

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.M.

Date of Birth: [redacted]

Date of Hearing: May 31, 2011

CLOSED HEARING

ODR No. 1608-1011KE

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Southmoreland School District
609 Parker Avenue
Scottdale, PA 15683

David G. Petonic, Esquire
314 C Porter Avenue
Scottdale, PA 15683

Date Record Closed:

June 7, 2011

Date of Decision:

June 18, 2011

Hearing Officer:

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

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is an elementary-school-aged student in the Southmoreland School District (hereafter District) who is eligible for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 *et seq.* Student's Parent filed a complaint against the District asserting that it denied Student an appropriate education during the 2010-11 school year. A hearing convened over one session, at which both parties presented evidence in support of their respective positions.

For the reasons which follow, I find no basis on which to award relief under the IDEA. Nevertheless, there is evidence in the record of this case which may provide guidance for the parties in developing future programming for Student, particularly for the 2011-12 school year.

ISSUES

Whether the District denied Student an appropriate educational program during the 2010-11 school year?²

FINDINGS OF FACT

1. Student resides with the Parent in the District and attends a District elementary school. (Notes of Testimony (N.T.) 36)
2. During Student's preschool years, Student had language delays and was provided with speech/language services through early intervention. (N.T. 54-55; School District Exhibit (S) 2 at 2)
3. Student attended kindergarten in the District, and repeated kindergarten the following year. (N.T. 37)
4. Student was identified for special education by the District during first grade, the 2009-10 school year, based on speech/language needs, and began receiving itinerant

¹ In the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

² The complaint and amended complaint set forth claims that related solely to the 2010-11 school year. Following a prehearing conference call in which the Parent mentioned claims prior to the 2010-11 school year, the Parent was advised that she could raise any other claims in a separate due process complaint.

speech/language support for two thirty-minute individual and/or small group sessions per six-day cycle. Student's Individualized Education Program (IEP) included goals addressing speech/language needs including listening comprehension. (N.T. 38-40; Parent Exhibit (P) 2)

5. Student experienced difficulties with peers prior to the 2010-11 school year. For example, another student bit Student on the wrist on the school bus during Student's first grade year. (N.T. 88, 102-03, 112-13, 174-75, 206, 225)
6. In the spring of 2010, the IEP team considered a new evaluation of Student to update information on Student's academic and speech/language skills. (P 8)
7. Student began second grade at the start of the 2010-11 school year. In the middle and end of the first marking period, Student achieved a D grade in Language Arts and a high C grade in Math. Comments noted Student's inability to read orally, a need to improve independent reading, and poor foundation with number facts. (N.T. 197-98; P 9; S 18)
8. In October of the 2010-11 school year, second grade, the Parent requested an evaluation of Student because Student's test scores in math, reading, and spelling were poor. The District agreed with the request. (N.T. 50-51, 78; S 1a, 1b, 1c, 1d; P 7)
9. The District issued an Evaluation Report (ER) in late October 2010 which included input from the Parent and teachers, an observation by the school psychologist, and cognitive and achievement testing. (P 19; S 2)
10. The ER noted that Student was perceived at home and in school as shy and withdrawn. Parent input reported that Student was sensitive and Student's feelings were easily hurt. The ER also recommended that the District monitor Student's adaptive behavior skills. (S 2)
11. Student achieved a full scale IQ score of 72, in the borderline range, on the Wechsler Intelligence Scale for Children – Fourth Edition. Student demonstrated a relative strength on the Processing Speed Index. (S 2)
12. On the Wechsler Individual Achievement Test – Second Edition, Student achieved scores below expectations on the Reading Comprehension, Numerical Operations, and Math Reasoning subtests. Composite scores in Reading and Mathematics also revealed significant weakness. (S 2)
13. The ER concluded that Student was eligible for special education on the basis of a specific learning disability in math³ and reading comprehension, as well as a speech/language impairment. (S 2)

³ The ER's conclusions with respect to Student's identified specific learning disabilities are somewhat discrepant from the categories set forth in the federal and state regulations, 34 C.F.R. § 300.309 and 22 Pa. Code § 14.125(1). However, there is no dispute over Student's identified eligibility categories.

