

*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

Student's Name: D. S.

Date of Birth: [redacted]

ODR No. 15330-14-15-KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Sarah E. Zuba, Esquire  
Catherine Merino Reisman, Esquire  
Freeman, Carolla, Reisman & Gran LLC  
19 Chestnut Street  
Haddonfield, New Jersey 08033-2315

Perkiomen Valley School District  
3 Iron Bridge Drive  
Collegeville, PA 19426

Sarah Davis, Esquire  
Fox Rothschild, LLP  
10 Sentry Parkway, Suite 200  
P.O. Box 3001  
Blue Bell, PA19422-3001

Dates of Hearing:

October 16, 2014; December 2, 2014;  
December 5, 2014; January 5, 2015

Record Closed:

January 26, 2015

Date of Decision:

February 10, 2015

Hearing Officer:

William F. Culleton, Jr., Esquire, CHO

## INTRODUCTION AND PROCEDURAL HISTORY

Student<sup>1</sup> is an eligible child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and an individual with a disability protected by the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504).<sup>2</sup> (NT 9; SD 1.)<sup>3</sup> Student is in fifth grade at a private elementary school (School) and lives within the respondent District. (NT 9; SD 23.) Student is identified under the IDEA as a child with the disabilities of Other Health Impairment and Speech or Language Impairment. (NT 9.)

Student attended fourth grade at the School, paid for by the District pursuant to an agreement in lieu of providing a free appropriate public education (FAPE). (SD 2, 3.) In May 2014, the District sought to return Student to its own elementary school, and offered a placement and Individualized Education Program (IEP). (SD 23.) Parents assert that the District's offer denied Student a FAPE. Parents seek reimbursement of the School's tuition and transportation costs for Student's current school year. The District asserts that it has offered a FAPE, and declines to reimburse Parents.

---

<sup>1</sup> Student, Parents 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. Because the Student's mother engaged in many transactions with the School, she is referred to below as "Parent" in the singular.

<sup>2</sup> Student's eligibility under the IDEA is uncontested; as a child with a disability, Student is also a qualified individual with a disability under section 504, based upon the record in this matter. 42 U. S. C. §12102 (1)(A)(limits major life activity); 42 U. S. C. §12102 (2)(A)(learning is major life activity). The evidence is preponderant that Student's impairment substantially limits Student's learning. Parents also assert their claims under the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. (ADA). I assert jurisdiction over the ADA claims and decide them here only insofar as they are "derivative" claims that assert issues and request relief that is identical with the issues and relief requests advanced pursuant to the IDEA and section 504. 22 Pa. Code §14.102(a)(2)(xxx) (expressly incorporating 34 C.F.R. §300.516, including subsection (e) of that regulation); Batchelor v. Rose Tree Media Sch. Dist., 2013 U.S. Dist. Lexis 44250 (E.D. Pa. 2013); Swope v. Central York Sch. Dist., 796 F.Supp.2d 592, 600-602 (M.D. Pa. 2011).

<sup>3</sup> The parties presented a joint exhibit book for the record; as is common practice in these hearings, the parties agreed to mark the joint exhibits as "School" exhibits. In this matter, they selected the mark "SD." I admitted these exhibits at the outset of the hearing, along with Parents' exhibits. (NT 13, 135.) Any references to "Joint" exhibits in the record are intended to refer to exhibits marked "SD". Later in the hearing, the District marked and offered a new exhibit, which it marked "S 1", again for School; this was not a joint exhibit. (NT 521-522.) In addition, I admitted two exhibits upon my own motion, over objection, marked HO 1 and HO 2. (NT 660-664.)

The hearing was completed in four sessions. I conclude that the District offered an appropriate placement and IEP, thus offering a FAPE to Student; I deny the Parents' request for tuition reimbursement.

### **ISSUES**

1. Did the District offer to provide Student with a FAPE for the 2014-2015 school year?
2. Is the School an appropriate placement for Student for the 2014-2015 school year?
3. Considering the equities, should the hearing officer order the District to reimburse Parents for the cost of Student's tuition at the School for all or any part of the 2014-2015 school year?

