

*This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.*

## **Pennsylvania**

# **Special Education Hearing Officer**

### DECISION

Child's Name: G. D.  
Date of Birth: [redacted]

ODR No. 17818-15-16-AS

### CLOSED HEARING

Parties to the Hearing:

Parent[s]

West Chester Area School District  
829 Paoli Pike  
West Chester, PA 19380-4551

Dates of Hearing:

Record Closed:

Date of Decision:

Hearing Officer:

Representative:

David G. C. Arnold, Esquire  
920 Matsonford Road, Suite 106  
West Conshohocken, PA 19428

David T. Painter, Esquire  
Sweet, Stevens, Katz, Williams, LLP  
331 East Butler Avenue  
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August 22, 2016, September 19, 2016,  
September 23, 2016, October 28,  
2016

November 18, 2016

December 5, 2016

William F. Culleton, Jr., Esquire,  
CHO

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> was a student of the school district named in this matter (District), during the Student's second grade year (2014-2015 school year), and approximately half of Student's third grade year (2015-2016 school year). Student is not identified as a child with a disability within the meaning of the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). The District recognizes that Student has a disability within the meaning of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), and has offered and provided a section 504 service agreement as required by Chapter 15 of the Pennsylvania regulations implementing section 504, 22 Pa. Code §15.7.

On January 4, 2016, Parents withdrew Student from the District and unilaterally placed Student in a private school (School). Student's Parents thereupon filed this due process request, asserting that the District had failed to meet its "child find" obligations under the IDEA, and had failed to offer and provide a free appropriate public education (FAPE) under both the IDEA and section 504. Parents seek reimbursement of their tuition payments to the School for the second half of Student's 2015-2016 school year, and the present, 2016-2017 school year. The District asserts that the Student is ineligible under the IDEA, and that it has offered and provided a FAPE within the meaning of section 504.

The hearing was completed in four sessions. I have determined the credibility and reliability of all witnesses, with regard to the specific issues of fact before me, as discussed below.

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<sup>1</sup> Student, Parents and the respondent District are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality. Student's mother, who participated in many of the transactions relevant here, is referred to as "Parent" in the singular, distinguishing her from the "Parents" acting together.

I have considered and weighed all of the evidence of record<sup>2</sup>. I conclude that Parents have failed to meet their burden of persuasion, discussed below, under the law. Therefore, I deny the requested relief and dismiss the matter.

### **ISSUES**

1. Did the District fail to perform its “child find” obligations under the IDEA and section 504 during Student’s second and third grade years?
2. During the Student’s second and third grade years, did the District fail to offer and provide a FAPE within the meaning of either the IDEA or section 504?
3. Is the School an appropriate placement for Student?
4. Considering the equities, should the hearing officer order the District to reimburse Parents for all or any part of the tuition that they have paid on account of Student’s placement in the School for part of the 2015-2016 school year and for the entire 2016-2017 school year?

### **FINDINGS OF FACT**

#### STUDENT’S EARLY HISTORY AND BEHAVIORAL ISSUES

1. Student is elementary school age and in fourth grade. (NT 42-43.)
2. From age four, Student has been diagnosed and treated for an emotional disorder with anxiety. Student is also reported to exhibit symptoms of Obsessive Compulsive Disorder (OCD). (S 7, 18; P 30.)
3. At home, Student has exhibited difficult behaviors, including rigidity, perfectionism and becoming frustrated easily. Student’s behaviors have included picking at Student’s fingernails and toenails, thus trimming them down to the skin; scratching self; eating to excess; seeking food from others and even eating food from the garbage. (S 7.)
4. In pre-school, Student exhibited excessive concern about food. Student was reported to be eating other children’s food and eating out of trash cans. Student also was reported to be perfectionistic and to criticize peers for their mistakes. (P 30 p. 11.)

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<sup>2</sup> I have admitted into evidence all of Parents’ exhibits except P 20, which was not referenced and as to which objection was raised; this is excluded per objection. I admitted into evidence all of the District’s exhibits except S 15, which the District withdrew after marking.

5. Student at home has exhibited obsessive and compulsive symptoms including repeatedly requesting information on what will happen next, repeating questions excessively, creating lists and becoming focused on patterns, repeating self out loud, and social problems with other children, especially being “bossy” with others and rigid about others following rules. (NT 44-47.)
6. At home and in kindergarten, Student exhibited symptoms of obsessive thinking about food, and inappropriate eating, either to excess, or from inappropriate sources like the trash. (P 30.)
7. Student achieves at a high level [redacted]. (S 7, 18.)

#### FIRST GRADE

8. Parents placed Student in a public school in a different district for first grade, with the support of Student’s therapist. (NT 54-55; P 19 p. 1.)
9. Student adjusted well to public school in the first half of first grade in 2013. (NT 55-57; P 30 pp. 133-148.)
10. In Student’s first grade year, the district of residence at the time found Student to be disabled within the meaning of section 504 and provided accommodations through a section 504 service agreement. (NT 55-57; P 30 pp. 133-148.)
11. Between March and June 2014, Student’s eating obsessions, and inappropriate eating habits increased both in school and at home. (P 30 pp. 151-160.)
12. During this time, the Parents were contemplating moving to a new home located within the District. (P 30 p. 160.)
13. Student exhibited some of Student’s past problematic behaviors during the second half of first grade, but at a level which did not interfere substantively with Student’s access to the curriculum. (NT 51-52; P 30 pp. 133-160.)