14. A meeting of Student's IEP team convened in November 2010 to develop a new IEP. Goals addressed reading fluency, math skills, and speech/language needs. Student was to be provided with thirty minutes of speech/language support twice per six-day cycle. (S 3, S 4)
15. Student's proposed placement was in a regular education class with cooperative teaching and consultation with the learning support teacher, and a continuation of speech/language support. The Parent approved the Notice of Recommended Educational Placement (NOREP) and Student moved to a different second grade classroom. (N.T. 197-98, 228, 234, 327; S 5)
16. In the late fall of the 2010-11 school year, Student also began to receive tutoring in math and reading twice each week after school. (N.T. 80-81, 103-04, 217-18; P 21)
17. Progress reporting in November on the speech/language goals stated that Student had made "very good progress" on regular tense verb forms (S 9 at 1), and detailed how Student was performing on other targeted speech/language skills. (N.T. 259; S 9)
18. On or about November 24, 2010, the day before Thanksgiving, Student reported to the Parent that a student in the middle school had hit Student in the hallway at school, and Student had a red mark near Student's eye that evening. Student did not know if the action was intentional or accidental. The Parent reported this incident to the District but did not receive a response prior to the holiday. (N.T. 68, 90-96, 218-19, 230-31; S 28, S 29)
19. On December 1, 2010, the Parent faxed a letter to the District about the November 24, 2010 incident. The District responded by setting up a meeting for December 2, 2010, and made an investigation into the incident, concluding that the middle school student was absent from school on the date in question. (N.T. 105-08, 219-22, 269-74; S 17, S 22, S 23)
20. Sometime in the winter of 2010-11 school year, the Parent began to explore alternative placements for Student including a cyber charter school. (N.T. 67, 82-85; P 22)
21. A comparison of the progress reporting in January 2011 with the November 2010 progress report reveals that Student had made gains in formulating sentences using past tense of irregular verbs (80% accuracy in January compared to less than 20% accuracy in November 2010). This progress report again detailed Student's performance on various other speech/language skills. (N.T. 260; S 9, S 10)
22. At the end of the second marking period, Student had achieved an A grade in both Language Arts and Math. (N.T. 236-37; S 18)
23. On or about February 8, 2011, an incident involving Student occurred on the school bus. In that incident, another student hit Student and several other students with seat belt buckles. Student was hit in the abdomen with the seat belt. The school nurse examined

Student including the abdominal area and did not see any mark, but that evening the Parent noticed a mark in that area. (N.T. 29-30, 110-13, 184-87, 212-13)

24. The next day, February 9, 2011, Student's Parent went to the school and called police to investigate the seat belt incident. There was a meeting to discuss the occurrence. On that same date, the Parent also sent a fax to the District asking it to schedule a meeting or conference to discuss various incidents of bullying involving Student. The District questioned the student who was accused of hitting Student with the seat belt. That student admitted the conduct, and that student was disciplined. (N.T. 29-31, 113-16, 274-80, 295, 299-302, 304; S 19, S 20, S 24)
25. After the February 8, 2011 incident, the school bus driver was instructed to ensure that every student on the school bus used the seat belt, and to be certain that Student and the other student were separated on the bus. (N.T. 281-82)
26. The District responded to the Parent's February 9, 2011 request for a meeting/conference by referencing the February 9, 2011 meeting and stating that steps had been taken to remedy the situation. Specifically, the other student was disciplined, and Student and the other student were to be separated on the school bus. (N.T. 119-21, 122-23, 286-87; Due Process Complaint at 6-7; S 25)
27. In late March 2011, Student reported to the Parent that another student told Student, during the school day, to "ax" another child. Student then wrote with a magic marker on a piece of furniture in the home, writing that Student did not like the child mentioned. (N.T. 57-59, 128-32, 133, 199-200, 243-45, 288; S 16)
28. The next day, Student's teacher and the school principal questioned Student and the other student who reportedly was involved in that March 2011 conversation. Student and the other student denied that any such statement was made. (N.T. 243-45, 288; S 16)
29. Progress reporting in April 2011 reflected performance consistent with that in January 2010 with respect to using the past tense of irregular verbs and noun-verb agreement, and answering "wh" questions with accuracy; and inconsistent accuracy in using language processes (associations and categories). (N.T. 262-63; S 10, S 11)
30. By the end of the third marking period, Student had an A in Language Arts and a B in Math. (N.T. 238; S 18)
31. Sometime in May 2011, Student was outside at recess when a peer wanted an item Student had and took it away from Student. Student ran after the peer and the two of them slipped and fell in the mud. Student had to go to the nurse for a change of clothing. Student did not report that a conflict with a peer was the cause of the fall in the mud, and no teacher witnessed the occurrence. (N.T. 176, 190-92, 248-50)
32. Near the end of the fourth marking period, Student had a B grade in Language Arts and a low B in Math. (N.T. 238-39)