### **FINDINGS OF FACT**

1. Student has a history of suspected skull fracture prior to Student's adoption by Parents. Student also has a history of diagnosis with Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD) and Intermittent Explosive Disorder. (SD 18.)
2. At age 4, Student was found eligible for support services based upon developmental delay, and Student received behavior support and speech therapy until Student entered kindergarten in a District school at age 5 in the 2008-2009 school year. Student repeated kindergarten in the 2009-2010 school year. (SD 18.)
3. Student presented with serious behavior concerns in kindergarten and first through third grades. Student exhibited physical aggression, temper tantrums, impulsive behaviors, noncompliance, elopement, outbursts and inattention. Student experienced difficulties with transitioning and following directions. Student missed significant instructional time during these years. (SD 18.)
4. In first through third grades, Student's needs included articulation, language form and syntax skills, working memory, visual processing speed, organization and delayed academic achievement. (SD 18.)
5. During this period, the District classified Student with Traumatic Brain Injury, Speech or Language Impairment and Other Health Impairment. The District placed Student in full-time learning support for the second half of first grade, and in supplemental learning support for second grade. The District placed Student in supplemental emotional support for third grade. (SD 18.)

6. During this period, the District provided related services in the form of speech and language therapy, an aide in the classroom, group therapy with a social worker, and a positive behavior support plan. Student also received programming for history of brain injury, specially designed instruction and accommodations, and Extended School Year (ESY) services in the summer of 2013. (SD 18.)
7. While in the third grade supplemental emotional support placement, Student exhibited behaviors impeding Student's learning, including elopement and defiance that resulted in significant loss of instructional time. The District attempted to address these behaviors through a positive behavior support plan. (NT 44-45, 143, 265, 323-325, 398-400, 434; HO 1, 2.)
8. Parents disagreed with Student's programming and placement, and removed Student from the placement provided by the District for Student's fourth grade year; the District agreed, pursuant to a settlement agreement in lieu of FAPE, to provide funding for Student's education at the private School for Student's fourth grade year, the 2013-2014 school year. (SD 3, 13.)
9. In fourth grade, at the School, Student was receiving two sessions per week, 45 minutes per session, of individual speech therapy. Speech therapy addressed word finding, organization of verbal expression, articulation and conversational skills. (SD 18.)
10. On January 16, 2014, the District forwarded to Parents a permission to re-evaluate consent form, as well as a release of information for obtaining Student's records from the School, interpreting the previous settlement agreement to provide for a re-evaluation. (SD 9, 10, 11.)
11. On or about February 20, 2014, Parents returned the permission to evaluate form and records release for School documents, noting that it was their intention to grant permission in compliance with the previous settlement agreement. (SD 10, 12.)
12. On April 17, 2014, the District provided to Parents a re-evaluation report for Student. The report included a review of Student's developmental, medical and educational history, including information on Student's behavior and performance at the School in fourth grade; written Parental input; cognitive and achievement testing; academic progress reports and teacher reports and recommendations from the School; reports of previous local and state assessments, including benchmark testing; reports of three classroom observations of Student at the School (by the District's school psychologist, occupational therapist and speech and language pathologist); observations of the District's school psychologist during testing of Student; the reports of three behavior rating inventories; a speech and language evaluation including formal testing of expressive and receptive language, spoken language and articulation; and an occupational therapy evaluation, including motor proficiency, fine motor precision, integration and control, manual dexterity, upper limb coordination, manual coordination, visual motor integration, handwriting, visual perception, social participation and sensory processing. (NT 695-696; SD 16, 18.)
13. In April 2014, Parents reported to the District evaluator that Student's academic, behavioral and social skills were much improved due to the benefits of placement in the School.

Parents reported that Student was a "very different child than [Student] was 1 year ago." (SD 18.)

