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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: KJ

Date of Birth: xx/xx/xx

Date(s) of Hearing: April 13, 2007; April 25, 2007

OPEN HEARING

ODR NO. 7435/06-07 KE

Parents

Mr. and Mrs.

Parents' Representative:

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School District:

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Dated Transcript Received: 4/28/07

Date Closing Arguments Received: 5/8/07

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Date of Decision: 5/24/07

Hearing Officer: Margaret Drayden, Esq.

Précis

Student has a complicated medical and educational history which impacts on her learning. Parents believe her slow rate of learning, coupled with regression, prove that the District has failed to educate Student appropriately and they seek a private placement, which they say the District has agreed to investigate. The District's position is that Student is Mentally Retarded, that learning is slow, and that it provides an appropriate placement in the least restrictive environment.

Findings of Fact

1. Student, whose date of birth is xx/xx/xx, is a third-grade student who resides in the Bentworth School District (District) and currently identified as a student as a student with a disability and eligible for special education as Other Health Impaired (ADHD, seizure disorder, rheumatoid arthritis and a Speech/Language impairment). Student has Verbal Apraxia which is a deficiency in neurological connections which affects speech. (SD-5; NT at 49.)¹
2. Student has been previously identified as a student eligible for special education under the category of Mental Retardation. (SD-5, SD-10.)
3. Student is reported to currently take (or has taken) a combination of medications, including Dexedrine (5 mg.) and Strattera for ADHD; Trileptal (Oxcarbazepine) for seizures, and Zoloft for OCD. (SD-5, SD-8, SD-12; P-1, P-2, P-3.)
4. Student is a friendly, social child with a very supportive family. (SD-5.)
5. Verbal apraxia is a motor programming speech disorder which often causes inconsistent articulation errors and is due to central nervous system damage. Automatic speech tasks, such as counting and saying the days of the week, are often easier than running speech. (NT at 209-210.)

December 20, 2002 Neuropsychological Assessment:

6. Student, age 5 years, 4 months, was seen for a neuropsychological assessment at [redacted] Hospital. Student spoke in single word/short sentence level; her speech was reported as "very difficult" to understand. (P-2.)
7. *The Leiter International Performance Scale – Revised* (Leiter-R), is a formal measure of nonverbal intelligence and problem-solving. Student performed in the average range on the Matching subtest (Standard score of 95 and 37th percentile) and in the borderline impaired range on the Classification subtest (Standard score of 70 and 2d percentile). (Id.)
8. *The Beery-Buktenica Developmental Test of Visual Motor Integration* (VMI) – Student performed in the borderline impaired range. (Id.)

¹ Parents' exhibits are noted as "P-"; District exhibits are noted as "D-"; Hearing Officer exhibits are referenced as "HO-"; Noted Transcript is referenced as "NT"; Findings of Fact are noted as "FF".

9. *School Readiness Composite of the Bracken Basic Concept Scale-Revised* – Student performed in the borderline impaired range. (Id.)
10. *The Stanford Binet-4th Ed.* (SB-IV) – Student scored as follows:
 - Verbal Reasoning: StandardAreaScore (SAS): 68; Range: Mildly Deficient
 - Abstract/Visual Reasoning: SAS: 80; Range: Low Average
 - Quantitative Reasoning: SAS: 80; Range: LowAverage
 - Short-Term Memory: SAS: 96; Range: Average
 - Test Composite: SAS: 77; Range: Borderline (Id.)

2003-04 School Year - Kindergarten:

11. Student received speech/language therapy (S/L) for articulation and language difficulties; occupational therapy (OT) for visual perceptual motor, bilateral manipulation, and upper extremity posturing; and Student received learning support for academics for part of the year. After school Student received services at [redacted tutoring] Center and S/L at [redacted] Hospital. (SD-12; P-2² .)
12. Student's behaviors were typical of a student with ADHD – she lacked attentiveness and focus, needed constant redirection to complete academic tasks, had difficulty following directions and performing tasks despite teachers' interventions and strategies. (Id.)
13. Student had a TSS in the classroom daily who redirected Student and removed her from the classroom when she became fixated or “out of control”. The TSS reported Student made progress but it would vary from day to day. (Id.)
14. Student worked below grade level without redirection in reading and math. (Id.)
15. In social settings, Student seemed unaware of others and her reactions were inconsistent. (Id.)
16. Student's school readiness skills were inconsistent, she would fixate on items, stare, fail to react when spoken to, and had difficulty processing new information. (Id.)
17. Student's treatment goals included increasing social communication, increasing attention and compliance, increasing understanding of expressive and receptive language, and improving communication skills. (Id.)
18. On 3/8/04, (age 6 years, 6 months) Student was evaluated by a certified school psychologist from the IU. (Id.)
19. Student's receptive vocabulary development was assessed using the *Peabody Picture Vocabulary Test – IIIA*, and Student obtained a standard score of 79 at the 8th percentile; Student's articulation skills were assessed using the *Goldman-Fristoe Test of Articulation 2* and Student produced 3-5 word phrases and sentences with poor syntax and grammar skills, and often required extra time to produce a verbal response due to her inability to coordinate the motor movements necessary for speech. Student's performance on the *Boehm Test of Basic*

² SD-12 is the 4/1/04 Reevaluation Report and P-2 is the 6/22/06 Neuropsychological Evaluation Report from The Children's Institute.

