

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: S.W.

Date of Birth: [redacted]

Dates of Hearing: 3/28/2017

Closed HEARING

ODR File No. 18864-16-17

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parents Attorney
Pro Se

Local Education Agency
Abington School District
970 Highland Avenue
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Date Record Closed:
Date of Decision:

April 3, 2017
April 11, 2017

Hearing Officer:

Charles W. Jelley Esq. LL. M.

INTRODUCTION AND PROCEDURAL HISTORY

The child (Student)¹ is an eligible student of the school district named in this matter (District). The Student is school age and is identified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a Student with the disability of an Other Health Impairment (OHI).

When the Parent failed to respond to the District's proposal to modify the Student's Individualized Education Program (IEP), the District filed a complaint, invoking the IDEA's "due process hearing" procedure, with the Office for Dispute Resolution (ODR) 20 USC § 1415(f). In the complaint, the District argued that the Student's IEP should be changed to ensure the Student's receipt of a "free appropriate public education" (FAPE) which is the central guarantee of the IDEA 20 USC §1412(a)(1). See, Due Process Compl. Notice, S#50; *See also*, 20 U.S.C. § 1414(d) (setting forth requirements for the IEP). To provide FAPE, the District is proposing to modify the Student's IEP goals, specially-designed instruction, level of support and the time the Student spends in the regular education classroom.

Before the hearing, the Parties participated in one telephone prehearing conference call. After the teleconference, the hearing officer provided the parties the Office for Dispute Resolution (ODR) Standard Practices (HO#1). Several days before the hearing, the hearing officer contacted the parties to remind them of the hearing date and requested a copy of the 5-day disclosure materials. The District responded. Although the Parent did not provide any disclosure materials, the Parent indicated the Parent would attend the hearing. However, the Parent did not participate in the due process hearing. The hearing officer, on the record, called the Parent at the

¹ Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality. References to the District's exhibits will be marked as S# while references to the transcript will be marked as NT p.. The Parent did not submit any exhibits.

two contact phone numbers in the ODR database. When the Parent did not return the call, the hearing officer waited for 45 minutes and then went back on the record and completed the hearing in one session (NT pp.7-10). After the hearing, the Parent emailed the hearing officer, stating that she was with her daughter at an unidentified emergency room. The hearing officer responded, asking if the Parent wanted to proceed, but the Parent never responded.² The dispute is now ripe for a decision.

I have determined the credibility of all witnesses and I have considered and carefully and thoughtfully weighed all of the evidence of record.³ I have concluded that the District's proposed IEP and placement are reasonably calculated to provide the Student with substantial benefits. An Order directing the District to implement the February 2017 IEP and the change in placement is attached hereto along with copies of the appeal procedures.

ISSUES

1. Did the District provide an appropriately comprehensive reevaluation of Student, before proposing modification to the pendant IEP?
2. After reviewing the Reevaluation Report did the District offer the Student an appropriate IEP?
3. Should the hearing officer order the District to implement the February 2017 IEP?

² The email communications are found in the record as Hearing Officer Exhibits ## 1-6)

³ The District presented 26 Exhibits and testimony from four witnesses; several other witnesses were excused from attendance and then returned back to the classroom.

FINDINGS OF FACT

JUNE 2016 IEP⁴

1. On June 10, 2016, the District provided a draft IEP to Parent at a meeting on the same date. The IEP acknowledged that Student's inappropriate behaviors were affecting education. (P 15)
2. The June 2016 IEP placed Student, in Itinerant Learning Support, with all classes taken in the general education classroom except for instruction in the special education classroom twice per week, for 45 minutes per session for communication arts, including reading comprehension and fluency, as well as written expression and one session per week, for 30 minutes per session, for social skills instruction. (P 15)
3. The June 2016 IEP provided measurable goals addressing reading comprehension, initiating and completing assignments and oral reading fluency. (P 15)
4. The June 2016 IEP provided specially designed instruction, modifications and accommodations addressing Student's needs regarding behaviors; attention to task; organization; task initiation and completion; testing accommodations; hyperactivity; reading; written expression; and social skills, including 30 minutes per week of social skills instruction in a special education classroom setting. (P 15)
5. The June 2016 IEP included a Positive Behavior Support Plan (PBSP) addressing the four behaviors of concern identified in the Functional Behavior Assessment (FBA). The PBSP added new measurable goals addressing time on task; compliance with teacher directions; using kind, respectful language toward others; and not invading peers' personal space. The plan also provided for incentives through a classroom behavior system. (NT 355-356; P 15)

SECOND GRADE PROGRESS

6. In second grade, Student made significant progress academically and functioned at grade level in core academic areas, despite below average performance in reading and sentence composition. (NT 356-358, 512; S 40, 45, 47, 55, 58)
7. In second grade, Student made significant progress in behavior, despite continued difficulties that decreased over time. (NT 357-358, 372-373, 507-511; S 44, 58)

