

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: I.R.

Date of Birth: [redacted]

ODR No. 17114-15-16-AS

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent(s)

James J. Conaboy, Esquire  
Abrahamsen, Conaboy & Abrahamsen, P.C.  
1006 Pittston Avenue  
Scranton, PA 18505

Stroudsburg Area School District  
123 Linden Street  
Stroudsburg, PA 18360

Kristine Roddick, Esquire  
King, Spry, Herman, F & F LLC  
One West Broad Street, Su. 700  
Bethlehem, PA 18018

Dates of Hearing:

January 14, 2016; February 17, 2016;  
February 29, 2016; March 30, 2016

Record Closed:

April 18, 2016

Date of Decision:

May 3, 2016

Hearing Officer:

William F. Culleton, Esq., CHO

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> is a resident of the District named in this matter (District). Student is identified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), as a child with the disabilities of Autism, Intellectual Disability and Speech or Language Impairment. Student is enrolled in the District but Parents have kept Student home from school since October 2015. Parents assert that Student should never be physically restrained, that the frequent use of physical restraint in Student's placement was harming Student. They urge the conclusion that Student's placement and the IEP proposed by the District fail to offer a FAPE.

The District requests due process in order to determine whether or not it has offered a free appropriate public education (FAPE) to Student. The District also requests an order authorizing it to re-evaluate Student without parental consent. Parents did not file for due process and are not requesting a hearing officer order. Their assertions of fact are pertinent only as a defense to the District's complaint.

The hearing was conducted in four sessions between January and March 2016. The closing of the record was delayed because the hearing officer directed that Parents produce Student's therapist for testimony, thus adding a session and requiring accommodation of the therapist's schedule. (NT 45-47.) Due to the nature of the issues, written summations were needed, and the record closed upon receipt of summations. I conclude that the District has offered a FAPE, and I authorize the District to re-evaluate Student in the absence of parental consent.

### **ISSUES**

1. Does the June 10, 2015 IEP, as revised, offer Student a free appropriate public education as defined in the IDEA?

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<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 here in order to guard Student's confidentiality.

2. Is Student's current placement in a full-time autistic support classroom operated by the governing Intermediate Unit and located in the Student's neighborhood school an appropriate placement, notwithstanding the classroom program's use of restraint?
3. Should the Hearing Officer authorize the District to proceed with a re-evaluation of the Student, notwithstanding Parents' revocation and withholding of consent?

### **FINDINGS OF FACT**

1. Student is identified under the IDEA as a child with the disabilities of Autism, Intellectual Disability and Speech or Language Impairment. (HO 1, 2 para. 4.)
2. Student is profoundly developmentally delayed. Student has serious behavioral, self-help, communication, sensory and task-completion needs. Student is non-verbal and communicates via a manual communication binder consisting of core and fringe extended vocabulary, as well as through behaviors. Student's sensory needs include difficulties with noise level, messy things, food smells and physical activities, which cause overstimulation. While in school, Student was not yet toilet trained. (NT 54; HO 1, 2 para. 5, 6, 7.)
3. At home, Student has exhibited and exhibits behavior problems including aggression toward Student's father, biting self and scratching self in the face, breaking the skin with resulting infections. (NT 245-264, 283-284; J 1, J 43, 46 p. 48, 51.)
4. Student has exhibited serious sleeping difficulties, often being awake for hours in the middle of the night. Medication for these difficulties has not been effective. (NT 245-247, 254-264, 270-274; J 42, 43, 46.)
5. Parents have not accepted services in the home despite repeated recommendations by medical service providers. (NT 254-25; J 43, 46.)
6. Student has a history of significant behavior problems in school, primarily aggressive in nature. These include biting, scratching, hitting, kicking, desk tipping, crying, screaming, dropping to the ground, throwing materials, and charging staff. Some of Student's serious and dangerous behaviors continued to be displayed in school until Student's last day of attendance in October 2015. (J 1, 44, 45.)
7. Student received early intervention programming in both Pennsylvania and another state, including center-based special education programming, speech and language support, occupational therapy, physical therapy, and adapted physical education and bus transportation. (J 1.)
8. From first through fourth grades, Student attended a full time special education classroom operated by the local intermediate unit (IU); this was located in various school buildings that were operated either by the District or by a different school district. (J 1, 9.)