- Concepts – 3d Ed.* was at the 3rd percentile and noted to be “extremely low for her grade level.” (Id.)
20. A phonemic awareness inventory assessment was administered on 9/15/03 with Student achieving a score of 2 out of 80 (5%) and on 1/13/04 with Student achieving a score of 7 out of 80 (9%). The examiner noted she felt Student was guessing at the answers. Both assessments indicated minimal phonemic awareness. (Id.)
 21. Title I standardized assessment inventories reported the following scores: Reading: 31%; Math: 53%; Phonemic Awareness: 5%; Print Inventory: 33%. (Id.)
 22. On 3/8/04, Student was administered the *Stanford-Binet Intelligence Scales – 5th Ed.* Student obtained a Non-Verbal IQ score of 74 (4th percentile), a Verbal IQ score of 49 (<0.1 percentile), and a Full Scale IQ score of 60 (0.4 percentile), which placed Student’s intellectual ability within the impaired range. However, the school psychologist noted that due to Student’s verbal apraxia, “this score may not be a true measure of [Student’s] true abilities.” Student’s nonverbal ability, which was within the borderline low average range, at the 4th percentile, appeared “more representative of [Student’s] ability due to the nonverbal nature of the test. [Student] display[ed] a strength in her knowledge of basic human activities, within the average range. Her skill in visually matching and duplicating patterns is low average. [Student’s] sequential and inductive reasoning skills and short-term visual memory [were] within the borderline low average range.” Verbal subtests were all within the impaired range and it is reported that Student “had difficulty verbalizing her answers to questions, often producing one or two word answers.” (Id.)
 23. Student’s level of academic achievement was evaluated with the *Bracken Basic Concept Scale – Revised*. Student scored no higher than the 1st percentile in any subtest and all of the scores were within the “very delayed” range and “at expectancy for her intellectual ability.” (Id.)
 24. Student was administered the *Beery-Buktenica Test of Visual Motor Integration* (VMI) when Student was 6 years, 7 months, and Student’s scores were within the impaired range, at 0.7 percentile, which the certified school psychologist found to be “consistent with the performance on similar tasks included in the Visual-Spatial Processing Factor Score of the Stanford-Binet.” (Id.)
 25. The scaled scores of the *Adaptive Behavior Evaluation Scale* (ABES) showed a marked disparity between the School Version and the Home Version. The School Version indicated Student’s adaptive behaviors at school met or exceeded less than 1% of female student’s of the same age. This indicated Student’s adaptive behaviors were within the impaired range, which was consistent with all other testing. The Home Version, completed by Parents, indicated Student’s adaptive behaviors at home were within the high average range, with skills which met or exceeded that of 84% of female students of the same age. (Id.)
 26. The 4/1/04 RR concluded that Student’s primary disability category was Mild Mental Retardation, and Student’s secondary disability category was speech and language impairment. (Id.)

2004-05 School Year – First Grade:

27. Student received all of her academics in Learning Support. (SD-10, SD-12; P-2.)
28. The first week back in the Learning Support room, she knew 32 out of 73 words from the Edmark reading program. (SD-10.)
29. Student's final grades were: Language Arts: 88; Mathematics: 85; Reading: 80; Spelling: 94; P.E: Satisfactory; Art: Satisfactory; and Music: Satisfactory.³ Student has a total of 18.5 absences. (SD-29.)

2005-06 School Year – Second Grade:

30. Student received all academics in a regular education classroom until February 2006, at which time Student went to the Learning Support class for Language Arts. (SD-10, SD-12; P-2.)
31. Student received S/L services as a push-in service for most of the school year, but the S/L therapist found Student to be very distractible and that it was not the best environment for the therapy. Later in the school year, S/L services were provided as a pull-out therapy. (NT at 210.)
32. Progress Monitoring, using the Wilson Assessment of Decoding and Encoding, showed reading improvement. On 1/6/06, Student knew, *inter alia*, consonant sounds: b, c(k), d, f, g(g), k, l, m, n, p, r, s(s), t, v, x, z. By 3/14/06 Student had added h and w. On 1/6/06, Student knew consonant sounds: short a and e and long u and o and ar; on 3/14/06, Student added short e and o and added "or". Student read 2 words per minute the first week she was in Learning Support reading; on 3/7/06 she read 9 wpm; on 3/15/06 she read 6 wpm; and on 3/24/06 she read 5 wpm. On 3/7/06 Student got 10/10 short "a" words from the Wilson program correct; on 3/21/06 she got 9/10 correct. (SD-10.)
33. On 3/20/06, she knew 40 out of 73 words; at the end of the school year, Student knew 70 out of 73 words from the Edmark reading program. (SD-10.)
34. On 3/27/06, the math/science/handwriting/creating writing classroom teacher reported Student had made good progress. She could count and "complete addition/subtraction problems up to sums of 18. She has some knowledge of the process of adding and subtracting 2 digit numbers." (SD-10.)
35. On 3/27/06, the reading teacher reported Student had completed the first grade, first book of the Harcourt reading series started in September; that Student had read all 6 stories fluently and mastered all vocabulary words, that Student was successful on modified tests to show reading comprehension and knowledge of vocabulary words. When tested on Kindergarten words and first book vocabulary, Student knew 30/45 words; the ones missed were basic first grade vocabulary. (SD-10.)
36. Student was reading from the first grade, second book, when she transitioned to the Learning Support class for reading. (SD-10.)
37. On 3/29/06, the S/L pathologist assessed Student's expressive vocabulary development by using the *Expressive One-Word Picture Vocabulary Test*. Student's Standard Score was 65 and her Percentile Rank was 1. Those scores

³ The grading scale is: A: 93 – 100%; B: 83 – 92%; C: 70 – 82%; D: 60 – 69%; F: 0 – 59%.

- were in the Extremely Low range of scores. Student produced 4-6 word phrases and sentences with reduced grammar skills, but was reported to continue to make progress in phrases and sentences of increasing length. (SD-10.)
38. On 3/29/06, the S/L pathologist also assessed Student's receptive vocabulary development using the *Peabody Picture Vocabulary Test-III*A (PPVT-III) is a test which requires the student to point to the correct picture and does not require a verbal response. Student's Standard Score was 86 and Percentile Rank was 7. Those scores were in the Moderately Low range of scores. (SD-10.)
 39. The 3/29/06 RR concluded Student qualified as a student with a disability and in need of specially designed instruction; Student's primary disability category was listed as Mental Retardation. (SD-10.)
 40. Both Parents signed the RR and checked the box indicating Agreement with the document, including the disability category of Mental Retardation. (SD-10.)
 41. Student's final grades were: Mathematics: 76; Reading: 82; Spelling: 76; Science: P; Handwriting: S; P.E.: S; Art: S; Music: S; Conduct: S. Student had 14.5 absences. (SD-30.)

June 22, 2006 Neuropsychological Evaluation Report:

42. Dr. S, Neuropsychologist, administered the *Wechsler Intelligence Scale for Children-4th Ed.* (WISC-IV); *NEPSY Developmental Neuropsychological Assessment* (NEPSY) subtests: Comprehension of Instructions, Phonological processing, Visuomotor Precision, Design Copying, arrows, auditory attention, Visual Attention, Memory for Faces, Tower; *Finger Tapping*; *Grooved pegboard*; *Rey Complex Figure Test* (FCFT); *Hooper Visual Organization Test* (HVOT); *Children's Memory Scale* (MCS) Subtests: Dot Locations, Family Pictures, Word Lists; *Wisconsin Card Sorting Test* (WCST); *Children's Category Test* (CCT); *Woodcock-Johnson Tests of Achievement-3d Ed.* (WJ-III); *Connors' Parent Rating Scale-Revised* (CPRS-R).(P-2.)
43. Clinical Observations of Test-Taking Behaviors. Dr. S reported Student was noncommunicative, which Parents explained Student was very smart but she has difficulty in putting thoughts into words and "shuts down" with unfamiliar people. (P-2.)
44. Dr. S found Student's nonresponsiveness more likely that Student was genuinely confused and perplexed and did not know what to say or do; that she did not demonstrate signs of frustration typical among individuals whose communication is limited by verbal apraxia, nor did she initiate gestures to aid in communication which is also typical of individuals with verbal apraxia. Dr. S found Student's nonresponsiveness to questioning "aberrant." (P-2.)
45. Student would "feign being asleep" while testing and it was only in Mother's presence that she would respond. Consequently, many tests were readministered in Mother's presence. (P-2.)
46. Parents are convinced that Student "'knows the answers' but was unwilling or unable to verbalize her thoughts." (P-2.)