AUGUST 2017 THIRD GRADE

⁴ On February 14, 2017, Hearing Officer William Culleton, Esq. entered an Order and a Decision at SW ODR FILE #18276-1617 KE about the Student's 1st and 2nd grade IEPs. Hearing Officer Culleton found the District provided the Student FAPE in each school year. For the benefit of the Parties, I will adopt and restate Hearing Officer Culleton's Findings of Fact about the Student's transition from 2nd to 3rd grade. To assist the reader the adopted findings will **be italicized**. The adopted Findings of Fact describe the Student's pendant August 2017 IEP, implemented in the fall of 3rd grade, the Student's present levels and the District's efforts to provide a FAPE. I take notice of the Decision and Order and incorporate the relevant findings herein as though fully set forth at length.

8. From the beginning of 3rd grade, in August 2016 to February 2017, the Student has been suspended 10.5 days for violations of the Student Code of Conduct. From August 2016 to February 2017, the Student has been absent 33 days, and tardy/late 34 days (S#1, S#6, S #9, S #24 p.25-26)
9. To correct the attendance concerns the District prepared a School Attendance Improvement Plan. (S#7) The District also filed truancy charges with the local magistrate. (NT pp.159-161.; NT pp.43-46)
10. On November 10, 2016, the District sent the Parent an Invitation to Participate in an Individualized Education Program (IEP) meeting. (D#12; NT p.46)
11. On November 10, 2016, the IEP team met; the Parent joined the team meeting by phone. Before the meeting, the District provided the Parent with a "Draft IEP." The IEP team reviewed and discussed the Student's Attendance Improvement Plan. Specially-designed instruction, in the form of social skills training and self-monitoring, were added to support the Student's attendance. The IEP team also increased the supports of a para-educator throughout the day. (S#13 p.4; NT pp.40-46)
12. On November 23, 2016, the District issued a Permission to Reevaluate Consent Form. (S#14) The Parent agreed to allow the District to conduct a psychiatric evaluation, including social, emotional and behavioral assessments. The District also completed a second FBA (S#14 p.1, S#19; NT p.36, NT p.80)
13. On January 20, 2017, the District gave the Parent a Draft of the new Reevaluation Report. (RR) (S#24 NT pp.52-54)
14. The RR notes a decrease in the Student's impulse control and significant inability to attend to tasks. The teachers indicate growing weaknesses involving concentration, attention, distractibility, a tendency to give up/boredom and an overall avoidance of schoolwork. (S#24 p.22) The teachers also reported numerous peer-on-peer behavioral incidents. In one instance, the Student made sexually inappropriate comments that caused the other student to become extremely upset. (NT pp.170-172)
15. The FBA data noted 11 acts of peer-on-peer aggression, 30 plus acts of classroom disruption, and 9 acts of non-compliance during a 90-minute observation. (S#24-25; NT pp.81-91)
16. The Student's non-compliance, peer-on-peer aggression and school attendance issues are interfering with learning (S#24 p.26; NT pp.86-89)
17. On January 26, 2017, the District gave the Parent an Invitation to Participate in an Individualized Education Program meeting. (S#25)
18. On January 30, 2017, the IEP team met and reviewed the Student's progress reports, discipline reports, school attendance and classroom grades. (S#27 p4) The Student's academic performance and behavioral performance is regressing. The Student's overall growth is stagnant. The Student's social, emotional and behavioral performance regressed

from 2nd grade. (S# pp.9-17) To respond to the stagnant performance the IEP team proposed 14 different forms of specially-designed instruction, a Positive Behavior Support Plan, and for the first time offered a summer school Extended School Year program. (S#27) To support the Student's unique needs, the District proposed increasing the Student's participation from two (2) 30-minute sessions per week of Communication Arts and one (1) 30-minute session a week of social skills instruction to five (5) sessions per week totaling 300 minutes of Learning Support. (S#13 p.28, S#27 pp 5) Although invited to the IEP meeting the Parent did not attend. (S#13)