9. When Student was in third grade, the IU conducted a functional behavioral assessment and provided a behavior intervention plan for Student. (J 9.)
10. Student is a resident of the District. Parents moved into the District in October 2014, and enrolled Student in the District from October 22, 2014 to date. (NT 6, 82; HO 1, 2 para 2, 3.)<sup>2</sup>
11. Between October 22, 2014 and March 2015, when Student was in fourth grade, the District placed Student in, and Student attended, a full time special education classroom operated by the IU in a school building operated by a different school district. (NT 83-85; HO 2, 3 para. 34, 35; J 1, 9.)
12. During September, October and/or November 2014, an aide employed by the IU abused Student physically by repeatedly isolating and restraining Student, as well as by roughly touching Student in violation of Pennsylvania criminal statutes. (NT 83-85; HO 2, 3 para. 41.)
13. On February 11, 2015, the District convened an IEP team meeting regarding Student. It continued Student's educational placement of full-time autistic support, but brought Student back to one of its own schools, which happened to be Student's neighborhood school, in an autistic support classroom operated by the same local intermediate unit. (J 8.)
14. The offered program and placement was and is part of the Pennsylvania Autism Initiative of the Pennsylvania Department of Education, Bureau of Special Education. (HO 1, 2 para. 9.)
15. The offered program and placement utilizes methodologies approved by the Pennsylvania Department of Education, Bureau of Special Education, following the research-based Applied Behavior Analysis methodology, including direct, sequential, one-to-one instruction in basic skills of behavior, communication and language. The program is data-based and requires rigorous teaching and data-keeping services. It provides communication with parents on a frequent basis. (NT 626-631; J 35, 37, 39.)
16. The IU program utilizes physical restraint in the form of various “holds” by adult staff. Its policies restrict such restraint use to situations in which restraint is necessary for the safety of the child or others. IU policy requires staff to use hands-free de-escalation techniques whenever it is safe to do so before employing physical restraint techniques. All IU staff are trained in these policies and in the proper implementation of physical restraint techniques. Supervisory staff monitor the implementation of IU physical restraint policies in order to assure fidelity. (NT 626, 631-645; 657-676.)

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<sup>2</sup> The parties moved exhibits into evidence that were marked Joint (“J”), School (“S”) or Parent (“P”). By agreement of counsel, the parties’ detailed pleadings, including precise admissions, denials and new matter, are considered stipulations of fact in this record. (NT 5-6.) For convenience, I have admitted into evidence my marked-up hearing officer copies of these as “HO 1” for the Complaint, “HO 2” for the Answer and New Matter, and “HO 3” for the District’s response to the New Matter. My markings indicate only where I read the pleadings as creating a stipulated fact. The Office for Dispute Resolution (ODR) will certify “clean” copies of these pleadings as part of the record in case of appeal, pursuant to standard legal practice.

17. Physical restraint of the kind employed in the IU program is a necessary component of any educational program, as long as it is employed only where necessary to prevent dangerous behavior. (NT 516-520, 530, 571-575, 613-619, 664-666, 682-688, 735-736; S 10.)
18. The IEP offered by the District in February 2015 included an Occupational Therapy goal addressing bilateral coordination skills; a self-help goal for washing of hands; communication goals involving identifying item names and requesting others to perform specific actions; identifying colors and shapes; answering yes/no questions; and decreasing the occurrence of problem behaviors. All goals were measurable; for some goals no baseline was available, and baselines for those goals were stated as zero. (J 8.)
19. The February 2015 IEP provided for modifications and specially designed instruction following Applied Behavior Analysis principles, including: differential reinforcement; errorless learning; intensive one-to-one teaching of basic skills; interspersal of easy and difficult targets; behavior data collection; personal care assistance; positive behavior support; probe data; prompting; systems of reinforcement; integrated speech and occupational therapy model of delivery of related services; transfer trials; visual supports; chaining; activity schedule; mixing-in varying targets and tasks; modeling; behavior shaping; Verbal Behavior Milestones Assessment And Placement Program (VB-MAPP); teaching “ready” behaviors; provision of quiet areas and movement breaks. (J 8.)
20. The February 2015 IEP offered speech and language services, delivered individually, one time per week for 30 minutes; occupational therapy, individually delivered, one time per week for 30 minutes; adapted physical education, one time per week for 45 minutes; and special transportation, home to home. (J 8.)
21. The February 2015 IEP offered extended school year services including: autistic support class, three hours per day, four days per week, for four weeks; speech and language therapy, one time per week, 30 minutes per session, including whole group, small group and individual instruction as needed, for four weeks; occupational therapy, one time per week, 30 minutes per session, including whole group, small group or individual instruction, for four weeks. (J 8.)
22. Parents became aware of the physical abuse in March 2015 and removed Student from the IU placement immediately. (NT 83-85.)
23. Parents shared with the District a note from Student’s physician recommending that Student be placed on homebound status in order to “prevent” Post-Traumatic Stress Disorder (PTSD). (NT 54-55; J 6.)
24. The District never received documentation of a diagnosis of PTSD. (NT 54-55, 221, 267-268; J 6, 19, 42, 43, 46.)
25. On March 30, 2015, the IEP team revised the IEP to clarify that personal care assistance would be delivered through a one-to-one aide, and that Student would be attending at the

neighborhood school. The team also discussed assistive technology and Parents' concern that the school day was too long for Student. Parents agreed to try the full school day, with a subsequent IEP team review. (J 8.)