14. The April 2014 re-evaluation report classified Student with Other Health Impairment and Speech or Language Impairment. Standardized cognitive testing revealed consistent cognitive ability scores in the upper limit of the borderline range; scores were reported with caution due to variance among component subtests. The report noted significant improvements in nearly all academic areas (based upon standardized achievement testing), and Student's benefit from structured routine. The report noted weaknesses in verbal reasoning; working memory; vocabulary and decoding; reading comprehension and fluency; spelling; written expression; articulation and intelligibility; expressive language; attention and focus; impulsivity and emotional control; organization; behavior control and social skills. (SD 18.)
15. Student's overall performance in mathematics was within the average range, although standardized testing revealed weakness in mathematics fluency. Student was able to succeed in the School's mathematics class, in which instruction is delivered at a pace that is similar to that of a regular education class. (NT 453; S 18.)
16. Although the report noted that Student performed below the average range for all areas of reading (including word vocabulary, decoding, comprehension and fluency), and writing (including spelling, sentence composition and essay composition), testing revealed no statistically significant discrepancies related to these academic weaknesses; therefore, there was no classification of Specific Learning Disability. (SD 18.)
17. The report recommended removal of the disability category Traumatic Brain Injury, given additional information including a neuropsychological evaluation in 2013. The report noted Parents' agreement to this recommendation. (SD 18.)
18. The report recommended special education services and specially designed instruction in the areas of reading and writing. It recommended accommodations and modifications in the area of mathematics. It recommended speech and language therapy for articulation and intelligibility. It did not recommend direct occupational therapy services. (SD 18.)
19. The report recommended a list of specific modifications and accommodations for the consideration of the IEP team. (SD 18.)
20. On April 24, 2014, the District sent an invitation to Parents for an IEP team meeting scheduled for May 14, 2014. (SD 19.)
21. On May 1, 2014, a District special education teacher was under the impression that Student was to return to the District, even though no IEP meeting had yet been convened and the teacher was not so informed by Parents. (NT 759-761; S 26 p. 127.)
22. The District sent a draft IEP to Parents for their review one or two days before the scheduled IEP meeting. (NT 628-629, 856.)
23. At the meeting on May 14, 2014, the District offered a draft IEP for the coming academic year, in which Student would be in fifth grade. The District offered to place Student in

supplemental learning support at Student's neighborhood elementary school. The District also offered to provide a placement of itinerant emotional support. The District offered to educate Student in a general education classroom for social studies, science, mathematics and all specials. For reading, writing and spelling, the District offered to provide instruction in small groups in the learning support classroom. In addition, the District offered to provide speech and language therapy in a small group setting outside the regular classroom. (SD 21.)

24. The draft IEP recognized that Student exhibited behaviors impeding learning. The District offered to provide a functional behavioral assessment and positive behavior support plan within 30 to 60 days of the beginning of school. The draft IEP contained some specially designed instruction to support Student's behavior needs, based upon information about Student's behavior at the School. (NT 909-911; SD 20, 22.)
25. It is best practice to conduct an FBA in order to inform the development of the positive behavior support plan. (NT 212-214, 220-222, 361-364, 368, 782-783, 874-875.)
26. It is best practice to conduct an FBA only in the environment in which the educational services are being provided; an FBA conducted in the School would have yielded no usable information, since behavior is environment-specific. (NT 212-214, 220-222, 358-359.)
27. The School tolerated many of the behaviors that constituted an impediment to Student's learning in the District's elementary school. (NT 339-343.)
28. The draft IEP offered goals to address Student's written expression; spelling; vocabulary; writing fluency; mathematics computation; reading fluency; reading comprehension; phonics; emotional self-regulation; social skills; social behavior; attention to task; organization and planning of materials and homework assignments; articulation; speech intelligibility; and expressive language. (SD 21.)
29. The goals and specially designed instruction as described in the draft IEP proposed to teach Student to utilize a number of checklists and rubrics to learn self-management of materials, assignments, schedules, emotions, social behavior and attention to task. (SD 21.)
30. The draft IEP offered accommodations and specially designed instruction to address attention to task; organizations; social skills; emotional self-regulation; communication between school and home; written expression; reading of sight words and high-frequency words; mathematics computation; reading decoding, fluency and comprehension; writing legibility; sensory needs; note-taking; memory; and spoken intelligibility. (NT 907-911; SD 21.)
31. The draft IEP offered small-group instruction for speech and language needs and reading instruction. For reading, the draft IEP offered an opportunity to work in a small group setting or one to one setting up to 90 minutes per day. The draft IEP offered small group instruction opportunities for individualized mathematics instruction in the general education setting. The draft IEP offered individualized consultation with the learning support teacher with regard to monitoring of emotions and behavior. (NT 783, 904; SD 21.)