#### SECOND GRADE

14. In June 2014, the family made arrangements to move to the District. (P 30 p. 160.)
15. Also in June 2014, Student’s private therapist initiated discussion with Parent to refer Student to a psychiatrist. (P 30 p. 160.)
16. In August 2014, Parent signed a release form authorizing the District to obtain records and speak to Student’s therapist. (NT 53-54; P 34.)
17. Student entered the District for second grade, and attended a District elementary school for all of second grade and the first half of third grade. (NT 42-43.)

18. Parent provided a copy of Student's section 504 service agreement from the previous district, and the District implemented this service agreement. In October 2014, the District offered its own section 504 service agreement, which Parents accepted. (NT 58-60; P 19 pp. 3, 7, 8-15, 29.)
19. In September and October 2014, as Student began second grade in the District, Parents and District educators disagreed on whether or not to accelerate Student into the third grade mathematics curriculum. Parents asserted that Student had mastered the second grade curriculum in the previous district, while District educators found that Student's initial test performance did not justify acceleration into the third grade curriculum. The District decided not to accelerate Student into the third grade curriculum, but did provide some advanced instruction in mathematics. (NT 172-173; P 19 pp. 1-6; P 32.)
20. In second grade, Student experienced conflict with a particular peer, and Parent concluded that the peer was bullying Student. However, the behavior was no more than typical social conflict among children in second grade. (NT 63-65; 174-178.)
21. During Student's second grade year, Parent reported to Student's second grade teacher that Student was exhibiting inappropriate social behavior, by pouting and withdrawing from social activities in order to get additional attention from peers. Parent and teacher agreed that the peers would be counseled to ignore this behavior so as not to reinforce it. (NT 64-65; P 7.)
22. Overall, Student's second grade social functioning was not problematic. (NT 339-348, 701; P 3 p. 3, P 3B, P 4 through 6, P 19 p. 57, P 32 p. 4, P 38 p. 1; S 31.)
23. In second grade, Student's academic grades were below Parent's expectations [redacted]. (NT 65.)

### THIRD GRADE

24. In the first half of Student's third grade year (2015-2016 school year), the District provided Student with 150 minutes per week of [advanced] mathematics instruction, as well as [redacted]. (P 32.)
25. Student's section 504 service agreement did not provide that staff should attempt to reduce stress for Student at school in any ways other than two specified accommodations – correcting in a positive way, and allowing access to staff for purposes of talking about anxiety if it became evident. (NT 345; P 3 through 6.)
26. In October 2015, during the first half of third grade, Student began having difficulties with some peers in school. Student's generalized anxiety and social anxiety escalated in November and December 2015. (NT 742; P 19 pp. 32-33, 206; P 30 pp. 189-198.)
27. Beginning with an email message dated October 27, 2015, Parents reported to District officials at least twelve incidents allegedly instigated by a peer who allegedly had engaged in bullying when Student was in second grade, and by other peers who allegedly shunned

and criticized Student, allegedly at the instigation of the alleged bully. In one incident, [an object] hit Student in the head, causing a bruise. In another incident, Student was hit with carrots thrown at lunch. (NT 65-89, 222-223, 232-241, 244; P 19 pp. 32-45.)

28. Student's third grade teacher had observed a different interaction between Student and the peer accused of bullying. The teacher viewed Student as a leader whom the alleged bully sometimes followed. Nor did the teacher observe Student being increasingly isolated, although the teacher noticed that Student was interacting more with children of the opposite gender and students from other third grade classes. (NT 232-238, 458-459.)
29. Student's counselor and principal addressed these allegations by interviewing Student and all of Student's third grade classroom peers, as well as two peers from second grade. Both the counselor and the principal observed Student's social interactions during lunch periods and discussed Student's conflicts with peers with Student, who admitted participating in inappropriate behavior toward peers, sometimes as a reaction to similar behaviors directed toward Student. (NT 65-89, 279-296; P 18 p. 3, P 19.)
30. Student's counselor and principal concluded that the alleged bullying was part of a reciprocal pattern of conflict between Student and the alleged bully, in which Student was sometimes the aggressor. (NT 205-206, 354-356, 473-474; P 19 pp. 45-53, P 38 pp. 6-8.)
31. The teacher observed that the conflict between Student and the alleged bully became worse as time went on. (NT 253-254.)
32. Parents requested a meeting about the situation but Student's teacher declined, on grounds that there was no need for a meeting because the situation was being managed in the classroom without disciplinary consequences. The teacher did offer to continue communicating by email or telephone. (NT 209; P 19 pp. 52-53.)
33. In December 2015, in the course of investigating the ongoing conflict among Student and Student's peers, Student's principal referenced Student's counselling sessions indirectly in the course of explaining to whom it would be appropriate to talk about the principal's conversation with Student on that day. Student or Parents interpreted this to be asking Student if Student was continuing to see a therapist. (NT 90-91, 506-507, 549; P 19 pp. 96-98.)
34. The principal interrupted the initial session of psychological testing for a District evaluation report in order to discuss with Student some allegations of inappropriate behavior. This interview with Student was upsetting to Student, but Student was able to participate in testing afterwards, without any negative effect on the validity of the test scores. (NT 292-294, 451-452; P 16.)
35. Student confided to Student's private therapist a feeling of not having anyone at school who could be trusted to help and protect Student in the midst of ongoing peer conflicts. However, the School and the District were prepared to provide such a person. (NT 534, 551; P 30; S 41.)
36. Parents asserted to District officials that their interventions had the effect of further isolating Student and causing a serious increase in Student's anxiety. (NT 65-92; P 19.)