26. Student began attending school in the offered placement on or about April 9, 2015. Student began attending for a modified school day, with dismissal at 2 P.M. (HO 1, 2 para. 22; J 8, 9.)
27. From April 10, 2015 to October 2015, IU personnel kept systematic data on Student's behaviors, including the number, intensity and duration of incidents and the antecedents and consequences. (J 32, 44.)
28. The District convened an IEP team meeting on April 8, 2015. Parents attended. Parents indicated that they had a doctor's note indicating that Student should be placed on homebound status. However, Parents indicated that they were not going to seek homebound status at that time. In addition Parents signed a permission to re-evaluate Student for purposes of trialing augmentative communication devices. (J 5, 6.)
29. On April 8, 2015, the IEP team revised the IEP to add specially designed instruction in the form of a communication log, including communication when restraint is involved. The revision also clarified the nature of the provided quiet area by removing the small size specified in the February 2015 IEP. (J 8, 37.)
30. The IU teachers addressed Student's emotional needs by encouraging Student to express emotions through Student's available communication device, the picture book. (NT 423-424, 748; J 8.)
31. On April 9, 2015, Parents delivered the letter recommending homebound status to the District's director of special education. (J 6.)
32. On April 21, 2015, the IEP team met and revised the IEP to clarify and add information to Present Levels of Academic and Functional Performance. The team discussed Student's new behaviors; problems getting Student onto the bus in the morning; an incident of restraint; Parents' concern that the school day was still too long; and a plan to assess Student's need for augmentative communication devices. (J 8.)
33. During the April 21, 2015 IEP meeting, Parents expressed agreement that some restraint might be necessary as a last resort in order to protect Student's safety and the safety of others. (J 8.)
34. During the April 21, 2015 IEP meeting, IU personnel assured Parents that they would be notified whenever an incident of restraint occurred, and that they were free to come to the school at any time. However, they requested that Parents refrain from taking Student home after incidents of restraint. They explained that taking the Student home might reinforce the behaviors that necessitated the use of restraint. Parents understood and agreed. (J 8.)

35. At the April 21, 2015 IEP meeting, the team the team did not decide to place Student on homebound status; the team agreed to shorten the Student's school day by half an hour beginning on the next day. Subsequently, the District issued a Notice of Recommended Educational Placement (NOREP) proposing to change Student's program and placement. The District proposed to reduce Student's hours at school by 30 minutes per day, and to add to Student's program 30 minutes per day of educational services provided through Instruction in the Home. The NOREP indicated that the purpose of this change was to help Student transition to the new school environment. On May 11, 2015, the District received Parents' response, disapproving the recommended action. (J 7.)
36. On May 4, 2015, by telephone conference with a waiver of IEP meeting, Parents and the District director of special education agreed to increase Student's school day by 30 minutes. Parents again declined instruction in the home. (J 8.)
37. At an IEP team meeting on May 8, 2015, the IEP team discussed restraint. Program personnel explained that restraints are needed, and that the data indicated at that time a decrease in the duration of restraints. All restraint procedures were explained to Parents, who indicated an understanding of the need to utilize restraint. At this meeting, the team also discussed toilet training, extended school year, transition to full day, increasing related services, the District's request for permission to re-evaluate Student and other needs. Parents agreed to the re-evaluation. (J 8.)
38. On May 8, 2015, the IEP team revised the IEP to add a toileting goal, with an attached, data-based toilet training procedure; it also increased the Occupational Therapy goal to be delivered two times per week for 30 minute sessions, and increased speech and language sessions to be delivered two times per six day cycle for 30 minute sessions. (J 8, 36.)
39. While in school, Student received occupational therapy services consistent with the May 2015 IEP. (HO 1, 2 para. 12(c).)
40. Between April 10, 2015 and June 5, 2015, Student had twenty-seven behavioral incidents, each of which lasted between several seconds and fifteen minutes in duration. Thirteen, or 45%, of these incidents required the use of passive restraint. (J 10, 28.)
41. Between April 9, 2015 and June 10, 2015, Student was absent 13 days, and was late one day. (J 14, 28.)
42. In the fourth marking period of fourth grade, Student made some progress in requesting items; identifying colors and shapes; decreasing the number of behavioral incidents; and learning the multiple steps of hand washing. Student showed little progress in tracing shapes or naming items receptively. Some goals were not introduced. Student did not meet any of the goals set forth in the existing IEP. (J 14, 39.)
43. On May 27, 2015, the District issued a re-evaluation report for Student. (HO 1, 2 para. 10.)

44. The re-evaluation recognized the following needs: decreased behavioral incidents; imitate motor movements; cutting of shapes; identifying reinforcing items; hand-washing; use of communication book to make requests; task completion skills; use of communication book to express wants and needs; and matching new to old pictures. (J 9.)
45. The re-evaluation recommended a focus on increasing functional independence, communication skills and functional academics. It recommended continuation of a positive behavior intervention plan and use of a designated personal care assistant. It recommended shorter intensive teaching sessions, with scheduled physical movement activities in between them. It recommended continuation of related services. (J 9.)
46. The re-evaluation recommended the use of prompt hierarchy; creative motivational strategies; and flexibility when Student has a difficult time with self-regulation. It noted that the latter should include temporary lowering of demands. Other techniques recommended were: visual schedule; preselected highly valued reinforcement for new tasks; and consistent wording and structure in regard to task demands. (J 9.)
47. On May 27, 2015, the District offered Parents an IEP based upon the re-evaluation report of the same date. (HO 1, 2 para. 11.)
48. The May 27, 2015 IEP offered occupational therapy in the amount of two thirty-minute sessions per week. (HO 1, 2 para. 12(c).)
49. The District conducted an IEP team meeting on June 10, 2015. During the IEP meeting, Parents acknowledged that Student had shown an increase in use of technology; better affect; attempting to communicate at home; a happier mood; and the effectiveness of the IU intervention method in calming Student. Parents also expressed concern with Student's negative behaviors at school. (J 10.)
50. At the June 2015 IEP team meeting, District personnel indicated an intention to reduce the frequency of restraint use with Student, in response to Parents' request. (NT 60.)
51. The June 2015 IEP recognized a new educational need: to improve Student's ability to transition between activities. (J 10.)
52. The June 2015 IEP proposed goals to address self-help skills (hand washing); receptively identifying pictures of items; requesting continuation or cessation of an activity; requesting actions of others; reduction in problem behaviors; increase in task completion skills; matching new items to identical pictures; imitation of gross motor actions; transitioning from preferred sensory activity to seated work; and cutting out simple shapes. (J 10.)
53. The IEP continued to offer modifications and specially designed instruction in the form of numerous Applied Behavior Analysis techniques, and included toilet training, verbal intervention, physical intervention to block dangerous behavior and communication with parents regarding use of restraint. (J 10.)