47. Dr. S found that “the test results may underestimate [Student’s] maximal level of cognitive functioning [but] to the extent that the problems with communication, attention, and motivation demonstrated by [Student] are pervasive in nature, it also would be reasonable to assume that the results from the evaluation provide a fairly valid and reliable estimate of her typical level of cognitive functioning.” (P-2.)
48. Intellectual Functions. Dr. S found that while “a valid Full Scale IQ could not be derived” using the WISC-IV, that the scores “suggest that her intellectual functioning is severely and diffusely impaired, with her verbal intellectual functioning being more severely impaired than her nonverbal intellectual functioning.” Most telling is that “[t]hese findings generally are consistent with the results from the Stanford-Binet-Fifth Edition (SB-V), which was administered to [Student] on 03/08/06 (sic).” (P-2.)
49. Auditory Receptive Language Functions. The NEPSY and WJ-III results were Student’s “ability to understand what is said to her is severely impaired....These findings are consistent with the results from the previous evaluations...”⁴ (P-2.)
50. Oral Expressive Language. Student “performed in the borderline impaired range on the Picture Vocabulary subtest for the WJ-III and in the frankly impaired range on the Vocabulary subtest from the WISC-IV. These findings suggest that [Student’s] expressive vocabulary is moderately to severely impaired.” (P-2.)
51. Reasoning. Student’s abilities were evaluated with 4 WISC-IV subtests. She received raw scores of “0” on both the Similarities and Comprehension. Her responses on the Similarities were echolalic, while on Comprehension she “just shrugged her shoulders and did not talk at all. These performances suggest that her verbal reasoning skills are severely impaired.” Student’s Nonverbal Reasoning skills were evaluated with the Picture Concepts subtest, where she scored in the frankly impaired range, and the Matrix Reasoning subtest, where she scored in the borderline impaired range. “These findings suggest that her nonverbal reasoning skills are moderately to severely impaired.” (P-2.)
52. Motor Functions. Student performed in the impaired range in the Finger Tapping test and the Grooved pegboard. (P-2.)
53. Visuospatial Functions. The WISC-IV Block Design subtest score was in the borderline impaired range and in the frankly impaired range on the Design Copying subtest from the NEPSY and the RCFT. Student was in the borderline impaired range on the Arrows subset from the NEPSY, and Dr. S concluded Student’s visuospatial skills were moderately to severely impaired. (P-2.)
54. Attention. Auditory attention and working memory functions were evaluated with 3 WISC-IV subtests (Digit Span, Letter-Number Sequencing, and Arithmetic). Student performed in the impaired range on all 3 subtests and Dr. S concluded Student’s auditory working memory functions were severely impaired. (P-2.)

⁴ This sentence was incomplete. It reads, “These findings are consistent with the results from the previous evaluations and suggest that her receptive as well as her expressive language skills” which leads one to conclude that both receptive and expressive language skills are impaired.

55. The NEPSY Auditory Attention subtest was administered. “She made a substantially greater than expected number of omission errors on this task. That is, she failed to respond to 25/30 verbal cues on the tape. By contrast, she did not make any commission errors...This performance suggests that [Student’s] ability to sustain her attention to an ongoing stream of auditory verbal information is impaired but that she is not likely to make dysinhibited, impulsive errors.” (P-2.)
56. The NEPSY Visual Attention subtest was administered. “On the relatively easy Cats task...she performed in the average range for age...on the more challenging Faces task...she made a substantially great than expected number of errors of both omission and commission....These finds suggest that her selective visual attention skills are within normal limits for age for relatively simple visual discrimination tasks but that they break down significantly with increased complexity.” (P-2.)
57. Memory Function. CMS and NEPSY subtests were administered and Student scored in the severely impaired range for her age. (P-2.)
58. Visual Memory functioning was evaluated using the CMS Dots Location and NEPSY Memory for Faces subtests. The findings “suggest that [Student] has difficulty accurately encoding visual information into long-term memory storage but that she generally can retain that information over time.” (P-2.)
59. Executive Functions. Executive functions are the higher order cognitive processes and were evaluated using the NEPSY Tower subtest, the WCST, and the CCT. Student performed in the borderline impaired range on the Tower; in the frankly impaired range on the WCST. Student had perseverated with incorrect form responses throughout all 64 trials on the WCST despite feedback that the responses were incorrect. She also had a “substantially greater than expected number of errors” on the CCT. These scores suggested Student is “cognitively rigid and concrete and that her higher order executive planning, problem-solving, concept-formation, and behavioral self-regulation skills are impaired.” (P-2.)
60. Processing Speed. WISC-IV subtests suggested “her visuomotor processing speed is markedly impaired.” (P-2.)
61. Academic Achievement. WJ-III subtests were administered. Student performed in the borderline impaired range on the Reading Fluency subtest, in the frankly impaired range on the Letter-Word Identification and Passage Comprehension subtests, in the impaired range on the Spelling and Writing Samples subtests. Student’s math skills were assessed with the Quantitative Concepts, Calculation, and Math Fluency subtests and she performed in the impaired range on all 3 of these measures. Her academic achievement in Science, Social Science and Humanities was assessed with the Academic Knowledge subtests, where she performed in the impaired range, which was “consistent with the impaired range score that she attained on the Information subtest from the WISC-IV. These findings suggest that her semantic fund of knowledge is impoverished, which is not surprising in light or (sic) her severe memory impairment.” (P-2.)
62. Behavioral. The CPRS-R, which is an ADHD rating scale, suggested Student has ADHD, Combined Type, which is consistent with her diagnosis. (P-2.)

63. Mental Retardation. Dr. S opined in his report that the “results from a comprehensive battery of neuropsychological evaluation suggest that [Student] is an individual with Mild Mental Retardation who is demonstrating a moderate to severe degree of diffuse cognitive impairment relative to her peers....These findings (sic) generally are consistent with those from previous evaluations insofar as they indicate that [Student’s] overall level of cognitive functioning is moderately to severely impaired with her verbally mediated cognitive functions being more severely impaired than her visually mediated cognitive functions. It should be noted that [Student] clearly had difficulty cooperating with formal testing procedures, especially those requiring a verbal response, which suggests that the results may underestimate her maximal level of cognitive functioning.” (P-2.)
64. Dr. S recommended that Parents “be helped to gain a better understanding of [Student’s] severely and diffusely impaired levels of cognitive and behavioral functioning as they appear to significantly overestimate her cognitive/social abilities and significantly underestimate the degree of her cognitive/social deficits.” (P-2.)
65. The school psychologist agreed with Dr. S’s finding of mental retardation. (NT at 143.)