37. Student's teacher, counselor and principal observed Student interacting with peers and concluded that Student was not socially isolated, although Student's interactions diminished with a group of three other children. (NT 279-286, 364-365, 458-459, 530-531; P 18 p. 3, P 19 p. 46; S 61 p. 1, S 65 p. 1.)
38. Student's difficulties were a pattern of conflict with peers that were reciprocal and Student was not consistently the victim in these conflicts. (NT 205-206, 354-356, 473-474, 742-743; P 19 pp. 45-53, P 30 p. 190, P 38 pp. 6-8.)
39. In November 2015, Parents asked Student's principal and counselor to move Student to a different third grade classroom, but the District declined, due to concerns that such a move could create a new set of problems, and opting instead to increase their observation and social skills instruction to all of the children in Student's classroom. (NT 124, 210-212, 298, 306-307, 314-317, 321, 518-520, 526-527; P 19 p. 65, P 35.)
40. In December 2015, the Director of Elementary Education raised the possibility of a change in classroom placement as a way of dealing with the ongoing conflicts between Student and peers and Student's consequent anxiety; this was raised in informal conversation as part of an exploration of any actions that the District could take in order to help Student with Student's anxiety as reported by Student's therapist. At that time, Parents disagreed with that option. (NT 515-516, 551-561; S 41.)
41. Student was evaluated for headaches, which were found to be stress-induced. Student did not take medications that were prescribed for the headaches. (NT 52.)
42. Parents held Student out from school in late December 2015. (NT 94-95, 97, 191; P 19 pp. 92, 96.)

#### UNILATERAL PLACEMENT IN THE PRIVATE SCHOOL

43. In December 2015, Parents considered removing Student from the District's school and placing Student in a private school setting. (P 30 p. 196.)
44. District personnel spoke with Student's therapist during a meeting on December 22, 2015 at Parents' insistence. (NT 53, 93-95.)
45. Parents removed Student from the District and placed Student in the School on January 7, 2016. (NT 95-98, 143, 191.)
46. On January 7, Parents provided a letter to the District, notifying it that they intended to seek tuition reimbursement at public expense for the cost of their placement of Student at the School. (NT 98; P 3.)

## DISTRICT JANUARY 2016 EVALUATION REPORT

47. Parents consented to a District evaluation of Student for special education under the IDEA in December 2015, and the District's assigned psychologist began testing in December and January. Parents provided written input in December. (NT 99-102; P 15.)
48. The District provided an Evaluation Report on January 28, 2016. (P 16.)
49. The evaluation report was based upon extensive parental input; input from three teachers; Student's contemporary grades and benchmark assessments; a classroom observation by the psychologist and the psychologist's observation during testing; cognitive and achievement testing; a test of phonological processing; a behavior assessment scale with participation by Parent and Student's regular education teacher; and a 49 item self-report to assess anxiety, in which Student answered questions orally. (P 16, 32.)
50. The District's psychologist considered Student's medical diagnoses of anxiety-based disorders in rendering her opinions. The psychologist spoke to Student's therapist over the telephone for 30 to 45 minutes prior to issuing the evaluation report, and was aware of the therapist's assessment of Student's anxiety. During that telephone conversation, the therapist did not indicate that the Student could not return to the District due to anxiety. (NT 447-450, 456-458, 470-471, 699; P 16, P 30 p. 198, P 32.)
51. The psychologist was not aware of a letter sent subsequent to the December meeting and prior to the telephone conversation with the psychologist, in which the therapist stated that the Student could not return to the District due to Student's anxiety. However, the psychologist was aware of the Student's need for the support of a trusted adult other than the school counselor, and believed that the District could provide such a person. (NT 446-450.)
52. The District's January 2016 evaluation report found that Student's cognitive ability is in the extremely high range. Student's achievement in mathematics was measured in the "high" range, and Student's achievement in most measures of reading and writing was above average. (P 16.)
53. Student's achievement scores in phonological processing and nonsense word decoding were average, showing relative weakness; this was confirmed in an additional test of phonological processing that showed functioning in the upper end of average to high average ranges. The evaluator concluded that, though this is an area of relative weakness, Student's classroom performance showed that Student was able to function in reading at a high level by compensating for this relative weakness, based upon a teacher report that Student was in the teacher's highest level word study group in class. (P 16.)
54. The psychologist did not rely upon two curriculum based assessments of Student's reading that provided varied scores. (NT 479-480.)
55. Although Student demonstrated a tendency to read quickly to the detriment of comprehension, Student's ability to read and comprehend did not regress during the first half of third grade. (NT 404-428, 443, 467-468, 593; P 16, 33; S 70.)