33. Student may have missed a few speech/language therapy sessions in May 2011 due to the speech/language therapist's schedule. (N.T. 181, 267)
34. The District does have a bullying policy which, among other things, defines bullying and prohibits any form of it by District students. (N.T. 283-84; S 27)
35. The following exhibits were admitted at the hearing: P 2, P 7, P 8, P 9, P 19, P 21, P 22; S 1a-e, S 2, S 3, S 4, S 5, S 9, S 10, S 11, S 16, S 17, S 18, S 19, S 20, S 22, S 23, S 24, S 25, S 27, S 28, S 29, S 34, S 35; Hearing Officer Exhibit (HO) 1 (N.T. 307-15, 341-42, 343)

DISCUSSION AND CONCLUSIONS OF LAW

Broadly stated, 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);⁴ *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. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles 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 are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to

⁴ The burden of production, "i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

be generally credible and the testimony as a whole was essentially consistent. In some instances, witnesses' recollections differed, which did not necessarily render the testimony incredible. The credibility of particular witnesses is discussed further in this decision as necessary.

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify 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 Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

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). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). 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 record reflects that Student struggled at the start of the 2010-11 school year with poor marks during the first marking period. (Findings of Fact (FF) 7, 8) While it is somewhat concerning that it was the Parent, not the District, who took the initiative that fall to begin the evaluation process with respect to Student's obvious academic difficulties,⁵ the District readily agreed, and completed that evaluation well within sixty days of the request and also within the first sixty calendar days of the school year. (FF 8, 9) *See* 22 Pa. Code § 14.123(b) (requiring school districts to issue an evaluation report within sixty calendar days of receipt of written parental permission, excluding summer vacation).

The Parent's claim is essentially that Student has been a victim of a series of bullying incidents which has impacted Student's educational progress as evidenced by a drop in some grades and a lack of progress with speech/language skills.⁶ (N.T. 152-57, 166-69)

There can be no question that bullying has become a grave concern in our nation. As the U.S. Department of Education recently recognized, "Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential." U. S. Department of Education, Office of Civil Rights, Dear

⁵ The record does not establish what, if anything, happened in the spring of 2010 after the IEP team decided to evaluate Student to obtain information on Student's academic and speech/language skills. (FF 6)

⁶ There was some evidence presented that Student had taken a game system to school against the wishes of the Parent, and that Student had lost a few of the games that are used in the system. (N.T. 58, 60, 70, 241-43, 252) This evidence did not appear to relate to any of the bullying conduct, or otherwise have any particular impact on Student's special education program.

Colleague Letter: Bullying and Harassment, at 1 (Oct. 26, 2010).⁷ “Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA[.]” U.S. Department of Education, Office of Civil Rights, Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000).⁸ “Harassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE.” *Id.*

Our own Third Circuit has recognized that a student who is the victim of bullying and whose education is adversely impacted as a result can be denied FAPE. *Shore Regional High School v. Board of Education*, 381 F.3d 194 (3d Cir. 2004). A New York District Court more recently addressed a claim that a school district deprived a student of an appropriate special education program because it did nothing to prevent bullying of the student by other students, thereby negatively affecting the student’s opportunity for an appropriate education. *T.K. v. New York City Department of Education*, ___ F.Supp.2d ___, 2011 WL 1549243 (E.D.N.Y. 2011). In an extensive analysis of what bullying is and how it is manifested in today’s youth society, the Court noted that “[e]very disagreement among children does not amount to bullying.” *Id.* at *9. “What distinguishes bullying from other forms of childhood aggression, whether a hard-fought basketball game or rough-and-tumble play, is unequal and coercive power.” *Id.* (citation omitted). “Increased power need not be actually present, but there must be at least a perceived advantage for the bully either physical or psychological.” *Id.* (citation omitted). Bullying is generally viewed as a pattern of negative acts committed over time. *Id.* at *6; *see also* Ericson,

⁷ Available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>

⁸ Available at <http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>

N., Addressing the Problem of Juvenile Bullying, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, at 1 (June 2001).⁹

The *T.K.* Court also recognized that students with disabilities are at a greater risk of bullying, both because of the disability and for other reasons. *T.K.*, *supra*, at *11. The test formulated by the *T.K.* Court is as follows.