32. The draft IEP offered assistive technology including daily schedule; checklists; rubrics, logs and graphic organizers; primary skip lined paper; graph paper and other modifications to forms; and other visual aids as needed. (SD 21.)
33. The draft IEP offered speech and language therapy in a small group setting two times per cycle, 30 minutes per session. (SD 21.)
34. At the May 14, 2014 IEP meeting, Parents discussed their criticisms of the re--evaluation report. The District representatives and the Parents discussed the District's conclusion, based upon the re-evaluation report, that the appropriate placement for Student would be a supplemental level of support with itinerant emotional support, rather than a full time level of support or self-contained private school setting. (NT 601-602, 633-635, 639-640, 856-857, 888.)
35. There was also discussion of the recognition by District personnel that Student had made significant progress at the School. The IEP team also discussed concerns about the draft IEP's proposals for using checklists, because there was concern that too many checklists would be overwhelming for Student. (P 8.)
36. At the May 14, 2014 IEP meeting, the District representatives and Parents discussed the District's intention to perform a functional behavioral assessment within 30 to 60 days of Student's first day of school; they also discussed the District's intention to consider providing a specific research-based reading decoding, encoding and fluency instruction program to Student at levels equivalent to those Student was receiving at the School. District representatives offered to consider an assistive technology assessment process to be conducted in the fall. District representatives indicated that the IEP would be amended to include typing as an accommodation for testing. The IEP team agreed to remove the goal regarding pro-social behavior, because it was redundant. The team also agreed to open the IEP in the fall to add baselines. The IEP team discussed District's intention to provide both full group and small group instruction with regard to reading comprehension. The team prepared a NOREP at the meeting, reflecting the placement being recommended. (NT 854-856, 895-902; P 8.)
37. At the May 14, 2014 meeting, the IEP team discussed the District's willingness to provide Extended School Year (ESY) services to Student as a form of transitional service to help Student become re-acclimated to the public school setting. In addition, the assigned teaching staff were prepared to offer assistance to Student with any transitional needs. ESY was not offered in writing in the IEP because Student was not considered eligible for it under Pennsylvania regulations. (NT 906-908.)
38. At the May 14, 2014 IEP meeting, the participants discussed concerns among District personnel that the IEP called for too many checklists, thus potentially confusing or overwhelming Student because of Student's executive functioning deficits. The IEP was not changed with regard to checklists. (NT 354-355, 357, 827-831.)
39. After the May 14, 2014 IEP meeting, the District sent a finalized IEP to Parents, along with a NOREP. The finalized IEP offered the same placement and related services as offered in the draft IEP. (SD 23; P 7.)

40. The finalized IEP omitted one of the goals in the draft IEP, a goal that addressed pro social replacement behavior in less than optimal social situations. The finalized IEP added baselines to the speech and language goals. (SD 23.)
41. The finalized IEP added additional accommodations for testing, including the use of a word processor or computer, and reading test items aloud where appropriate. The finalized IEP also added specially designed instruction in the form of direct, scientifically research-based teaching of writing, including development and editing of basic sentences, paragraphs and stories (30 minutes daily); systematic, research-based instruction in decoding and encoding through a multi sensory approach using controlled and decodable text (45 minutes daily); and comprehension instruction to develop higher order thinking skills through modified and direct small-group instruction (30 minutes daily). (NT 857-863; SD 23; P 7, 8.)
42. Parents did not return the NOREP. (SD 24.)
43. On July 29, 2014, a physician with the Children's Hospital of Philadelphia provided Parents with a physician's note entitled "After Visit Summary", which included a "Plan Discussed Today" including continuing Student at the School. (P 1.)
44. On July 30, 2014, Parents' attorney provided the District with ten days' written notice that Parents would unilaterally place Student at the School for the 2014-2015 school year. Parents' attorney included a copy of the physician note from Children's Hospital of Philadelphia. (P 1.)

## **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 (which in this matter is the hearing officer).<sup>4</sup> 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

---

<sup>4</sup> 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.



produce a preponderance of evidence<sup>5</sup> that the other party failed to fulfill its legal obligations as alleged in the due process complaint. 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 “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In this matter, the Parents requested due process and the burden of proof is allocated to the Parents. The Parents bear the burden of persuasion that the District failed to provide Student with an offer of FAPE, that the private school is appropriate, and that the equities support an order for tuition reimbursement. If the Parents fail to produce a preponderance of evidence in support of any one of these claims, or if the evidence is in “equipoise”, then the Parents cannot prevail under the IDEA.

## TUITION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student’s needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three-part test to determine whether or not a school district is obligated to fund such a private placement<sup>6</sup>.