54. The June 2015 IEP continued to offer speech and language therapy, individual basis, two times per six-day cycle, 30 minutes per session. It continued to offer occupational therapy, individual, two times per week, 30 minutes per session. It also continued adapted physical education once per week and special transportation, home to school and school to home. (J 10.)
55. The June 2015 IEP continued to offer extended school year services to Student. (J 10.)
56. On June 10, 2015, the District provided assistive technology and augmentative communication device assessment reports, recommending trials of augmentative communication devices. (HO 1, 2 para. 13; J 11, 12.)
57. On June 22, 2015, the District offered a NOREP continuing full-time autistic support in Student's neighborhood school, with the interventions set forth in the June 2015 IEP. (J 10.)
58. On June 22, 2015, the District offered extended school year (ESY) services via NOREP. Parents did not approve the NOREP, thus rejecting the services as offered. (HO 1, 2 para. 16; J 13.)
59. Parents approved the IEP and the Notice of Recommended Educational Program (NOREP) dated June 22, 2015, which offered the program embodied in the May 27, 2015 IEP. (HO 1, 2 para. 11.)
60. In July 2015, Student began weekly therapy sessions with a private therapist, to address Student's history of trauma. (J 19; P 9.)
61. Between August 31, 2015 and October 26, 2015, Student's attendance was sporadic. Student was absent on forty-eight percent of available school days during this period. (HO 1, 2 para. 22.)
62. Between August 31, 2015 and October 26, 2015, Student was late on eight days and picked up early on eight days. On three days Student was late arriving and was picked up early. (J 28.)
63. During this period of time, Student engaged in 57 episodes of problematic behavior; passive restraint was applied on 10, or 17%, of these occasions. (J 28.)
64. The District convened the IEP team on September 1, 2015. The team reviewed steps taken in pursuit of the plan for trialing augmentative communication and other assistive technology devices. It also reviewed the current IEP; policies and procedures for employing physical restraint as a last resort after attempting hands free de-escalation; toilet training; transportation; and coordination with a planned home program. (J 16.)
65. At the September 2015 meeting, the team reviewed a report that Parents provided from non-physician staff of a medical facility. The report did not indicate a diagnosis of Post

Traumatic Stress Disorder, although it noted a history of “physical abuse, alleged”. In a section entitled “patient instructions”, it provided a general, non-technical description of applied behavior analysis principles. Educators at the meeting addressed the items listed in this section of the report and indicated that all of the listed items were being provided by qualified staff. (J 15, 16.)

66. The “instructions” section of the report also contained a web site address for a private school, with no explanation of why it was listed there. (J 15.)
67. The referenced private program does not maintain a “hands off” restraint policy in all circumstances. (S 9, 10, 11.)
68. IU personnel began trials of augmentative communication devices in September 2015. (J 38.)
69. District personnel reviewed the medical report and on September 8, 2015, sent Parents a NOREP that proposed continuation of Student’s program and placement. Parents did not return the NOREP. (HO 1, 2 para. 17; J 15.)
70. In September 2015, Parents forwarded to the District a one-page report by Student’s private trauma therapist. The report asserted that Student’s behaviors were due to a “trauma echo” from previous physical abuse in school, and it endorsed a diagnosis of PTSD. The report asserted that these behaviors were easily calmed by using a non-hands-on approach and that a decompression room, “compression hold”, compression vest or weighted lap belt would be sufficient techniques to calm Student when engaged in problematic behaviors. The report recommended that there be “absolutely no hands-on restraints” in school. Rather, the report recommended removing Student from the situation or the use of one-on-one intervention. (J 19; P 9.)
71. Student’s therapist is a Pennsylvania licensed professional counselor with over twelve years’ experience in providing direct therapeutic services to adults and children, and with an emphasis on trauma-based therapy. The therapist had no experience in public school teaching or education. The therapist is not a physician and did not formally diagnose Student with Post Traumatic Stress Disorder. The therapist did not consult with District or IU personnel in formulating the recommendations for Student. (NT 491-497, 533, 537-538, 545-546; P 2.)
72. The District convened an IEP team meeting on September 29, 2015. The team discussed the private therapist’s report, and set forth a detailed procedure to address Student’s sensory needs, as well as to intervene with Student’s negative behaviors. (J 20.)
73. The team requested an evaluation of Student’s sensory needs by the occupational therapist. (J 20.)
74. Parents returned the NOREP embodying these team decisions on October 5, 2015, without signature. (J 20.)