56. Student was able to access the curriculum and achieve significant academic success in third grade. Student's grades were 90 or above in all subjects, except for 89 in writing in the first marking period (raised to 90 in the second marking period) and 86 in social studies in the second marking period (down from 97 in the first marking period). Student's benchmark scores were proficient for mathematics and writing, but Student's score was 66 percent in reading on the single benchmark administration. (P 16.)
57. In third grade, Student did not need special education in order to achieve at a level commensurate with Student's cognitive ability. (P 16.)
58. The District's psychologist administered a behavior inventory designed to assess a child's behavior, emotions and social competence. On this measure, Parent's and the teacher's scores were substantially different. While Parent's responses indicated high levels of dysfunction and concern in a broad range of areas, the teacher's responses indicated average or no concerns in all areas but externalizing behaviors, in which the teacher's responses indicated "at risk" concerns. The teacher reported that Student "sometimes" bullies, picks on, hurts or gets back at others. The teacher's behavior inventory responses were consistent with the psychologist's observations of Student in the classroom and in the clinical setting. They were consistent with the narrative reports of Student's three teachers. (P 16.)
59. Parent's scores on a behavior inventory administered in December 2015 or January 2016 were so negative that the instrument flagged the Parent's responses for interpretation with "extreme caution". (NT 461-462; P 16.)
60. Student did not exhibit behavioral concerns in school to the same extent or degree as Parent had reported regarding Student's behavior at home. This may be due to Student's different behavior at home or Parent's different perceptions of Student's behavior at home. (NT 697, 702; P 16.)
61. Parent reported that Student was able to form social relationships outside of school with peers and adults. (P 16, 32.)
62. Teachers reported that Student was able to form social relationships at school for the majority of the time, despite problems caused by inappropriate social behavior. (P 16.)
63. Student's dysfunctional behaviors at school were a mild impediment to Student's overall achievement. In the school setting, Student was able to work collaboratively with others and form appropriate social relationships. (NT 162-163; P 16.)
64. Student's responses to the oral questions administered in the anxiety self-report instrument revealed no self-report of problems with defensiveness, physiological symptoms of anxiety, or social anxiety. Student reported moderately problematic levels of worry. Student's total anxiety score on this instrument was in the average range. (P 16.)
65. In the school setting in third grade, Student experienced significant anxiety, but that anxiety did not prevent Student from achieving substantial learning and success in the academics, emotional and behavioral regulation and social skills. (P 16, P 30.)

66. The District's evaluation report concluded that Student is not a child with a disability within the meaning of the IDEA, because Student's diagnosed anxiety cannot be classified as an emotional disturbance as IDEA defines it, and there is no evidence of either a specific learning disability or other health impairment, as IDEA defines them. These conclusions were based upon the finding that none of Student's diagnosed conditions have an adverse effect upon Student's educational achievement, within the meaning of those terms in the IDEA. (NT 112; P 16.)
67. The District's evaluation report recommended that Student continue to receive accommodations through a section 504 service plan due to Student's diagnosed anxiety disorder. (NT 445; P 16.)
68. The Parents and the District discussed the District's evaluation report at a meeting. Parents brought the report of Student's therapist, previously sent to the District, to the attention of the multi-disciplinary team. (NT 102; P 32.)

#### EDUCATIONAL PLANNING FOR 2016-2017 SCHOOL YEAR

69. Student was tested privately in August 2016 for reading ability. The testing indicated that Student was able to read competently at a fourth grade level, and exhibited many of the components of reading skill at the fifth and sixth grade levels. Nevertheless, Student continued to display relative weakness in reading comprehension skills, which supported a choice to continue Student's instruction at the fourth-to-fifth grade level, in view of Student's anxiety, or [at the] fifth-to-sixth grade level, in view of [redacted]. The report did not recommend which choice would be best. (NT 110; S 70.)
70. Student remains at the School pending Student's therapist's permission to return to a District school. (NT 156.)
71. After the December 2015 meeting with Parents and the private therapist, District officials did not convene another meeting. (NT 296-297.)
72. On March 4, 2016, the District revised Student's section 504 service agreement to provide additional accommodations including a transition plan should Student return to the District. (P 7.)