---

<sup>5</sup> 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. 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.

<sup>6</sup> The weight of judicial authority in this Circuit holds that tuition reimbursement is available under section 504, and that the Burlington-Carter tests are equally applicable to section 504 claims for tuition reimbursement. See, 34 C.F.R.

Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district’s program legally adequate? Second, is the parents’ proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3<sup>rd</sup> Cir. 2007).

#### FIRST PART OF THE BURLINGTON-CARTER TEST: OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding offer and 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 Program (“IEP”). 20 U.S.C. § 1414(d). The District in this matter was obligated to offer a placement and IEP that was “reasonably calculated” to enable Student to receive “meaningful educational benefits” in light of 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 (3<sup>rd</sup> Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

---

§103.33(c)(4); Lauren G. v. West Chester Area Sch. Dist., 906 F.Supp.2d 375, 390-391(E.D. Pa. 2012). Therefore, I so conclude. It follows that the ADA provides the same remedy. 42 U.S.C. §12133 (providing same “remedies, procedures and rights” for ADA claims as are available under section 504). See, Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996), overruled on other grounds, A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (2007)(allowing ADA claim for same remedies as available under section 504). In light of my conclusion that a FAPE was offered in this matter, I deny the claims made under section 504 and the ADA.

“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 provide a 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 or 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 (3<sup>rd</sup> Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

A school district is not necessarily required to offer or provide the best possible program to a student, or to maximize the student’s potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a “basic floor of opportunity” for the child. 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).

The law requires only that the IEP be judged as of the time at which it was made. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) The reasonableness of the school district’s offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

I review the last offered IEP to determine whether or not that document was reasonably calculated to provide Student with meaningful educational benefits at the time at which the IEP was offered. D.S. v. Bayonne Bd. Of Educ., 602 F.3d 553, 565-565 (3d Cir. 2010). Thus, the determination must be made on the basis of facts known or available to both parties at the time that the IEP was offered. See R.E. v. New York City Dept. of Educ., 694 F.3d 167, 185-187 (2d Cir. 2012). This is especially important in the present matter, where Parents were required to make a decision about the wellbeing of their child based upon the IEP; this was the only written promise to them, and they could not be assured that any unwritten promises substantially deviating from those made in the IEP would be either honored or enforceable. Ibid. Guided by the above authority, I will not in effect amend what is written in the IEP retrospectively by relying upon additional promises at the hearing or explanatory evidence that promises materially different services than what the written IEP offered at the time it was delivered to Parents. I will determine on the record what Parents reasonably knew or should have known was being offered by the District.

Applying the above standards, I conclude that the District offered a program and placement that was reasonably calculated to provide Student with an opportunity to receive meaningful educational benefit. I conclude that the re-evaluation that the District performed in 2014 was comprehensive and addressed all of Student's suspected disabilities and educational needs. Further, the District's draft IEP addressed all of the identified educational needs with placements, specially designed instruction, accommodations and related services that were reasonably calculated to provide a FAPE. Moreover, the District discussed the re-evaluation report and its draft IEP appropriately with Parents at the May 2014 IEP meeting, and it revised the offered IEP

to add some services and further specify the nature of others, thus addressing all of Student's needs in a reasonably calculated offer of a FAPE.

The 2014 re-evaluation was appropriately comprehensive. It addressed Student's developmental, medical and educational history, including Parents' input and information on Student's behavior and performance at the School in fourth grade. District evaluators measured Student's cognitive functioning and academic achievement in the areas of reading, writing and mathematics, by administering standardized tests and considering curriculum based and statewide test scores. Evaluators scored and interpreted three different behavior rating inventories – one broad based inventory that probes for evidence of a broad range of emotional and functional deficits, and two more specific inventories that seek evidence of attention and executive functioning difficulties. The District's speech and language pathologist conducted a speech and language evaluation, including formal testing of expressive and receptive language, spoken language and articulation. The District's occupational therapist conducted an occupational therapy evaluation, addressing motor proficiency, fine motor precision, integration and control, manual dexterity, upper limb coordination, manual coordination, visual motor integration, and Student's handwriting, visual perception, social participation and sensory processing.