75. As part of Student's sensory diet, IU program provided Student access to a sensory room. It also provided a weighted blanket and a mesh compression vest, along with a variety of other sensory items. (J 22.)
76. On October 14, 2015, the parties signed a staff action for emergency plan ("SAFE"). The plan set forth detailed procedures for de-escalation without touching, and detailed procedures for application of physical restraint, as a last resort, when necessary for the safety of Student or others. The plan called for notice to Parents after 15 minutes of physical restraint without signs of de-escalation. It called for referral to the behavioral health system if Parents should be unable to take Student home within 20 minutes of being notified by the building administrator. (NT 655-656; J 23.)
77. The de-escalation approach emphasized non-hands-on de-escalation approaches, including verbal redirection and removal from the situation to a safe quiet area. The approach included physical intervention, according to the IU program's written procedures, to be used only as a last resort should Student be unable to de-escalate and at the same time display self-injurious behaviors or behaviors that put staff or peers at risk. (J 20, 23.)
78. On October 15, 2015, the District issued a NOREP proposing the IEP changes, and continuing placement in full time autistic support. (HO 1, 2 para. 19, 20; J 25.)
79. The District proposed to re-evaluate Student in order to update its understanding of Student's cognitive ability and educational strengths and needs. It also proposed to provide a functional behavioral assessment (FBA), in order to provide effective behavior interventions in the future. Parents initially consented, but later rejected the recommendations, stating that Student needed a private school setting. (NT 739-741; HO 1, 2 para. 29, 30, 31; J 24, 25, 27.)
80. Parents kept Student home from school starting on October 27, 2015, and Student remains out of school. (HO 1, 2 para. 24.)
81. The District convened an IEP team meeting on November 11, 2015. The team reviewed four incidents of restraint in October 2015; reviewed behavioral detail showing that Student was using some communication and that positive interventions were working for Student; reviewed a continued decrease in the need to provide passive restraint; and reviewed Student's inconsistent attendance. The team also reviewed Parents' concerns regarding the trials of augmentative communications devices. (J 28.)
82. At the November 2015 meeting, IU team staff reiterated their preference that Parents not take Student home from school after being notified of an incident of use of restraint. (J 28.)
83. At the November 2015 meeting, Parents indicated their desire for homebound services. (J 28.)

84. The District requested further information about medical recommendations for homebound instruction and private placement. Parents did not provide the requested documentation. (HO 1, 2 para. 25, 26; J 28: S 7.)
85. From the beginning of school in the 2015-2016 school year until Student ceased attending school on October 27, 2015, Student demonstrated mastery of a picture-matching goal, but did not attain any other IEP goals. (J 30, 39.)
86. During this period, Student showed mastery of the first two steps of hand-washing and made some progress, with support, in learning two additional steps of hand-washing. (J 30, 39.)
87. During this period, Student began to attend when Student's name was called, but did not show consistent mastery of this objective; five objectives of Student's listener responding goal were not yet introduced. (J 30, 39.)
88. During this period, Student learned to communicate "more" independently with Student's manual communication (picture) board, and learned to use a trialed augmentative communication device to communicate "stop" and "again" with hand-over-hand assistance. (J 30.)
89. During this period, Student demonstrated the ability to communicate "drink" and "goldfish" (a reinforcer) independently, and "help" and "give" with hand-over-hand assistance, using Student's communication (picture) board; Student also worked on "help", "go", "give" and "give ball" with a trialed augmentative communication device, requiring varying levels of support. (J 30.)
90. During this period, Student's problem behaviors remained above baseline, so Student made no progress on Student's behavior goal; however, there was a small decrease in the incidence of use of restraint to respond to Student's behavior. (J 28, 30.)
91. During this period, Student made some progress on Student's goal for completion of multiple-part tasks. (J 30, 39.)
92. During this period, Student began to request a break appropriately with maximal support; Student began to transition back to work from breaks with maximal prompting. (J 30.)
93. During this period, Student made minimal progress on the occupation therapy goal of cutting shapes. (J 30.)
94. During this period, Student made no progress on goals relating to identifying reinforcing items, and imitating actions. (J 30, 39.)
95. The IU speech therapist delivered 18 sessions of therapy during the Student's fourth grade year, and 3 sessions during Student's fifth grade year. The therapist noted that Student was

absent 17 times during fourth grade when the therapist was available to deliver services, and 11 times during fifth grade. (J 31.)

96. The IU occupational therapist delivered 10 sessions of therapy during the Student's fourth grade year, and 5 sessions during Student's fifth grade year. (J 33.)

97. The District offers to continue Student in the present placement. (HO 1, 2 para. 9, 11.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **BURDEN OF PROOF**

The burden of proof is composed of two considerations: the burden of going forward (introducing evidence first) 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). In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), an IDEA case, the United States Supreme Court held that the burden of persuasion is on the party that requests relief. Thus, the moving party must produce a preponderance of evidence<sup>3</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.

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<sup>3</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.

