating and weekly meetings with the guidance counselor and later with the assistant principal.

Student did not, or could not, take advantage of the emotional support offered to her in the itinerant program. She refused to go more than a few times to either counselor, she

accessed the assistant principal only on a few occasions, she rarely used the behavior monitoring sheet and when she did she argued with the teachers when they filled it out honestly. Not utilizing the supports offered to her, Student's behaviors intensified to the point where she appeared to be doing what she wanted to do when she wanted to do it and her moods and behaviors affected the other students in her classes and interfered with the teachers' ability to instruct their classes.

The District provided credible, clear and compelling testimony from faculty members at High School that this student requires a higher level of service. As the hearing officer noted on the record, Student was being extremely difficult with, and interfering with the teaching of, both a seasoned, experienced male teacher (English) and a young, understanding female teacher ([foreign language]). She was deliberately defiant towards a teacher with whom initially she seemed to be cooperative (Science). She refused to utilize the guidance counselor or the assistant principal for emotional/behavioral support. She rejected and/or argued about a behavior support/report mechanism and even on the occasions when she used it did not take the next step of processing it with a counselor or the assistant principal and/or show it to her mother on a consistent basis.

The Parent's preference is that Student remain at High School, which is not her neighborhood school. However, the District's part time emotional support program, albeit a more restrictive level of service, is not offered at High School but is offered at Student's neighborhood school, High School. At High School she will be able to associate with neighborhood peers for parts of the school day and, fortuitously, she will also be able to enroll in a Law Academy.

This hearing officer is convinced that High School did make every attempt to accommodate Student and that there is nothing more for her there. She requires a higher level of emotional support and that level is available at her neighborhood school. The District will be ordered to place her at High School and once she is there to convene an IEP meeting with High School staff to review and/or revise the IEP as appropriate for that setting.

By way of dicta, although the District is willing to try a part-time emotional support program, this hearing officer views the District's proposed placement as conservative in light of Student's history and surmises that Student may in fact eventually require an even higher level of service. However, a part-time emotional support program is an appropriate next step and may afford her success if she utilizes the supports offered to her.

ORDER

It is hereby ORDERED that:

1. The School District shall change Student's special education placement from itinerant emotional support to part-time emotional support. The District may remove Student from High School to High School, Student's neighborhood high school, for purposes of delivering the part time emotional support program.
2. Within 5 school days of Student's transfer to High School the District shall convene an IEP meeting for the purpose of reviewing and/or revising her educational program with High School staff.

January 11, 2006
Date

Linda M. Valentini, Psy.D.
Linda M. Valentini, Psy.D.
Hearing Officer