2006-07 School Year – Third Grade:

66. Student receives instruction in the Learning Support classroom for math, spelling, language and reading and is attended by a 1-on-1 aide in both her regular and LS classrooms. Student is in regular education for Science and Social Studies. (SD-5; NT at 229.⁵)
67. On 9/13/06, Student underwent an OT re-evaluation. Student displayed decreased attention and focus and would appear to be physically fatigued, closing her eyes. *The Motor-Free Visual Perception Test – 3rd Ed.* (MVPT-3) was administered. Student demonstrated an age equivalency of 5 years/2 months. The *Bruininks-Oseretsky Test of Motor Proficiency, Subtest 7 – Visual Motor Control* was administered and Student demonstrated an age equivalency of 4 years/2 months. (SD-5.)
68. The purpose of the 11/9/06 RR was threefold: a functional behavioral assessment, an occupational therapy evaluation and an assistive technology screening. (SD-5; NT at 134-35.)
69. The school psychologist observed Student on several different occasions in different settings and observed off-task behaviors and inappropriate social skills. As part of her reevaluation, she reviewed the prior RR but did not include the test results from it. (SD-5; NT at 136, 138.)
70. The 3/29/06 RR repeated the IQ scores from the 4/1/04 RR. (SD-10, SD-12; NT at 138-139.)

⁵ SD-5 is the 11/9/06 RR.

71. The 2-prong analysis for a determination of Mental Retardation require an IQ score and 2 adaptive behaviors which are severe to impaired. On the teacher's adaptive behavior evaluation scale, all were within that category. (NT at 140, 152.)
72. Adaptive behavior scores are subjective. (NT at 169.)
73. The school psychologist testified that in her professional opinion Student meets the criteria of a child with mental retardation. (NT at 144.)
74. In the 11/9/06 RR, the Classroom teacher reported Student displayed hyperactive behaviors in class and is only able to stay on task for a matter of seconds, that she had difficulty with 3d-grade science and social studies curriculum, that the curriculum is modified, that a multisensory approach is used, and that Student is provided with verbal cues to remain on task, special seating, flashcards and peer helpers. (SD-5; NT at 229-30.)
75. In the 11/9/06 RR, the LS teacher reported Student performed at 1.5 level in math and 1.0 level in reading. (SD-5.)
76. On or about 11/9/06,⁶ the IEP team met and discussed Student's lack of progress and the option of a different placement. (SD-5; NT at 164-65.)
77. The 11/9/06 RR reported Student does not have a specific learning disability (SLD). (SD-5.)
78. The 11/9/06 RR had attendance signatures, but no one checked whether they were in agreement or disagreement with the report. (SD-5.)
79. The 11/9/06 RR reported Student participated in an assistive technology screening; that Student would not be trialing augumentative communication devices, but Mrs. E. would recommend some educational/computer access suggestions to Student's teachers and parents. (SD-5.)
80. A functional behavioral assessment was completed and included in the 11/9/06 RR with antecedents, behaviors of concern, and consequences. (SD-5.)
81. The IEP team decided that Student qualified for special education both as a child with Mental Retardation and Other Health Impaired and Student's primary disability category was changed from Mental Retardation to OHI; a secondary disability category listed was S/L Impairment. (SD-5; NT at 147-149, 188-89.)
82. Due to Dr. F's input regarding Student's neurological impairment, the IEP team decided the OHI designation was more fair in terms of diagnosis and the OHI designation would open up placement options for Student. (NT at 155-56.)
83. Parents made a request of the school principal to remove the mental retardation designation from the RR because [school name redacted] would not accept children with a diagnosis of mental retardation. (NT at 174, 186.)
84. Dr. F testified that she has seen Student 4 times, starting in October 2006 after having been seen by colleagues, both in neurology and developmental pediatrics, because she was failing to progress in academics and because of emotional and behavioral difficulties . (NT at 23-24.)
85. Dr. F would consider Student's seizures to be her primary diagnosis. Student has both convulsive and non-convulsive seizures. (NT at 25, 49-51.)

⁶ The 11/9/06 RR states it was provided to parent on 11/9/06, but Mother signed the bottom of the signature page as of 11/29/06 indicating waiver of the 10 day waiting period and agreeing to proceed immediately to an IEP meeting. (SD-5.)

86. Non-convulsive seizures can affect a person's ability to attend, understand what is going on and to produce a response to that, but it does not present as an actual seizure. (NT at 50.)
87. Student has "spike and wave abnormalities even when she is not having a convulsive seizure" which "affects her mental status, it affects her attention span, affects her ability to understand information that is presented to her and to be able to organize her...output so that she can respond appropriately to expectations that are made of her in the classroom. It could also create anxiety, clinging behavior." (NT at 52-53.)
88. Dr. F found Student to be a youngster with "significant neurological difficulties that are evident by her difficulty with attending, sustaining, conversing with individuals and responding to questions in the environment and yet, in contrast, when in a sort of unstructured situation with respect to play, she functions at a very high level." (NT at 24-25.)
89. Dr. F also found Student has anxiety problems which are the result of her neurological problems. (NT at 26.)
90. Dr. F diagnosed verbal and motor apraxia. (NT at 26.)
91. Dr. F has not assessed Student to determine if she is mentally retarded. (NT at 26.)
92. Dr. F attended the November 2006 IEP meeting and recommended Student attend an approved private placement and understood that a decision was made that the District would complete an application for said private school. (NT at 28-30.)
93. Dr. F opined that [school name redacted] would probably meet Student's unique needs including her educational needs; Dr. F has no professional relationship with [school name redacted]. (NT at 30, 38, 39.)
94. Dr. F is not a certified school psychologist, did not observe Student in class. (NT at 31.)
95. Dr. F did not diagnose Student as mentally retarded. In her expert opinion Student is not mentally retarded, she is neurologically impaired. Her verbal performance split is almost 25 points which is indicative of a learning disability and a neurological problem, not mental retardation. (NT at 35-36, 62; P-1.)
96. Dr. F has 30 years experience in the field of developmental disabilities. (NT at 40.)
97. Dr. F opined that while there is no distinction between the medical and legal definitions of mental retardation, she believes individuals can have neurologically handicapping conditions that result in a scatter of scores which, "if one simply adds scores together, you come up with a suboptimal IQ, as has happened to [Student]." (NT at 40.)
98. Dr. F testified that Student's deficiencies are due to her neurological impairment and the family's concurrence that Student's level of adaptive functioning is within the normal range. (NT at 41.)
99. Dr. F testified [school name redacted] was an appropriate placement due to their level of expertise in dealing with the neurologically impaired and the curriculum is presented in a multi-modality fashion to accommodate a variety of learning disabilities, including "a lot of drill and repetition" which in Dr. F's opinion, would be the "kind of setting in which [Student] would learn best." Additionally,