#### CREDIBILITY OF WITNESSES

73. Student sometimes reported events in a way that left an inaccurate impression that Student was being victimized or shunned by Student's peers. (NT 130-135, 139, 151-152, 202-203, 204, 219-220, 223, 232-241, 244, 354-356, 361-362, 713; P 18 p. 1, P 19 pp. 85-86, P 27, P 16, P 32 p. 8, 11; S 35 p. 2.)
74. Parent's understanding of events occurring at school was based primarily upon Student's reports to Parent, which Parent considered to be corroborated by telephone calls from parents of Student's peers, as well as emails from District staff. (NT 270; S 35.)

75. Although Parent considered incidents of conflict between Student and a particular peer in second grade to have constituted bullying, Student's teacher did not consider any such conflict to have been bullying. (NT 163-178.)
76. Student's therapist in September through December 2015 did not speak with District officials about events at the District school except for a telephone conference in December in which the therapist participated in a meeting with Parent and two school personnel, and a single telephone conversation on January 16, 2016, with the District's psychologist when the psychologist was preparing the District's January 2016 evaluation report. (NT 213, 262-263, 347, 448-449, 456-458, 557-561, 786-787; P 16, P 30 pp. 193, 196; S 41.)
77. The therapist and psychologist discussed the psychologist's assessment that Student's behavior in school was significantly different from that displayed at home, but there was no discussion of the therapists' assertion that the District school was not a safe or appropriate placement for Student. The psychologist was not aware of that report at the time of the telephone conversation. (NT 447-449, 456-458, 761-774; P 3 pp. 3-4, P 16.)
78. Student's therapist in November 2015 through the present expressed opinions that were biased in favor of Parents' unilateral placement at the School. The therapist did not speak with District officials about events at District school. The therapist reported in writing that part of the testing for the District's January 2016 evaluation report was not performed under "standard conditions", based solely upon Student's report, without seeking to verify the details of Student's report with the school psychologist who administered the testing. Yet the therapist contacted a teacher at the School as part of the therapist's data supporting the recommendation in favor of the private placement. The therapist's report was made in anticipation of litigation. (NT 157-158, 241, 807-810, 814, 822, 841-842, 845-851; P 27.)
79. Student's second grade teacher did not remember a meeting in October 2014 in which Parents brought up an allegation that a peer had been bullying Student. (NT 167-168, 274, 347.)

## **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.<sup>3</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 produce a preponderance of evidence<sup>4</sup> that the moving party is entitled to the relief requested 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 “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 the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claims, or if the evidence is in “equipoise”, the Parents 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)(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).

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<sup>3</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 (which in this matter is the hearing officer).

<sup>4</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.

Accordingly, I have weighed the evidence and made specific findings regarding credibility as applied to the specific issue of fact before me.

I accord reduced weight to Parent's testimony with regard to the District's knowledge and observations of Student's opportunity to access the curriculum and receive meaningful educational benefit, as well as the interactions between Student and Student's teachers, counselor and principal. With regard to the facts in these areas of concern, I find that Parent's testimony is unreliable.

Parent's understanding of events that transpired at school was unreliable as to findings pertaining to those events because Parent's understanding was not based upon personal observation or perception; rather, it was based entirely upon hearsay, most of which consisted of Student's reports and characterizations of events. I find that Student was an unreliable reporter of events at school, because Student's reports of such events were variable depending upon the intended recipients. Moreover, other sources of information available to Parent were not sufficient for purposes of my findings to corroborate the hearsay basis of Parent's understanding of events. The email correspondence of District personnel did not corroborate Student's reports of events in any material respect. Moreover, the reports of other parents were themselves hearsay and thus insufficient to convert Student's hearsay reports into reliable evidence. The bulk of the record, moreover, contradicted Parent's understanding of events that occurred at school.

I accord reduced weight to the reports of Student's therapists regarding Student's interactions with Student's teachers, counselor and principal, and regarding the District's responses to Student's needs. Both of these therapists accepted as true Student's and Parents' statements about these areas of fact. Neither therapist made any effort to corroborate such statements, yet both rendered opinions as to the appropriateness of the District's school and

services. I find that such opinions lack any credible basis in fact. I find that the experts' willingness to offer such opinions without any effort to corroborate the underlying factual basis calls into question the therapists' reliability as witnesses.

No doubt, in therapy it is the subject's subjective perception of events that is important, and I do not question – nor could I question - the acceptance of the subject's characterization of events for therapeutic purposes. Yet in a forensic setting, the therapeutic reality does not become objective reality ipso facto. Here, the therapists, who no doubt provided needed credence to Student's and Parents' impressions of events, failed to provide the bare minimum of factual basis for their assertions as to events at school.

I find that the District witnesses were credible and their testimony was reliable in all material respects. I base this upon the consistency of their reports with each-others' reports, with only a few, non-material exceptions. I also base this upon corroboration of most of their material assertions through exhibits created contemporaneously with the witness' assertions. I also base this upon the manner in which these witnesses answered questions, all of whom answered in a professional manner, volunteering information when needed to explain their answers, and readily admitting facts that seemed to weigh against them or their employer. This was especially true of the testimony of the school psychologist, whose testimony impressed as most reliable. Although one teacher and the counselor appeared to be somewhat defensive in responding, I find that their testimony on the whole remained credible and reliable.