Thus, the District's evaluators investigated all of the difficulties that Student had exhibited in Student's first three years with the District, as well as Student's functioning at the School in fourth grade. They covered the full range of Student's developmental, cognitive, functional, academic, emotional, behavioral and social functioning in school settings. Parents failed to introduce preponderant evidence to show that the District's re-evaluation failed to inquire into and reach conclusions about any significant disability or need of the Student.

The District's re-evaluation report identified Student's educational needs. The report noted weaknesses in verbal reasoning, working memory, vocabulary and decoding, reading comprehension and fluency, spelling, written expression, speech articulation and intelligibility, expressive language, attention and focus, impulsivity and emotional control, organization, behavior control and social skills.

I conclude that the placements offered by the District – identical in both the draft and finally offered IEPs - were reasonably calculated to address the needs identified in the District's re-evaluation report. The District offered a dual placement: Student was placed in supplemental learning support to address Student's needs in the areas of reading and writing; in addition, the District placed Student in itinerant emotional support to address Student's needs for emotional self-regulation and emotional control. The learning support placement offered to provide Student with a small group environment, separated from general education. Thus, the District offered to provide a placement for reading and writing that would reduce any stress related to Student's inability to keep up with Student's peers in these subject areas, while providing direct, explicit instruction in a small group setting to address Student's needs in these subjects.

Although Student had been performing below grade level in mathematics as well, the District's re-evaluation report recognized that this was due primarily to mathematics fluency deficits that could be expected reasonably to be amenable to remediation and accommodation, rather than modified curriculum or slower pace. Therefore, the District proposed reasonably to provide mathematics instruction in the regular education classroom with substantial supports, including extended time to address Student's weakness in mathematics fluency and individualized supports for mathematics problem solving, which could be impacted by Student's weaknesses in reading.

The District offered to address many of Student's weaknesses and needs through related services in the form of speech and language therapy. Through this therapy, the District offered to address Student's needs in articulation; speech intelligibility; expressive language; social skills; and social behavior. The speech therapist provided goals addressing these areas, and the IEPs, both draft and final, included specially designed instruction to address these needs.

The District's final offer IEP comprehensively addressed Student's educational needs through goals, specially designed instruction and accommodations. Comparing the needs identified in the re-evaluation report and the present levels of the IEP, I conclude that each is addressed by the goals that the District offered to the Parents. These were constructed so as to be measurable, although baselines needed to be added upon Student's return to the District; the District made it clear to Parents that this would be accomplished.

Specially designed instruction included direct, explicit, multi-sensory and sequential instruction through research-based programs to address Student's reading decoding; encoding; fluency and comprehension; spelling; written production and fluency; conventions and written organization. Accommodations and specially designed instruction were offered to address Student's needs with regard to mathematics; attention to task; organization; cognitive fluency; verbal reasoning; memory; sensory needs; articulation and speech intelligibility; expressive language; social conversational difficulties; emotional regulation and impulsivity; and behavioral control.

While the final offered IEP did not provide a positive behavior support plan to address Student's history of significant behaviors impeding learning, the District recognized the need for such a plan by noting that history in the IEP. It promised in the IEP meeting that it would conduct a functional behavioral assessment (FBA) within weeks of Student's return to its elementary

school, and then create a positive behavior support plan. This was a reasonable approach for three reasons.

First, it is best practice to conduct an FBA in order to inform the development of the positive behavior support plan. Second, it is best practice to conduct an FBA only in the environment in which the educational services are being provided; an FBA conducted in the School would have yielded no usable information, since behavior is environment-specific. Third, Student's behavior had improved at the School, at least in terms of the behaviors that the School was unwilling to tolerate, and as to many of Student's behaviors, the school simply tolerated them.

Thus, an FBA conducted before Student's return to the District would have been inadequate to gauge Student's likely reaction to the District's stricter elementary school environment. Since an FBA would be needed to construct a positive behavioral support plan, the District promised to provide one within 30 to 60 days. I conclude that this was a reasonable offer that appropriately addressed Student's anticipated need for supports in the area of behavior control.

In addition to promising an FBA, the District offered both goals and specially designed instruction to address behaviors that could be anticipated reasonably based upon Student's behavior at the School. While Parents' expert behavior analyst criticized the lack of a more formal plan addressing the return of behaviors that Student exhibited in third grade, I find this opinion unconvincing, because the witness justified it was based upon only the assertion that Student might exhibit such behaviors, and because the witness' opinions were not based upon sufficient knowledge of Student's third grade behavior, as discussed below.