- Student would be with other students with “similar learning disability problems but who have the potential for normal intellectual functioning” rather than a District classroom for mental retardation, life skills, or emotional behavioral difficulties. (NT at 43-44.)
100. Dr. F is unaware of the range of special education services available at the District and/or the IU. (NT at 44-45.)
 101. Dr. F is not certified to administer quantitative testing but is certified to assess the significance of that testing (NT at 47-48.)
 102. Dr. F opined that Student required her “environment be structured, consistent, predictable, and that those methods of teaching her are the same from one day to the next.” There must be considerable repetition, information must be presented “in small chunks”, she needs peers who are doing similar kinds of activities, expectations for output must be modified, she needs positive reinforcement, and breaks due to her ADHD. (NT at 54-56.)
 103. Dr. F opined that Student would benefit from being with other LD students who are learning rather slowly rather than age appropriate peers who are non-disabled because she would become frustrated by their ability to learn more quickly. (NT at 57-58.)
 104. Dr. F opined that if the District could provide Student with a full-time learning support class with a gifted teacher, such as Ms. F, the assistance of an aide, an environment with behavioral reinforcers, a modified curriculum, and access to expert consultation, that could meet Student’s educational needs. (NT at 60-61.)
 105. Student’s behavior specialist, from [facility redacted], started working with her approximately 2 years ago due to Student’s difficulties in staying on task and social interaction deficiencies. (NT at 67-68.)
 106. The behavior specialist writes a treatment plan and a TSS implements it in the home and in the community. Currently, the TSS accompanies Student to the Girl Scouts or CCD. They address such things as staying focused, interacting with others, maintaining eye contact, engaging with other children rather than parallel behavior, sharing and taking turns. (NT at 68-69, 71-72, 75.)
 107. The behavior specialist is not aware of a diagnosis of mental retardation from Student’s psychological evaluation. (NT at 69.)
 108. The behavior specialist has not observed Student in the District classroom setting. (NT at 69.)
 109. Student is a flight risk. (NT at 71.)
 110. Student’s classroom aide was trained by [facility redacted]. (NT at 74.)
 111. Currently, Student has 5 hours of “face to face” TSS services in the home and community and 3 hours of administrative assistance. (NT at 81.)
 112. Student’s social progress has been minimal in the past 2 years. (NT at 81, 82.)
 113. [Facility redacted] had worked with Student some years prior – was discharged because Student had made significant progress – but 2 years ago began working with Student again due to regression. Student was tantruming again, experiencing poor social skills, not following adult directives. (NT at 82.)
 114. Currently, Student averages 1-3 tantrums per week, each lasting 10-20 minutes. (NT at 82.)

115. The tantrums consist of being openly defiant and disrespectful of her Parents, not following adult directives, crying, and screaming. (NT at 82.)
116. Father testified that Student feels like an outcast and other students make fun of her going to the LS class and call it the “stupid class.” Student sometimes will not answer Father’s questions about how things went at school. (NT at 85.)
117. Father testified that the first grade teacher waited until 2 weeks before summer vacation to give Student’s aide 12 weeks’ worth of school work to do with Student. The first grade teacher would take Student out of the regular education class and take her back to the LS class. Student’s response was, “She doesn’t want me.” (NT at 87-88.)
118. Father testified that the second grade teacher said she couldn’t do more because she wasn’t trained to meet Student’s needs. (NT at 87.)
119. Father testified that the experts who have observed Student tell him Student requires a more restrictive educational placement. (NT at 89.)
120. Father testified that their experts have not observed Student in the classroom. (NT at 90.)
121. Parent’s friend, Ms. M., testified she attended the November 2006 IEP meeting; that it was quite lengthy, it started early and that close to noon it was decided to send Student to [school name redacted]. Ms. M. heard the Acting LEA (now Principal) ask the LS teacher, “what exactly do these parents want?” And after the LS teacher replied, the Acting LEA said, “well, [school name redacted], what is the problem?” She then said to Ms. M., “see, M., I do care about kids.” Ms. M. responded that she never doubted that, then left the meeting. (NT at 92-93, 355-56.)
122. Mother looked at various placements. The previous LEA wanted her to look at the [redacted] School District and actually went with her to visit [school name redacted] and the IU class in the [redacted] School District in January/February 2007. That LEA stated to Mother that she thought [school name redacted] was a wonderful school but not the appropriate placement for Student. The LEA then reported her findings at [school name redacted] to the District. (NT at 96-98, 127, 129, 189-90.)
123. The classroom at [District redacted] had grades 1-5⁷ with several learning support students and several Down’s Syndrome students who Mother believes were lower functioning than Student. (NT at 128-130.)
124. Mother testified that last year Student was in a 2d grade reader but now she’s in a 1st grade reader. (NT at 100-101.)
125. Mother testified that Student has regressed and what has been accomplished in the 2006-07 school year is a repetition of things previously known. Addressing Student’s 4 years of education, Mother stated: “They are gone. They are gone. They are gone. They are gone...We have lost 4 years of learning, of [Student’s] vital years of learning.” (NT at 352, 354.)

⁷ 22 PA Code §14.142 (f) states: The maximum age range shall be 3 years in elementary school (grades K-6) and 4 years in secondary school (grades 7-12). A student with a disability may not be placed in a class in which the chronological age from the youngest to the oldest student exceeds these limits unless an exception is determined to be appropriate by the IEP team and is justified in the IEP.” While Mother is sincere, it appears she is mistaken in her estimation of the age range of the IU class.