In this matter, the District requested due process and the burden of proof is allocated to the District. The District bears the burden of persuasion that its claims are true. If the District fails to produce a preponderance of evidence in support of its claims, or if the evidence is in “equipoise”, then the District cannot prevail.

#### THE DISTRICT’S PROPOSED PROGRAM AND PLACEMEMNT ARE APPROPRIATE

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 (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 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 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).

In this matter, the first issue is very narrow: has the District met its burden of proof by a preponderance of the evidence to show that it is proposing an IEP that meets the above legal standards? The District argues that it has met its burden of proof by showing that its IEP is

reasonably calculated to provide Student with an opportunity to receive meaningful educational benefit, as the above legal standards require. Parents argue that the offered program is inappropriate because Student would be placed with an IU provider whose staff (at a different location) abused Student in the past; Parents argue that, because that provider allows its educational staff to use physical restraint to stop dangerous behavior, it is likely that IU staff would re-traumatize Student by using restraint techniques with Student. I have assigned weight to the evidence supporting these arguments, and I have weighed the competing evidence. I conclude that the District has met its burden by a preponderance of the evidence.

The evidence is unchallenged that the District has evaluated Student to the extent permitted by Parents, and has identified Student's educational needs comprehensively. Its June 2015 IEP, as amended, includes the results of a comprehensive re-evaluation, FBA and assistive technology evaluation. The IEP lists Student's many functional, developmental and academic needs, which include toilet training and the ability to use language in order to make Student's wants and needs known to others without engaging in tantrum behavior and other inappropriate behavior that escalates frequently to dangerous behavior. The IEP notes Student's need for decreased behavioral incidents and identification of items that reinforce Student's positive behaviors. It recognizes the need for educational services aimed at increasing Student's functional independence, communication skills and basic functional academic skills, such as learning different shapes and their names. Thus, a preponderance of the evidence proves that the District offers appropriately to address Student's many profound educational needs.

The evidence is preponderant also that the proposed IEP, as amended, offers an appropriate number of measurable goals, aimed at addressing the above needs. These include goals for reduction of inappropriate behavior and teaching various skills, including: imitation of the motor

movements of others; hand-washing skills; receptively identifying pictures of items; matching new pictures to old pictures; expressing wants, needs and requests through a communication book with pictures of the desired items or actions; increasing the ability to complete assigned tasks; transitioning between assigned tasks and break time; and using scissors to cut out shapes from paper.

The June 2015 IEP also offers modifications and specially designed instruction that follows the research-supported methods of Applied Behavior Analysis. In addition, it offers toilet training; modifications to address Student's prominent sensory issues; a Positive Behavioral Support Plan; an individualized protocol on the last-resort use of physical restraint, pursuant to the IU's policy on use of physical restraint; and a protocol for communication with Parents. All of these service delivery techniques support the IEP goals and are aimed at re-designing the curriculum to fit Student's unique educational needs.

The IEP offers additional services to support its goals and modifications, including related services and extended school year services. Related services include speech and language therapy, occupational therapy, adapted physical therapy and modified transportation services. The evidence is preponderant that the additional services would be provided by qualified staff and are offered at an appropriate frequency and intensity.

The District introduced preponderant evidence that the above services would be provided through a state-approved and supervised educational program based on principles of Applied Behavior Analysis, generally considered in the field to be a research-based and appropriate educational approach for children with Student's combination of intellectual disability and autism. The evidence shows that this program is administered and delivered by qualified IU staff, based upon extensive data-collection and analysis. The program is monitored for delivery with fidelity,

and the record shows that it provided relatively high frequency of reviews with Parents in the past, including numerous IEP meetings and revisions.

The evidence showed that Student in fact did demonstrate learning and even behavior improvement, while in the IU program. Student's progress was incremental and slow. Nevertheless, I conclude that it was reasonable for the IU and the District to consider this progress as an indication that the IEP being offered was reasonably calculated to offer an opportunity for meaningful educational benefit, for three reasons. First, Student came to the District with severe disabilities, and a developmental delay of several years; thus, it was reasonable to expect only slow and incremental learning. Second, Student was plagued by chronic medical and sleep problems, which the evidence shows had a substantial impact upon Student's functioning in school, and contributed to Student's severe behavioral struggles, which impeded Student's learning. Third, Student was absent for many hours of programming, because of a deliberately shortened day for many weeks; chronic lateness; frequently being removed from school after behavioral incidents; and many days absent from school altogether. This absence from instruction alone would lead to an expectation of slow, incremental learning. On the record as a whole, then, it was reasonable for the District to continue to offer placement in the IU program, in consideration of Student's previous progress in that program.

I accord substantial weight to the evidence supporting the above findings and conclusions. I found that the District witnesses were credible, including the District's Director and the IU psychologist. The testimony of these witnesses was for the most part and in all material respects consistent with the documentary evidence, which was extensive. Parents' expert did not contradict any of this evidence.

## THE DISTRICT OFFERED AN APPROPRIATE PLACEMENT

Parents argue primarily that the District failed to offer an appropriate IEP because it failed to offer an appropriate placement. This argument is based upon the undisputed evidence that an employee of the IU physically abused Student, in the context of isolating and restraining Student, when Student was in fourth grade at a different location than that offered by the District now. Parents argue that this abuse traumatized Student, and that any physical restraint of Student in an educational program, even in response to dangerous behavior, would be inappropriate because it would re-traumatize Student. Since the District's offered placement, the IU program, utilizes physical restraint as a last resort for dangerous behavior, Parents urge the conclusion that the IU program is inappropriate.