Parents make much of contradictions among the recollections of various District personnel as to what transpired during two meetings in which Parents brought up their concerns about Student's social relationships at school. I find that these conflicts in the testimony do not vitiate the witness' credibility.

First, the second grade teacher did not remember an allegation of bullying or conflict reported during an October 2014 meeting that she attended, while the record supports the finding that this did occur. I draw no inference from this that the matter was not brought up at the meeting. To the extent that this weighs against the teacher's reliability, I do not find that it vitiates her testimony as to other matters. I credit the lapse of memory to the passage of time for this teacher, whose responsibilities included multiple children.

Second, two District witnesses contradicted the statements of the principal and director of elementary services that the director explored changing Student's class with Parents at a December meeting, and that the Parents declined such option. The two witnesses testified that the District never offered a class change, and one witness testified to her understanding that Parents desired a class change at that meeting. I give less weight to the contradictory statements, because neither of these witnesses was present in the meeting, and because the discussion for a class change was informal, resulting in no formal offer of which either contradicting witness would have been aware. I weighed this evidence in favor of the director's and principal's accounts, because they were present, they corroborated each other, and the contemporaneous notes of the director were consistent with their accounts.

In sum, the weight of the testimonial evidence concerning events at school favors the accounts of District personnel.

#### CHILD FIND UNDER THE IDEA AND SECTION 504

Under the IDEA "child find" requirement, 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a), (c), a local education agency has a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability." Ridley Sch. Dist. v. M.R., 680 F.3d 260,

271 (3d Cir. 2012)(citing P.P. v. West Chester Area School District, 585 F.3d 727, 738 (3d Cir. 2009)); Perrin v. Warrior Run Sch. Dist., 2015 U.S. Dist. LEXIS 149623 (M.D. Pa. 2015). Section 504 imposes a similar obligation.<sup>5</sup> See P.P. v. West Chester Area School District, 585 F.3d above at 738; 34 C.F.R. §104.35(a).<sup>6</sup>

Local educational agencies are required to fulfill their child find obligation within a reasonable time after notice of behavior that is likely to indicate a disability. Ridley Sch. Dist. v. M.R., 680 F.3d above at 271-272. An agency has a “child find” obligation to evaluate if its personnel should have “reasonably suspected” that Student was a child with a disability as defined under the IDEA or section 504. Ridley Sch. Dist. v. M.R., 680 F.3d above at 271; Perrin v. Warrior Run Sch. Dist., 2015 U.S. Dist. LEXIS 149623 (M.D. Pa. 2015); P.P. v. West Chester Area School District, 585 F.3d above at 738. The courts will assess the reasonableness of an agency's response to such information on a case-by-case basis, in light of the information and resources possessed by the agency at a given point of time. Ibid.

#### THE DISTRICT’S OMISSION TO EVALUATE IN SECOND GRADE

Parents argue that Student displayed behaviors that should have alerted District personnel to the likelihood of the disabilities of “emotional disturbance” and “specific learning disability” under the IDEA during Student’s second grade year. The evidence is preponderant that Student’s behaviors in second grade did not indicate the possibility of either such disability as defined by the IDEA or by section 504.

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<sup>5</sup> Pennsylvania regulations further define students protected under section 504 as “protected handicapped student[s]”. Arguably broader than section 504 itself, the Pennsylvania regulation requires accommodation of any otherwise qualified student whose mental disability “substantially limits or prohibits participation in ... an aspect of the student’s school program.” 22 Pa. Code 15.2.

<sup>6</sup> It is undisputed that Student is “otherwise qualified” within the meaning of section 504, and that the District is a recipient of federal funds. (NT 13.)

The IDEA's definition of "emotional disturbance" requires a substantial detriment to education: A child, even if diagnosed with a clinical emotional disturbance, is defined as a "child with a disability" under the IDEA only if the diagnosed condition is "exhibit[ed]" "to a marked degree that adversely affects [the] child's educational performance." 34 C.F.R. §300.8(c)(4)(i). The evidence is preponderant that Student did not exhibit anxiety in school "to a marked degree" or in such a way as to adversely affect Student's performance. On the contrary, I find that Student performed at a high level in second grade, both socially and academically.

Similarly, I conclude that the District was not obligated to evaluate under Chapter 15 of the Pennsylvania Code, which implements section 504. The evidence is preponderant that the District was not on notice that Student's anxiety disorder "substantially limit[ed] or prohibit[ed] participation in ... an aspect of the [S]tudent's school program." 22 Pa. Code 15.2. On this record, Student, despite Student's disorder, was able to function fully both behaviorally and socially in school.

I also conclude that Parents failed to prove by a preponderance of the evidence that the Student's second grade performance in reading triggered a "child find" obligation to inquire into a specific learning disability. The evidence shows that Student was performing well in reading in second grade. Student was reading at or above grade level, and achieving high marks in all subjects.