126. Parents receive daily reports from school from the home room teacher and also from the LS teacher. (NT at 102, 256.)
127. Mother requested an assistive technology report in May of 2006 but has not seen any report. (NT at 107.)
128. Mother testified that despite good efforts by the District, Student has not been successful, as seen by Student's lack of progress in reading. (NT at 107-08.)
129. Mother testified there have been incidents at school which she believes indicate Student's needs are not being met: (1) another student asked Student for her lunch ticket, and Student gave it to them. If an adult supervisor had not noticed Student sitting without her lunch, Student would not have eaten. (2) once a substitute Aide had Student walk up the hall to get to the Nurse while having focal seizures. (3) another time, Student had a focal seizure, but recovered, and then the Aide "brought her up to the room...which was, I thought, the appropriate thing to do at that time." (NT at 109-111.)
130. Mother testified that at the November 2006 IEP meeting, the Acting LEA said, "what do you want for [Student]?" Mother replied, "we want her to go to [school name redacted]." The Acting LEA said, "[school name redacted] is an excellent school, and would you like to drive her there, transport her there, or would you want us to transport?" The Acting LEA told Mother "she had to bring it to the new superintendent". "After that, we got a new LEA in, and it went downhill from there. We never did start any process." (NT at 111-12.)
131. Mother testified that [school name redacted] has a life skills class and a social skills class that she believes Student "desperately needs." Student would be with other children with severe ADHD. (NT at 113-14.)
132. Mother believes there is no life skills class in the District and that Student needs that.⁸ (NT at 119.)
133. Parents have tried full inclusion and Mother does not believe that was successful; she does not believe the learning support classroom is successful, either. (NT at 114-15.)
134. Mother testified she doesn't know curricula but believes there must be something more appropriate for her child. (NT at 115.)
135. Mother sees the behavior plan in the IEP as working well. (NT at 116.)
136. Mother testified Parents saw Dr. V, a Professor of Human Genetics and Pediatrics, and Chief of the Division of Medical Genetics, at [redacted] Hospital, because they wanted to "rule out mental retardation because if, in fact, that was in her bloodwork that she had, then we would have a more appropriate plan of action for her academics." (NT at 116-118; P-3.⁹)
137. The "Medical Genetics Outpatient Consultation" by Dr. V, states, "This is a 9-year-old girl referred by Dr. F2 for evaluation of ADHD and speech apraxia and seizures." There is no indication in the report that Dr. V is qualified to diagnose

⁸ Mother repeatedly testified that Student needs a Life Skills classroom, yet she also wants Student to be "pushed" academically. These are diametrically opposite positions. Life Skills Support is defined as "Services for students with a disability focused primarily on the needs of students for independent living." The implication is that this class is for children with less academic focus and expectations while Learning Support provides "Services for students with a disability whose primary identified need is **academic learning**." (Emphasis added.) 22 PA Code §14.141.

⁹ P-3 is entitled "Medical Genetics Outpatient Consultation."

- mental retardation or learning disabilities. The report does state, however, that “[c]hromosome testing has already been performed, but microarray analysis for microdeletions has not. This would include the 15q autism region. We should do this testing. She has not had a metabolic evaluation, and we should screen for this. [Student] has some minor dysmorphic features including synophrys, thin upper lip and long philtrum, but these are very nonspecific and she otherwise has no other signs suggesting a single gene disorder.” (P-3.)
138. The school psychologist testified that she created the 11/9/06 RR but not the 3/29/06 RR. Yet the signatures for the school psychologist appear to be the same. (SD-5, SD-10; NT 134, 137.)
 139. The District found Student was mentally retarded in March 2004 but has not retested her since that time. (NT at 167.)
 140. The Principal (who had been the Acting LEA) testified she did not agree to send Student to [school name redacted] at the November 2006 IEP meeting. (NT at 180-81.)
 141. The District believes Student needs more time in Learning Support – including time there for Science or Social Science. (NT at 183-84.)
 142. The District has proposed greater time in Learning Support in the past, but Parents were not receptive. (NT at 183.)
 143. The Principal testified that Parents want Student either in full-time inclusion in regular education classes or at [school name redacted]. (NT at 183-84.)
 144. The parents requested Principal remove the Mental Retardation designation from the RR because [school name redacted] does not accept children with MR diagnoses. (NT at 174.)
 145. The District does not send LEAs to visit other school districts unless planning to send a student there. (NT at 190-91.)
 146. Student’s 3d grade scores are based on a modified curriculum; Principal was not in the District during Student’s 1st and 2d grade years and does not know if her work was modified then. (NT at 193.)
 147. Principal has been principal of the school only since October 2006. (NT at 200.)
 148. All of Student’s 3d grade work is adapted. (NT at 194.)
 149. Principal does not recall stating, during the November 2006 IEP meeting, that she loves children but did recall discussing what was in Student’s best interests and that if [school name redacted] was deemed an appropriate placement, the District was obligated to send her there. (NT at 195.)
 150. The District could provide a full-time Learning Support class for Student. (NT at 201.)
 151. S/L therapy, provided 3 times/week, is provided as a pull-out therapy this year. (SD-17; NT at 210-11.)
 152. The proposed IEP continues the same S/L services and goals with the exception of adding a social skills goal. (SD-16; NT at 212-13.)
 153. The S/L therapist testified that Student is making “a lot of progress in her verbalizations,” that her sentences are increasing in length and her vocabulary is improving. Further, the therapist incorporates social goals such as taking turns, eye contact and conversational skills. (NT at 213-14, 220-21, 227.)

154. Student demonstrates her effort in S/L, typical of persons with verbal apraxia, by “a struggling behavior, kind of like a posturing, a silent posturing of sounds where they are holding their tongue without moving it.” (NT at 222-23.)
155. Students with verbal apraxia typically make very slow progress. (NT at 224.)
156. Student needs prompting to determine her skill/knowledge level. (NT at 223-24.)
157. Student’s 3d grade regular education teacher believes additional time in the LS class is needed. (NT at 231.)
158. Student has very limited, slow progress. (NT at 232, 247.)
159. “Scaffolding” – which is presenting an assignment to a student before the rest of the class – has shown success. (NT at 231, 237, 293-95.)
160. At times, Student’s observation of other children has been an effective behavior reinforcer. (NT at 236.)
161. When Student is printing, she must be directed and redirected to slow down and be careful. Her answers are typically 1 or 2 words. (NT at 242.)
162. There is no co-teaching with the special education teacher doing push-in in the regular education class. (NT at 243.)
163. Student has preferential seating in the regular education class; the regular education teacher has increased 1-on-1 time with her; and the 1-on-1 aide reinforces everything. (NT at 246-48, 250.)
164. Student is in the LS class for approximately 90 minutes/day. (NT at 252.)
165. The LS teacher works on reading, math, spelling, grammar, and reinforces science and social studies. (NT at 252.)
166. The LS teacher testified that Student would benefit from an additional 1-3 hours in the LS room each day. (NT at 253.)
167. The proposed IEP lists short-terms goals and objectives as this is required of students who take the PA Alternate System of Assessment (PASA), which is the alternative test offered when a student does not take the PSSA. (NT at 254, 292-93, 313.)
168. Student took the PSSA but was overwhelmed and had to be repeatedly redirected to stay focused. (NT at 254.)
169. The proposed IEP finds the PSSA is inappropriate for Student because she “meets all six of the Participation Requirements” for the PASA: 1. Student was in grades 3-8 or 11; 2. Student has significant severe cognitive disabilities; 3. Student requires very intensive instruction to learn; 4. Student requires very extensive adaptation and support for perform and/or participate meaningfully and productively in everyday life; 5. Student requires very substantial modifications of the general education curriculum; Student’s participation in the general education curriculum differs very substantially in form and/or substance from most other students. (SD-16; NT at 312.)
170. The LS teacher created short-term objectives and benchmarks for all measurable annual goals in the proposed IEP. (NT at 255, 313.)
171. Student has made reading progress; at the beginning of the school year, Student did not know any sight words and now knows 30-40 sight words and reads between 8-12 wpm (inconsistently). (NT at 256-57, 282-83.)
172. The LS teacher is using the Wilson Reading program, which is an orthographic reading program, and the Harcourt Reading Series. (NT at 257, 259.)