19. On January 30, 2017, the District sent the Parent the IEP and a Notice of Recommended Educational Placement/Prior Written Notice (NOREP/PWN) describing the proposed action. (S#28) The Parent did not respond to the NOREP/PWN. (S#28)
20. On February 7, 2017, the IEP team met again, this time with the Parent in attendance, to review the Student's present levels of academic achievement and functional performance. (S#31) The IEP's present levels tracked the Student's school attendance, performance on local and state assessments; academic achievement in communication arts, reading, writing, and math; and the Student's behavioral and social performance. (S#31 pp. 3-20) The present levels included detailed data and analysis, from the FBA, of the Student's interfering behaviors, antecedents and consequences. The results of the psychiatric evaluation were discussed, as were the Student's behavior rating scales (S #31 pp.17-20)
21. The present levels section of the IEP includes a clear description of the Student's strengths and needs. (S#31 p.24)
22. The IEP goals are measurable and include working baseline data. (S#31 pp.28-30)
23. The IEP's specially-designed instruction, related services and supplemental aids target the Student's academic needs and behaviors interfering with learning, social needs, and unique emotional/behavioral needs. (S#31 pp.32-33)
24. To appropriately support the Student's behavioral, social and emotional needs the IEP includes the related service of a "Large Group Therapeutic" class 15 times a school year for 30 minutes each session. (S#31 p.33 NT PP.73-74)
25. The IEP team documented a discussion and a review of how the team considered additional supplemental aids and services to promote the Student's participation in the regular education classroom. (S#31 p.34) After consideration of all of the existing data and considering the Parent's input, the IEP team recommended that the Student should participate in all aspects of the regular education curriculum, except for "Communication Arts" for 300 minutes per week and "Mathematics" instruction for 300 minutes per week. The team also discussed the Student's participation in a social skills group one (1) time per week for 30 minutes and a daily check in with the special education teacher, to review the expectations for each school day. (S# p.34) The team also recommended that the combined 600 minutes a week of pullout instruction take place in the Emotional Support classroom, as opposed to the Learning Support class. (S#31 p.34; NT pp.65-68)

26. The February 2017 IEP includes a Positive Behavior Support Plan that includes measurable goals and strategies to improve the Student's overall social, behavioral and emotional needs. (S#31 p.36, S#32; NT pp.105-116)
27. At the conclusion of the IEP conference, the District provided the Parent with a new NOREP/PWN describing the proposed actions to offer a FAPE. (S#33; NT pp141-143) On February 13, 2017, and again on February 23, 2017, the District re-sent the NOREP/PWN to the Parent by certified mail. (S#34; NT pp 65-66) When the Parent did not respond to the certified mail, the Assistant Director of Special Education called and emailed the Parent about the District's proposed IEP. In one email, the Parent vacillated back and forth about the Parent's plans for the Student's education. (S#37; NT p. 188)
28. When the Parent did not respond to the certified mail and telephone phone call about the IEP and NOREP/PWN the District filed the instant Complaint. (S#50)

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.⁵ In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁶ that the moving party is entitled to the relief demanded in the Complaint Notice.

L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called “equipose.” On the other hand, whenever the evidence is preponderant (i.e., there is

⁵ 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).

⁶A “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. See, *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. *Comm. v. Walsh*, 2013 Pa. Commw. Unpub. LEXIS 164.

weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. *See Schaffer*, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the District, who initiated the due process proceeding. If the District fails to produce a preponderance of the evidence in support of District's claim, or if the evidence is in "equipoise", the District cannot prevail under the IDEA.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 Pa. Code §14.162 (requiring findings of fact); *A.S. v. Office for Dispute Resolution* 88 A.3d 256, 266 (Pa. Commw. 2014) (hearing officers make credibility determinations weigh the evidence and make findings of fact) After weighing all of the evidence, with attention to this duty, I find the District's witnesses credible and reliable about the Student's lack of progress, behavioral challenges, and the changing circumstances, during the 3rd grade school year.

APPLICABLE LEGAL STANDARDS

The IDEA's primary goal is to ensure that all children with disabilities have available to them an education that emphasizes participation in regular education with specially-designed instruction, supplemental aids and related services. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015); *See also*, 20 U.S.C. § 1400(d)(1)(A)) FAPE must be "tailored to the unique needs of the handicapped child by means of an 'individualized educational program.'" *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (quoting the then 20 U.S.C. § 1401(18)) An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals" and "a

statement of the special education and related services ... to be provided to the child." 20 U.S.C. § 1414(d)(1)(A)(i)

When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA so that the IEP process "will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians," *Andrew F. v. Douglas Cty. Sch. Dist.*, 580 U.S. _____, slip op. at 11 (Mar. 22, 2017) (citing *Rowley*, 458 U.S. at 206-07). Recently, the Supreme Court clarified *Rowley* and provided a more precise standard for evaluating whether a school district has complied substantively with the IDEA. "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, slip op. at 11. In other words, the school must implement an IEP that is reasonably calculated to allow the student to "make progress in the general education curriculum," commensurate with the student's non-disabled peers, taking into account the child's potential. *Id.* at 3 (citation omitted)

In clarifying what is "reasonably calculated" for a particular student, the Court acknowledged that this is a "fact-intensive exercise" and that it "will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." *Id.* For most students, "a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." *Id.* But, even where that is not feasible, an education still needs to be "appropriately ambitious in light of [the child's] circumstances." *Id.*

This "fact-intensive inquiry" involves "a prospective judgment by school officials" as to how "'specially designed'" services will ultimately "meet a child's 'unique needs.'" *Andrew F.* at

*10 (quoting 20 U.S.C. § 1401(29)). Although "the IDEA cannot and does not promise [that] 'any particular [educational] outcome'" will follow, a student's "progress [can] plainly demonstrate that the IEP was designed to deliver more than adequate educational benefits." *Endrew F.* at *9.