I conclude that Parents have failed to introduce preponderant evidence that the proposed last-resort use of physical restraint with Student renders the District's offered program inappropriate. Parents' evidence is not convincing that the proposed IU program's use of physical restraint with Student is likely to re-traumatize Student. Moreover, even assuming that such re-traumatization is likely, it is not reasonable to suggest that any educational program can forego the use of physical restraint techniques in cases in which a student's behavior is dangerous. The evidence in this matter is preponderant that there is no educational program that would not intervene with regard to such behavior by physically preventing that behavior. Parents themselves need to use their own form of loving, gentle physical restraint with Student at home, as admitted. For all of these reasons, I conclude that the District's offered placement is appropriate in view of what they know at this time.

Parents sought to support their assertion that Student presently suffers from Post Traumatic Stress Disorder (PTSD) by the testimony of Student's current therapist. The therapist testified, and

I found the therapist to be credible. Moreover, this individual has an extensive background of providing therapeutic services to individuals who have suffered from some form of trauma, because his primary role is dealing with individuals who have been victims of crime. Given the therapist's expertise, I give credence to the therapist's testimony that, utilizing his clinical skills, he detects behavior consistent with trauma in Student's withdrawal and adverse reaction to touching.

While the therapist's clinical concern with re-traumatization must be given careful consideration, standing alone it has limited weight with regard to the appropriateness of the District's educational decision-making. The therapist is not a physician or a psychologist, and has limited experience with treating young children with autism. The therapist does not profess to render a diagnosis of PTSD. The therapist has not reviewed Student's entire medical record.

Nowhere in that record, to the extent provided in the extensive exhibits in this matter, does such a diagnosis exist. The medical record indicates a history of abuse. Student's pediatrician recommended that Student remain at home for a time in order to "prevent PTSD". Nevertheless, in numerous visits to the pediatrician after the abuse was discovered, there was never a diagnosis of PTSD, or even referral for diagnosis. Therefore, the therapist's concern with re-traumatization is based upon a premise of ongoing PTSD that is not supported by the record, and if Student were exhibiting symptoms of such a disorder, one would expect that at least a rule-out diagnosis would have been attempted. In short, the therapist's clinical concern with re-traumatization requires the District to proceed with caution and sensitivity; however, it does not prove that Student would be re-traumatized every time a staff member should physically restrain Student from engaging in dangerous behavior.

On this record, I give minimal weight to the therapist's recommendation that Student be educated at home under a protocol that does not permit any physical restraint for dangerous behavior. As noted above, this recommendation is based upon a premise that it is not sustained by the evidence. Yet, even if the District were to conclude that such risk of re-traumatization is most likely, the evidence is preponderant that there is no educational program that could proceed with such a limit on its use of physical restraint in dangerous circumstances.

Even homebound instruction could not proceed on such a basis. Homebound instruction would require at least five hours of instruction per week delivered by a District or IU staff member. Such instruction would require placing demands upon Student, including non-preferred activities, and the evidence shows that such demands would trigger negative behaviors, including dangerous behaviors. No program or professional educator could ignore such behaviors under such circumstances. It would not be reasonable or appropriate for a program to prohibit physical intervention as a last resort in such circumstances.

Parents sought to show that their home is a place where Student never needs physical restraint for dangerous behavior. Yet Parents' testimony to this effect is unreliable, because it is self-contradictory and is contradicted by numerous entries in the documentary record. Student's Father's testimony, for example, is contradictory as to whether or not he sometimes needs to intervene physically in Student's behavior (by gently and lovingly hugging Student), including at times when he is trying to teach Student something. He asserted that Student does not engage in dangerous behavior at home, yet this assertion was contradicted by a long history of repeated parental assertions to medical and educational professionals that Student did engage in dangerous behavior at home, including aggression towards Father and scratching Student's own face to an extent that required treatment for subsequent infections. There is no basis to conclude that locating

instruction in Student's home would immunize the educational process from Student's dangerous behavior.

Thus, the record preponderantly supports the District's judgment that a "hands-off" policy would not be appropriate, even in the hypothetical setting of homebound instruction. Therefore, the District was not unreasonable in believing that the superior educational setting of a brick and mortar school building was appropriate for Student despite the likely need to restrain Student from dangerous behavior in such a setting.

Parents argue that the IU program uses restraint too often, pointing to the high number of incidents reported. Yet Parents showed no significant evidence of unnecessary use of restraint. The record shows that Student's incidence of dangerous behaviors is high, and has been high for years. The record also shows that the District and IU have made efforts, successfully, to reduce the number of incidents. IU staff are trained in research-based Applied Behavior Analysis methodology, and the record shows that they use these techniques. The record shows that staff collected data on Student's behaviors, and that a functional behavioral assessment and Positive Behavior Support Plan are in place. Weighing the evidence, it is preponderant that the IU program is restraining Student frequently because Student's behavior is frequently dangerous.