When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

Id. at *27. “Where bullying reaches a level where a student is substantially restricted in learning opportunities [he or she] has been deprived a FAPE.” *Id.* at *28.

There was evidence presented with respect to four separate incidents during the 2010-11 school year. (FF 18, 23, 27, 31) After the November incident, the District responded to the Parent’s concerns after the holiday weekend and conducted an investigation. (FF 18, 19) With respect to the February 2011 incident, the District had Student examined by a nurse and conducted an investigation, ultimately disciplining the other student who committed the act against the other students and taking steps to ensure that Student and the other student would be separated on the school bus. (FF 23, 24, 25, 26) After the March 2011 incident, the District questioned the two students involved, including Student, and both denied that any statement was made to “ax” another student. (FF 27, 28) In the last incident during recess in May 2011, it

⁹ Available at <http://www.ncjrs.gov/pdffiles1/ojjdp/fs200127.pdf>

appears that the District was not aware that there was any conflict between Student and any other child which would have warranted some type of investigation or intervention. (FF 31)

Overall, this hearing officer concludes that the District did respond appropriately to each of the reported incidents, investigating each when they became aware of them and following through with appropriate steps, including discipline and separation of students, where necessary. Moreover, while there was some evidence that Student's grades during the third and fourth marking period during the 2010-11 school year were not as high as in second marking period and that progress on the speech/language goals was less than consistent in the third marking period (FF 22, 29, 30, 32), there was little evidence to demonstrate that the decline in grades was the result of any or all of the four incidents, rather than an increased difficulty of the curriculum and materials (N.T. 237-39), or that the inconsistency in some of Student's speech/language skills necessarily revealed a lack of improvement. (N.T. 261-62) As the U.S. Supreme Court has made crystal clear, it is the party who files the due process complaint who bears the burden of persuasion, difficult though it may be. Accordingly, this hearing officer cannot conclude that the District denied FAPE to Student on the basis of, or that Student's educational program was adversely affected by, the four incidents in question or the District's responses to them.

It merits mention that there is some disagreement between the parties as to whether the four incidents, taken together, could amount to a pattern such that the conduct toward Student constituted bullying. (N.T. 18, 22-23, 335, 340-41) At this point in time, the parties have participated in a due process hearing wherein the Parent's concerns over possible bullying have been clearly established, and the District is undoubtedly well aware that Student may be perceiving that Student is at some disadvantage in relation to the position and conduct of other students. Even if the District is not convinced that some of the incidents raised actually occurred

as the Parent believes, it cannot be disputed that Student is reporting events involving peers at school to the Parent which are causing her concern. The additional fact that Student, quite understandably, was reluctant to discuss the incidents during Student's testimony at the hearing does not mean that they did not happen, or that Student did not report them as having occurred. On the contrary, the fact that Student has, over the course of the 2010-11 school year, experienced difficulties with peers, has perceived conflicts with certain peers, and does not have many friends, raises significant red flags. (N.T. 88, 178)

Education is much more than academics; rather, an appropriate education encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010). It is noteworthy that the District's ER in October 2010 noted that Student is shy and withdrawn, and that adaptive behavior skills need to be closely monitored. (FF 10) Adaptive behavior includes social skills, such as forming and maintaining friendships, interacting with others, and comprehending social relationships. The importance of peer relationships will only increase as Student and Student's peers grow older. This hearing officer strongly suggests that the IEP team consider whether Student has needs in these areas which warrant assessment for possible intervention in Student's current and future IEPs.

Lastly, it is this hearing officer's sincere hope that the parties are able to continue to work collaboratively together on Student's current and future educational programming, despite the current disagreement. It was very apparent that the Parent is a devoted advocate for Student. It is also obvious that all of the witnesses who testified genuinely care about Student and Student's educational needs. A determined focus on a positive relationship between and among the parties can only benefit Student.

CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that the record does not establish that Student was denied FAPE during the 2010-11 school year. It is suggested, however, that the parties make use of the findings of fact and discussion set forth above, in addition to the information already known to them, as a basis for maintaining a cooperative relationship as well as developing an appropriate program for Student in the future, including the next school year.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parent's claims in this matter are **DENIED**. The School District need take no action in this matter.

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: June 18, 2011