Parent makes much of two curriculum-based assessments that Parents interpreted to indicate regression in reading skills. They argue that, in light of Student's very high tested IQ, Student should have made progress in reading, and that these two assessments show a disability affecting reading that should have triggered a District evaluation. I do not accept this argument.

The argument fails because its premise, that the two assessments showed academic regression, is contrary to the record. Based upon a preponderance of the evidence, which includes contrary interpretations by District evaluators, and contrary scores in reading on standardized testing, I find that Student did not display regression in reading skills, and that Student's relative weakness in some elements of reading skill did not impede Student's learning or seriously impact Student's achievement in the District's curriculum. Therefore, Student's reading did not raise a reasonable suspicion that Student was a child with a disability as defined either in the IDEA or in section 504.

I conclude by a preponderance of the evidence that, during Student's second grade year, the District was not on notice of behavior that should have raised a suspicion of disability as defined in the IDEA or section 504. Therefore, the District was under no IDEA or section 504 obligation to initiate an evaluation of Student during or immediately after Student's second grade year.

#### THE DISTRICT'S OMISSION TO EVALUATE IN THIRD GRADE

I reach the same conclusion regarding the period between the start of Student's third grade year and November 2015, when Parents requested an evaluation, and thus obligated the District to evaluate regardless of their "child find" obligation.<sup>7</sup> Parents argue that the District was on notice that Student was being "bullied" by another student and that this was adversely impacting Student's education, both in the social and academic spheres.

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<sup>7</sup> The Parents' "child find" argument applies to the period from the start of school in third grade until the date of Parents' request for an evaluation. Immediately upon Parents' request, the District proceeded to perform an evaluation in timely fashion, and Parents do not suggest otherwise.

The record is preponderant to the contrary, at least for the period from the beginning of school to the end of October, when Parent sent an email message to Student's third grade teacher, alerting her to the alleged "bullying". Subsequently, the District responded, and the record is preponderant that the District's response was appropriate to the degree of dysfunctional social behavior that Student was displaying, which the District's personnel credibly described as conflict, not bullying, as reciprocal, not one-sided, as "sometimes", not continual. I find that the degree of conflict, while it escalated from November through December, was not the acute, debilitating condition that Parents depict. I find that the evidence is not preponderant that this conflict had a serious impact on Student's social life in school or Student's learning in school, nor was there reason to suspect any such impact. Thus, as with second grade, the District was under no "child find" obligation to evaluate Student from the beginning of third grade to December 3, 2015, when it received a completed Permission to Evaluate form from Parents.

#### 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 a private placement when parents unilaterally remove a child and enroll the child in a private school. 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 and placement legally appropriate under the IDEA? 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 (3rd Cir. 2007). This three-part test is referred to as the “Burlington-Carter” test for tuition reimbursement claims under the IDEA.

## FREE APPROPRIATE PUBLIC EDUCATION

The first part of the Burlington-Carter test, legal appropriateness of the offered program and placement, refers to whether or not the District has offered to provide Student with a FAPE prior to the parents’ unilateral placement in a private school. The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE is “special education and related services”, at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247

(3d Cir. 1999). In order to 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 (3d Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3d Cir. 1988).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Ridley Sch. Dist. v. M.R., 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 program and its execution were reasonably calculated to provide meaningful benefit. 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.) Its appropriateness must be determined as of the time at which it was made, and the reasonableness of the 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).

Student was not identified under the IDEA, but the applicable legal standards for determining whether a section 504 FAPE was provided are virtually identical to those stated above. See P.P. v. West Chester Area School District, 585 F.3d above at 738; 34 C.F.R. §104.33(b)(1). Section 504 requires that a local educational agency “afford ... an opportunity to ... benefit from [its services]” that is “equal to that afforded to others”, 34 C.F.R. §104.4(b)(ii); that is “as effective” as the services provided to others, 34 C.F.R. §104.4(b)(iii); and that provides “equal opportunity to reach the same level of achievement” as the opportunity provided to others, 34 C.F.R. §104.4(b)(vii)(2).

#### THE DISTRICT OFFERED AND PROVIDED AN APPROPRIATE PLACEMENT AND PROGRAM FOR STUDENT DURING STUDENT’S THIRD GRADE YEAR

Pursuant to the above legal standards, the District offered an appropriate placement and program to Student for third grade. Student [redacted] was placed in a regular education environment with [advanced instruction] in mathematics. In third grade, the evidence is preponderant that Student performed at or above grade level at all times, and that, until December of Student’s third grade year, Student functioned well both academically and socially. The evidence is preponderant that the District’s placement provided Student with opportunities to achieve, both academically and socially, that were equal to those enjoyed by Student’s peers, 34 C.F.R. §104.33(b)(1).

Parents testified to a very different impression of Student’s third grade year, but I find that their assertions are not supported by preponderant evidence. They assert that Student was being bullied, but their impression, based upon hearsay, contradicts the weight of the evidence from teachers, counselor and principal who observed Student every day and in almost every setting.