Therefore applying *Endrew* and *Rowley*, I will now resolve the dispute.

DISCUSSION

THE DISTRICT'S REEVALUATION WAS TIMELY AND APPROPRIATE

There is no evidence to suggest that the District failed to gather comprehensive information about the Student's educational needs at the time of Student's entry into the 3rd grade.

In November 2016, noting difficulties in the Student's academic, social, and behavioral skills, the District sought and received permission to conduct a reevaluation of the Student. A reevaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs" 34 C.F.R. §300.304(c)(6) The reevaluation included a review of existing data, multiple observations, a social skills assessment and a Functional Behavioral Assessment (FBA) The results of the reevaluation were compiled and incorporated into a Reevaluation Report (RR) The District asked for and received Parent input, and provided the RR to the Parent in a timely fashion for review ten (10) days before the January 2017 and the February 2017 IEP meetings. There is no evidence to suggest that the decision to conduct the reevaluation or prepare the RR was inappropriate. Quite the contrary, when the District noted a concern, it promptly collected data and proposed a new program.

The Pennsylvania regulations implementing the IDEA, at 22 Pa. Code §14.133, create an obligation to perform an FBA in circumstances like this. 22 Pa. Code §14.133 calls upon the

District to provide certain students a Positive Behavior Support Plan (PBSP) A PBSP is necessary for students with disabilities “who require specific intervention to address behavior that interferes with learning.” *Ibid.* In this situation, in light of the increase in the frequency, the duration and the intensity of the Student’s behaviors all of which impeded learning, I find the FBA was necessary to determine the Student’s present levels of academic and functional performance. The FBA assisted the team in understanding what interventions were, or were not, providing sufficient support to achieve learning. Accordingly, I find the reevaluation and the RR were appropriate in light of the Student’s circumstances.

THE DISTRICT’S FEBRUARY 2017 IEP IS APPROPRIATE

The record is preponderant that the District’s February 2017 IEP offers the Student an appropriate program of specially-designed instruction and level of intervention, in the least restrictive setting. In 1st and 2nd Grades, the District cooperated with Parent’s desire for a lesser restrictive placement. Back then, the District provided an itinerant placement to address Student’s academic and low-frequency behavioral needs. Then, unlike now, the Student made academic progress. However, in 3rd Grade, the same cannot be said of the frequency, duration and intensity of the Student’s behaviors.

The Student has been truant, tardy and suspended on numerous occasions. In the 3rd Grade learning support and regular education classrooms, the Student has engaged in conduct that interferes with Student’s own learning and the learning of others. On more than one occasion, the Student has made inappropriate statements [and engaged in other problematic behavior]. This steady upward trend of misbehavior has contributed to a series of out of school suspensions, which in turn contribute to missing school.

During 2nd grade, the Student's academic performance remained on track. Recognizing and responding to the decline in the Student's academic and behavioral performance the February 2017 IEP includes new opportunities to learn. For example, to prevent even further regression, the Student is expected to participate in an Extended School Year (ESY) program. The February 2017 IEP includes a revised data-driven PBSP, additional supports from a teacher's aide throughout the day and revamped specially-designed instruction. The February 2017 IEP also includes enhanced related services, and measurable academic and behavioral goals. The schedule to monitor progress is reasonable in light of the Student's unique circumstances. To provide FAPE, the District believes that the Student's Level of Support should change from 60 minutes a week of Learning Support to 600 minutes of Emotional Support. The increase is proportional in light of the Student's new present levels of performance. Before making this recommendation, the District tried increasing the Student's time in Learning Support, conducted an FBA, revised the PBSP and extended the new service of a paraprofessional.

In studying the Exhibits, I agree with the District that the Student's unique needs since November require a different level and type of support. Unfortunately, the previous interventions and specially-designed instruction did [not] stop the downward slide.

Accordingly, I find that the proposed IEP changes to the specially-designed instruction, the goals, and the related services, as well as the added summer program, in conjunction with the

shift from full-time regular education and the substitution of Emotional Support for Learning Support are reasonably calculated to provide the Student FAPE.

CONCLUSIONS

I conclude that the District appropriately evaluated the Student. The District's February 2017 IEP is an offer of FAPE.

ORDER

And now, this April 11, 2017, in accordance with the preceding findings of fact and conclusions of law, the District's request for relief is granted. The District is directed to implement the February 2017 IEP in its entirety.

Charles W. Jelley, Esq. LL.M.
Charles W. Jelley, Esq. LL. M.
Hearing Officer