I conclude that the District appropriately balanced its obligation to provide a FAPE with its obligation to provide services in the least restrictive environment. A school district is required to take into account the continuum of possible alternative placement options when formulating an



IEP, including placement outside the district, if the district does not have an appropriate placement for the individual child. H. D. v. Central Bucks School District, 902 F. Supp. 2d 614 (3d Cir. 2000); see Alloway Twp. v. Bd. of Ed. v. C.Q., 2014 U.S. Dist. LEXIS 33328 (D.N.J. 2014)(LRE required only to extent that the LRE placement is “appropriate” – “i.e., satisfactorily educates the child” ... ); accord, S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 272 (3d Cir. 2003). Here, the District provided for more restrictive small group instruction in the areas of Student’s greatest academic need, while providing instruction in the least restrictive environment for subjects in which the data indicated that student could be expected reasonably to perform meaningfully, with extensive accommodations, specially designed instruction and supplementary aids and services in the general education setting.

Parents invite me to make findings to the effect that the District did not handle Student's behavior appropriately in third grade, and that, as a result, Student failed to receive meaningful educational benefit. Parents introduced extensive and detailed evidence with regard to Student's behavior in third grade. They point to Student's behaviors that allegedly impeded Student's learning and that of others; these included elopement, defiant behavior and work refusal. From this history, Parents argue that the District's offer of similar services for fifth grade is not reasonably calculated to succeed. Parents' argument must fail for two reasons.

First, even if I were to make findings to the effect that the District's positive behavior support plan was inadequate to control Student's behaviors in third grade<sup>7</sup>, this would not compel the conclusion that the District could not provide appropriate behavior management services to Student in fifth grade. Contrary to Parents' argument, the services to be offered for fifth grade

---

<sup>7</sup> I make no finding on the efficacy of the District’s program in third grade, for the reasons discussed below. The record was in considerable conflict on this issue, and I find it unnecessary to resolve it in view of my conclusion that, in this matter, the question is irrelevant.

would not be identical to those offered in third grade. In third grade, Student was placed in supplemental emotional support for most of the year; in fifth grade, Student would be placed in supplemental learning support, with itinerant emotional support services – a combination of placements that was not offered in third grade. Moreover, there was no evidence to suggest that the academic, emotional, behavioral and social goals – and specially designed instruction --offered in the May 2014 IEP were identical to those offered in the Student's IEP for third grade.

Second, even if I were to make the findings that Parents request, such findings would not compel the conclusion that Student's experience of public school in fifth grade would be the same as Student's allegedly unsuccessful experiences of third grade. Children grow and mature over the course of a year, especially in the early grades of school.<sup>8</sup> There was considerable evidence – indeed, it is undisputed – the Student's behavior in fourth grade at the School was significantly better than Student's behavior in third grade. However, the evidence was not preponderant to show that this improved behavior was due solely to the change in placement. There was no expert opinion evidence proving by a preponderance that Student's improved behavior was not primarily attributable to maturing. Thus, on this record, I am unable to discount the likely effect of maturation. It follows that Parents have failed to show by a preponderance that Student was more likely than not to repeat Student's previous behaviors in fifth grade.

In sum, and without disputing the premise that offering a repeat of identical services to Student might not be reasonably calculated to provide a FAPE, Parents' argument must fail. The record does not show preponderantly that the same services would be provided to Student in fifth grade. Moreover, the record does not show preponderantly that Student is the same child that the

---

<sup>8</sup> Parent recognized as much when she asserted that Student had matured even during the course of third grade, when some aspects of Student's behavior and academic performance appeared to have improved toward the end of the year. (NT 613.)

District attempted to educate in third grade. Indeed, Parents have argued to the District that Student is a much different child now than in third grade.

Parents raised a number of additional criticisms of the District's offered IEP and placement, including that it overemphasized the use of checklists and that it did not contain a transition plan to ease Student's return from the private school to the public school setting. None of these criticisms is of such likely negative weight that the District's offer is no longer reasonably calculated to confer meaningful benefit as a result. Moreover, I conclude that these issues were discussed in the IEP meeting and that the District promised at the meeting to address any needs in these areas. In sum, I do not find these criticisms to be fatal to the appropriateness of the District's offered placement and program.