173. Modifications used include spelling words aloud. Student may not immediately know a sight word, but after hearing it spelled – or spelling it aloud herself – she knows the word. Based on that, the LS teacher does more verbal types of modifications. (NT at 259, 283-84.)
174. The LS teacher finds that individual instruction with a high degree of repetition is needed. (NT at 260.)
175. Student's ability is commensurate with the other students in the LS class. (NT at 260.)
176. The LS teacher believes Student needs 80-90% of her academic day in the LS class with increased time spent on various reading instruction techniques. More intensity of instruction is warranted. (NT at 261-62, 273, 277-79, 285, 288.)
177. Student's time in the LS class is with 4 other students, the LS teacher, and 1 or 2 aides. (NT at 260, 266.)
178. The LS teacher attended the November 2006 IEP meeting. She is aware several schools were visited for possible placement, but doesn't recall an agreement being made at the IEP meeting. (NT at 268-69.)
179. The LS teacher believes peer models help Student succeed in the regular education and LS classes. (NT at 274-75.)
180. The LS teacher sees Student making slow progress. (NT at 276.)
181. Student's behaviors have improved since the beginning of the school year. Initially, there were more defiant behaviors while now the only problem is being off-task. (NT at 285-87.)
182. The school day is 6.5 hours long; Student is in LS 90-120 minutes/day, 45-60 minutes in regular education; balance is spent in specials, speech, OT, PE and homeroom. (NT at 281-82, 298-300.)
183. The Director of Special Education testified that the District can implement the proposed IEP in the District; that he believes the IEP team should identify a health plan to meet Student's needs re seizures; and that Student's educational needs can be met within the District. (NT at 314-318.)
184. The Director of Special Education has been with the District since the beginning of March 2007. (NT at 289, 320.)
185. The Director of Special Education has reviewed Student's records and finds Student has made educational progress. (NT at 336.)
186. Student's 3d quarter grades for the 2006-07 school year: Grammar: 85; mathematics: 88; Reading: 91; Spelling: 79; Social Studies: 91; Science: 97; Handwriting: S; PE: S; Art: S; Music: S; Conduct: S. Student had 10 excused Absences. (SD-41.)
187. Student's current IEP provides 28% of her education in the Learning Support classroom. (SD-17.)
188. The District's proposed IEP provides 56% of Student's education in the Learning Support classroom. (SD-16.)

Witness Credibility Assessment

189. Dr. F – is a Developmental Neuropsychiatrist with 30+ years of experience. She received her M.D. from the [redacted] University School of Medicine in 1977 and is board certified in both general psychiatry and child adolescent psychiatry. She is registered as both a physician and surgeon in Pennsylvania; is certified by the American Board of Psychiatry & Neurology, is a member of the American Academy of Child & Adolescent Psychiatry and the American Association of Psychiatry. She is a published author in her field of developmental disabilities, in specific genetic disorders, and in neurologically handicapping conditions. She was a professor at [redacted psychiatric facility] for 10 years and has lectured on mental retardation. (P-9.) Dr. F was exceptionally credible, both in her demeanor while testifying and regarding her professional skills, training, and commitment. Her impressive resume and many years of experience made her testimony compelling. However, she was unaware of the program the District provided and proposed and she could not give any specifics regarding the proposed private placement Parents sought, so the reliability of testimony regarding specific placement was diminished.
190. Behavior Specialist – granted a Bachelor’s degree in elementary education from [redacted] College – 2000; a Master’s in special education from the [redacted] University in 2004. She is certified in elementary education and has been a behavior specialist consultant for approximately 4 years. She is experienced in ODD, autism, intermittent explosive disorders and other diagnoses. She has 2 years of personal experience with Student. Her demeanor was professional and her testimony was straight forward and clear without any discernable bias and added to the overall picture of Student’s behaviors and needs.
191. Father – testified briefly – a good deal of his testimony was his understanding of what his child has experienced but it is not first-hand knowledge. Rather, it is, as he stated, what he heard from his wife and things he has been told. This is understandable because he is limited in his participation at IEP meetings due to his employment. Nonetheless, his testimony regarding his conversations with his daughter were credible and he presented himself as a very caring parent.
192. Mrs. M. - Family Friend – testimony was limited to her attendance at the November 2006 IEP meeting where she heard the discussion surrounding an approved private placement. Her testimony was forthright and open; she expressed herself in terms which clearly conveyed her recollection of events. She was very credible.
193. Mother – testified as to the ongoing educational history and frustrations of seeing her child vacillate educationally. She is clearly a very caring parent who is frustrated with the lack of progress her child has experienced. Her recollection of the November 2006 IEP meeting was highly credible. Her understanding of how a determination of mental retardation is made is lacking, however. She testified to taking Student to a geneticist for a blood test (August 2006) to learn if Student is mentally retarded after having received a thorough neuropsychological evaluation from [redacted] (June 2006) stating Student was mentally retarded.

Additionally, Mother feels Student needs to be pushed academically and repeatedly stated Student needs a life skills class without stating what she expected that class to provide or why. Further, Mother could not speak to specifics in [school name redacted] that were absent in the District's program. Nonetheless, Mother presented herself as someone who understands her child has a complicated medical/educational mixture and who wants a program which can address those needs and her heartfelt desperation was clear when she said, "They are gone. They are gone. They are gone. They are gone... We have lost 4 years of learning..."