They assert that Student's anxiety increased to alarming levels, and while I reach no contrary finding with regard to Student's functioning at home, the preponderant evidence, both testimonial and documentary, demonstrates that Student was functioning well in school despite rising anxiety and significant, but not predominant or age-atypical, social conflict. Parents argue that District personnel, upon receiving Parents' allegations of bullying, embarked upon a broad investigation that increased Student's anxiety and destroyed Student's sense that school was a desirable, safe place; yet, the evidence in support of this is entirely subjective hearsay from Student and for reasons set forth above, is accorded less evidentiary weight.

As to the interventions of the District counselor and principal in November and December 2015, Parents argue that these interventions damaged Student's attitude toward school. Indeed, section 504 regulations define discrimination as including "methods of administration" that "substantially impair[r]" the "accomplishment of the objectives" of the program – in this case, Student's appropriate education. 34 C.F.R. §104.4(b)(vii)(4)(ii). Yet the record is not preponderant that the investigations of Parents' allegations of bullying had any such effect. The December-January evaluation, supported by a variety of sources of information, found conclusively that Student was achieving appropriately in the placement provided.

Parents' challenges to this evaluation are not well taken. Parents argue that the psychologist failed to consider both the notes of Student's therapy with the Student's first therapist and the therapist's January letter report arguing that Student's placement was inappropriate and that Student could not return to school. Yet nowhere does the law require review of a therapist's notes for an evaluation of Student's need for special education and accommodations, when notes have not been provided by the Parent for that purpose. Nor is there preponderant evidence that such a review would have led to information contrary to the ultimate result of the evaluation – that Student

is not IDEA eligible, and that the District should continue to provide Student with a section 504 service agreement and regular education placement. Thus, the evidence does not show that the psychologist's omission to review these documents had any detrimental effect on the reliability of her conclusions.

Similarly, Parents argue that the psychologist failed to consider the effect of the two curriculum based assessments upon her conclusion that there was no learning disability. However, the record showed preponderantly that these two assessments did not show regression in reading, as Parents assert; thus, again, there is not preponderant evidence that the psychologists' omission to consider these curriculum based assessments undercut the validity of her findings that there is not a specific learning disability as defined in the IDEA.

Likewise, Parents argue that the psychologist was wrong to rule out Other Health Impairment because the therapist recommended against returning Student to school due to Student's anxiety disorder. Yet the psychologist was aware that Student was diagnosed, and aware that the Parents were concerned about the need for a trusted adult to support Student in view of Student's distrust of Student's assigned counselor; the psychologist credibly believed that such support could be put in place. Thus, the psychologist in fact did consider the heart of the therapist's basis for recommending against return to school, and the evaluation is not undercut because the psychologist reached a different conclusion.

Finally, Parents argue that the District refused to make a relatively small and practicable change in placement, thus discriminating against Student under section 504, 34 C.F.R. §104.4(b)(vii)(5). Parents wanted Student's classroom assignment to be changed in mid-year, and requested this in November. At first, the District declined, because it anticipated possible adverse consequences, and also because it believed that it could institute different accommodations to

ameliorate Student's anxiety. Indeed, it did institute a number of accommodations. However, Parents remained unsatisfied.

The evidence is mixed as to Parents' factual premise – that the District refused to change Student's classroom upon their request. As discussed above with regard to credibility, I weighed the conflicting evidence and find that the District was not adamantly opposed to granting Parents' request. On the contrary, District officials raised a change in classroom assignment in December as a possible accommodation, but Parents at that time refused the suggestion. Thus, Parents' argument as to District refusal to provide a reasonable accommodation must fail.

Underlying all of Parents' arguments is the belief that, [redacted], Student should have been achieving in second and third grade at a much higher level than Student demonstrated, both academically and socially. The record does not support this fundamental assertion preponderantly. Moreover, neither IDEA nor section 504 requires the District to guarantee that a child will achieve to the child's greatest potential. Rather, it requires evaluation upon reasonable suspicion, and supports and accommodations when necessary to provide the child with an opportunity for meaningful achievement, commensurate with the opportunity provided to all<sup>8</sup>. On this record, the District provided such opportunity to Student; thus, it did not deny Student the services that the law requires.

#### TUITION REIMBURSEMENT DENIED

As I find no deprivation of a FAPE under either the IDEA or section 504, it is not necessary to reach any conclusions as to the appropriateness of Parents' unilateral placement or the equitable

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<sup>8</sup> While meaningfulness must be assessed in light of cognitive potential, as I have done in this matter, Mary Courtney T. v. School Dist. of Phila., 575 above at 240, the FAPE obligation does not require a district to maximize a student's potential, Ridley Sch. Dist. v. M.R., 680 above at 269.

considerations inherent in an order for tuition reimbursement. Parents have failed to prove a deprivation at the first level of the Burlington-Carter analysis. Therefore, their request for tuition reimbursement is denied.

### **CONCLUSION**

In sum, I find that Parents have failed to prove a violation of the District's "child find" obligation under either the IDEA or section 504. Likewise, Parents have failed to prove a denial of a FAPE under either law. Consequently, they are not entitled to intervention by this hearing officer.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the requests for relief are 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.*

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

December 5, 2016