The record also reveals that the District is hampered in its efforts to get Student's behaviors under control. Its program is based upon direct instruction utilizing motivational techniques and frequent repetition and review. Student is placed in a full-day program, yet Parents have resisted allowing Student to participate fully. Moreover, the evidence is preponderant that Student's Mother frequently comes to school when notified of the use of restraint, and takes Student home early. Staff have asked Parents not to do this, because it can have the effect of rewarding Student for the bad behavior that resulted in the use of physical restraint. Parents have not cooperated with

this advice. I conclude, on this record, that the high incidence of restraint is not evidence of a deficiency in the IU program, or of its inappropriateness.

Parents suggest that the IU program is facially inappropriate because one of its staff pleaded guilty to criminal charges related to alleged inappropriate restraint of Student when Student was in fourth grade. I do not agree. This happened in a different location, which housed a different autism support classroom, with different staff. The abuser was terminated. Without minimizing the seriousness of the breach of the IU protocols and disciplinary control of its staff, I cannot infer from one incident of abuse at a different location and classroom that the IU protocols, training and staff supervision regarding restraint policy are defective at the present location.

Parents demonstrated deficiencies in IU record-keeping on some instances of restraint of Student. They argue that this shows a lack of fidelity in the implementation of its restraint policies as a whole. The suggestion is that, while the language of its policies and protocols forbids restraint except as a last resort and to prevent dangerous behavior only, staff use physical restraint more broadly, not as a last resort, and not for dangerous behavior only. I cannot draw such an inference from record-keeping failures. The record is preponderant to the contrary.

I do not doubt, nor am I insensitive to the gravity of what happened to Student in 2014. Although I am in no position to make a finding or conclusion with regard to the abuse inflicted upon this vulnerable child, I do not doubt the Parents' assertions that the District and IU's failure to protect Student in 2014 has inflicted pain on Student and Parents as well, and has damaged any trust between the parties. But that is not the legal issue before me. On this record, I cannot conclude that the painful events of 2014 are likely to recur, or that the IU policies and protocols for Staff at Student's present location are inappropriate for this Student.

In sum, I conclude by a preponderance of the evidence that the District has offered an appropriate placement to Student. Above, I conclude that the educational program offered to Student was appropriate also. In view of the above findings, I conclude that the June 2015 IEP and placement, as amended, constitute an offer of a FAPE.

#### REQUEST TO AUTHORIZE RE-EVALUATION WITHOUT PARENTAL CONSENT

The IDEA, 20 U.S.C. § 1414(a), requires local educational agencies to obtain informed consent from the parents prior to evaluating a child to determine whether or not the child is a child with a disability. 20 U.S.C. § 1414(a)(1)(D)(i)(I), 34 C.F.R. §300.300(a)(1). The notice required includes prior written notice of the intention to evaluate. 34 C.F.R. §300.300(a)(1), 300.503, 300.504. If parents refuse to consent to evaluation, the agency is allowed to request due process and seek an order of the hearing officer permitting it to conduct the evaluation. 20 U.S.C. §1414(a)(1)(D)(ii)(I), 34 C.F.R. §300.300(a)(3). The decision is an application of the hearing officer's equitable authority, and rests within the hearing officer's sound discretion. See, e.g., G.B. v. San Ramon Valley Unified Sch. Dist., 51 IDELR 35 (N.D. Cal. 2008).

I am satisfied that the District's request for a re-evaluation in October 2015 was appropriate. There was clearly a need for updated cognitive testing to determine Student's cognitive abilities and achievement potential; this is needed in order to gauge the effectiveness of instruction, given the Student's slow rate of acquisition. There was a need to update information on Student's developmental and functional needs, emotional regulation difficulties, and behavior control (to be addressed through the proposed FBA). There was a need for additional data on Student's academic achievement to further articulate and focus Student's educational program.

The comprehensive re-evaluation proposed by the District in October would have provided valuable information to Parents and to the District, to assist in planning Student's education.

The District's request remains appropriate today, notwithstanding Parents' revocation of consent. Parents explained that they desired a change of placement, yet a re-evaluation would have shed light on the appropriateness of seeking such a change. Parents explained that Student was being evaluated by the private therapist, yet the therapist testified that he does not perform diagnosis, and it is clear that the therapist did not provide any of the useful and needed data that would have been provided by a comprehensive educational re-evaluation.

Therefore, I conclude that it would be appropriate to exercise my equitable authority to authorize the District to re-evaluate Student, and I will so order.

### **CONCLUSION**

For the reasons set forth above, I conclude that the offered IEP and placement are appropriate. I further find good cause for a District re-evaluation at this time, and I authorize the District to proceed in the absence of parental consent. I hasten to add that the latter order does not in any way apply to Parents or Student; I have no authority to order them to do anything.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that:

1. The June 10, 2015 IEP, as revised, offers Student a free appropriate public education as defined in the IDEA.
2. Student's current placement in a full-time autistic support classroom operated by the governing Intermediate Unit and located in the Student's neighborhood school is an

appropriate placement, notwithstanding the classroom program's use of restraint.

3. The Hearing Officer hereby authorizes the District to proceed with a re-evaluation of the Student, notwithstanding Parents' revocation and withholding of consent.

*William F. Culleton, Jr. Esq.*

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

DATED: May 3, 2016