#### PREDETERMINATION

Parents argue that the District pre-determined the Student's placement to be with the District, ignoring the possibility of placing Student in the School for fifth grade. The only documentary evidence that Parents provide for this argument is an email by a special education teacher to his principal, dated May 1, 2014, prior to the 2014 IEP meeting. In that email, the teacher reports that Student was "incoming" from the School to the District. While this evidence is indeed sufficient to show that this particular teacher believed what he reported, the belief of this individual does not prove District predetermination by a preponderance of the evidence.

Nor does the record support the argument that the District ignored the full placement continuum including possible private school placement. On the contrary, three different professionals from the District visited the School and observed Student in classes. Consistent with the re-evaluation report, which thoroughly considered Student's needs, District personnel

recommended a less restrictive setting. The recommendation was discussed in the IEP meeting. Although the District maintained its recommendation despite Parents' disagreement, this alone does not constitute predetermination. I conclude that the evidence is insufficient to prove predetermination by the District.

#### APPROPRIATENESS OF THE SCHOOL AND BALANCE OF EQUITIES

As the Parents have failed to sustain their burden of persuasion regarding the first test in the Burlington-Carter tuition reimbursement analysis, it is unnecessary to reach the second and third tests. I conclude that the District offered a FAPE. Thus I make no findings and reach no conclusions on the appropriateness of the School as a placement for Student, or on the equities in this matter.

#### 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)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact).

In this matter, I found the witnesses to be credible generally. However, I accorded different weight to the testimony of some witnesses.

With regard to Parents' witness, the behavior consultant, I found the testimony generally credible and reliable; however, I accorded reduced weight to the witness' opinions, predicting that Student would not be able to succeed in a District setting, for two reasons. First, the witness admitted that her opinions were based upon hypotheses about the function of Student's behavior

that were not based upon systematic data keeping or a functional behavioral assessment. (NT 169-171.) Second, the witness admitted that she had very little information about the District's third grade FBAs and Student's reaction to the District's third grade positive behavior support plans. (NT 173-176.) Essentially, the witness was basing her opinions only upon limited personal observations of Student in third grade and again at the School, along with review of a few documents. (NT 141-156; 171.)

I accorded reduced weight to the testimony of the educational advocate, due to the witness' admitted preconceptions and lack of professional expertise in psychology or education. The witness demonstrated very formidable credentials as an advocate, but these do not include the above areas of expertise. Therefore, I did not rely upon the witness' opinions as to the propriety of the District's 2014 re-evaluation and offer of FAPE in May 2014. In addition, the witness' credibility was reduced. The witness exaggerated somewhat with regard to the details of Student's behavioral difficulties in third grade, (NT 308-310), made assertions about the May 2014 IEP meeting that were contradicted by credible witnesses, (NT 266, 906-908; 266-267, 894), and engaged in some jousting with cross examining counsel that raised some doubt about the witness' objectivity. (NT 310-312.)

As to what was discussed at the May 2014 IEP meeting regarding placement, I accord less weight to Parent's testimony, because Parent contradicted herself in testimony about this question. (NT 600-601; 631-635.) Parent categorically denied any discussion of that issue on direct examination; however, Parent admitted on cross examination that she had brought up the subject herself, and that there had been discussion of the re-evaluation report, in which private school placement was not recommended. Parent's self-contradictory testimony on this point reduced the persuasiveness of the Parents' assertion that the District had pre-determined Student's placement;

on the contrary, the evidence shows that the District considered Student's needs, recommended a less restrictive placement, and discussed the issue with Parents at the IEP meeting.<sup>9</sup>

### **CONCLUSION**

I conclude that the District offered Student a FAPE for Student's fifth grade school year. Therefore, I do not reach the issues concerning the appropriateness of the School or the equities. I conclude that this decision also disposes of the Parents' section 504 and derivative ADA claims. The request for tuition and transportation reimbursement is denied.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the Parents' request for relief is hereby **DENIED** and **DISMISSED**. It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

*William F. Culleton, Jr. Esq.*

---

WILLIAM F. CULLETON, JR., ESQ.

---

<sup>9</sup> The one contrary piece of evidence on this point – the teacher's belief that Student would be returning to his classroom, held prior to the IEP meeting – simply does not outweigh the rest of the testimonial evidence on this point.

HEARING OFFICER

February 10, 2015