194. School Psychologist – earned her Bachelor's degree in Psychology from [redacted] University in 1995, her Master's in School Psychology from [redacted] University in 2000, a certification as an Educational Specialist as a school psychologist in 2005, and is certified as a Education Specialist 1 as a school psychologist. While the substantive testimony was credible, an examination of the signatures on SD-5 and SD-10, the signatures appear to be that of this psychologist, yet she testified that she did not create SD-10. [Q: Tab 10, was this report created by you? A: No. it was not.] However, because her testimony was otherwise direct and credible, this Hearing Officer resolves this issue as the witness understanding the question to refer to the IQ testing which was referenced in the report, which was conducted by another school psychologist.
195. School Principal – Bachelor's degree in Home Economics and Early Childhood Education from [redacted] University; Master's degree from [redacted] College in Education; certified as a Principal and for Gifted Education. The Principal testified that while a discussion about Student attending another placement took place, she never made any agreement regarding [school name redacted]. This assertion was discredited by Dr. F and others who clearly heard concessions being made. Further, it strains the limits of believability that the LEA would have accompanied Parent to [school name redacted] had there not been some sort of agreement that [school name redacted] would at least be considered as a possible educational placement. In all other respects, this witness's testimony was credible.
196. Speech/Language Pathologist – Bachelor's in Speech Pathology and Otology from [redacted] University in 2002 and a Master's in Communication disorders from [redacted] University in 2004. She has been employed with the District since January 2005. Although her testimony was brief, she presented herself in a professional manner and her understanding of Student's speech and language needs was evident. This Hearing Officer found her quite credible.
197. Third Grade Regular Education Teacher – Bachelor's and Master's degrees in Elementary Education; he has been employed with the District since 1993. This teacher presented himself in a very professional manner – he addressed questions clearly and showed a great understanding of Student and her needs. He was very credible.

198. Learning Support Teacher – Bachelor’s degree, May 2006, from [redacted] College with a Major in Elementary Education and a Minor in Special Education. She has certifications in Elementary and Special Education. This teacher is spoken of very highly by everyone and while she was obviously nervous, her testimony was highly credible.
199. Acting Asst. Superintendent/Director of Special Education - Bachelor’s degree in K-8 education from [redacted] University in 1992; a Master’s in Special Education with an emphasis on Behavior Disorders, Mental Impairments and Collaboration Consultation from [redacted] University in 1994; is one course away from a Ph.D. in Administration and Special Education; is certified in Elementary Education, Special Education, Administration, and Supervisor of Students. He has taught general education – grades K-8, special education – all exceptionalities; he is an Adjunct Professor at [redacted] University where he teaches Special Education courses; and he is a trainer in Bridge’s Learning System – a neuroscience based learning system for students, a trainer in nonviolent crisis intervention training, a trainer of school-wide positive behavior support and a trainer in Special Education Reading programs. He previously was employed in [state redacted] where he was the Director of Special Education for the northern region of the state with approximately 30,000 students of which 7,000 were special education students; prior to that he was the [town redacted, state redacted] Coordinator of Special Education with 2,000 special education students. This witness was exceptionally credible, both in his demeanor while testifying and in his professional skills and training. His testimony was clear, direct, and his willingness to state that he would encourage the IEP team to make some changes to the proposed IEP based on testimony he had heard during the hearing added to his credibility.

Discussion and Conclusions of Law

Jurisdiction

A due process hearing is a hearing authorized through special education laws of both federal and state legislation. The jurisdiction of such a hearing is highly circumscribed. A hearing officer cannot decide any issue – no matter how significant – which is outside those narrowly defined parameters. Thus, any concerns parents may have regarding education services which concern matters beyond those parameters are beyond the purview of this process and this Hearing Officer.

Witness Credibility

Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses” and “give some reason for discounting”¹⁰ or crediting evidence. Further, Hearing Officers’ decisions are to “specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions”.¹¹ The Third Circuit, in Shore Regional High School Bd. Of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004), held that “if a state administrative agency has heard live testimony and has found the testimony of one witness to be more worthy of belief than the contradictory testimony of another witness, that determination is due special weight. Id.”¹² Carlisle Area School v. Scott P., 62 F.3d 520, 527-29 (3d Cir. 1995). Specifically, this means that a District Court must accept the state agency’s credibility determinations ‘unless the non-testimonial, extrinsic evidence in the record would *justify* a contrary conclusion.’ Carlisle, 62 F.3d at 592 (emphasis added). In this context the word ‘justify’ demands essentially the same standard of review by a federal appellate court. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985).”¹³ This court further held that “the task of evaluating [witnesses’] conflicting opinions lay in the first instance with the ALJ in whose presence they testified.”¹⁴

Similarly, credibility has been addressed in various jurisdictions. Looking to California, Stevens v. Parke Davis & Co., 9 Cal.3d 51, 67-68 (1973) held that a trier of

¹⁰ Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003).

¹¹ Id. at *34.

¹² Citing S.H. v. State-Operated School Dist. of City of Newark, 336 F.3d 260, 271 (3d Cir. 2003)

¹³ Shore Regional at 199.

¹⁴ Id. at 201.

fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted....[and also] reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” Further, a fact finder may reject the testimony of even an expert witness, although not contradicted. Foreman & Clark Corp. v. Fallon, 3 Cal.3d 875, 890 (1971) California courts have also found that “one credible witness may constitute substantial evidence”. Kearl v. Bd. Of Medical Quality Assurance, 189 Cal.App.3d 1040, 1052. (1986).

Burden of Proof

The burden of proof consists of both the burden of production and the burden of persuasion. Neither the IDEA nor the IDEIA¹⁵ addressed the subject of burden of proof and therefore the question of which party bore the burden was handled on a state-by-state basis with only a handful of states passing any laws or regulations on the matter. In Pennsylvania, the burden in an administrative hearing challenging an Individualized Education Program (“IEP”) generally fell to the LEA. Recently, however, the United States Supreme Court addressed this issue in Schaffer v. Weast, 126 S.Ct. 528 (2005). In the concluding paragraph of the Opinion of the Court, Justice O’Connor held: “The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.”¹⁶ In Antoine M. v. Chester Upland School District, Civ. Action

¹⁵ The IDEIA is variously referred to in case law as the IDEIA or IDEA 2004. In either event, it is one and the same.

¹⁶ 126 S.Ct. at 537.

No 05-3384, (E.D.Pa. Mar. 14, 2006), the Court held that even where the challenge is not to the sufficiency or appropriateness of an IEP, but rather for the failure to find a child eligible for one, “the overarching logic of Schaffer – that, in the context of the IDEA, the party bringing the challenge bears the burden of proof...[and] [a] student’s challenge to a district’s determination that he or she is not eligible for an IEP should not be treated any differently than a challenge to the adequacy of an IEP.” Thus, where a “case is brought solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs, *Schaffer* controls.”¹⁷

The burden of persuasion in an administrative proceeding lies with the party seeking relief.¹⁸ This requires the Hearing Officer to make a determination of whether or not the evidence is “equipoise” rather than preponderant. Preponderance of the evidence is defined as evidence presented by one party that is of greater weight or more convincing than the evidence offered by the other party. In other words, where there is evidence which tips the scales, the party which presented that evidence prevails. However, where the Hearing Officer finds the evidence is equally balanced on an issue, the non-moving party prevails.

Issues

1. In light of Student’s minimal progress, has the District provided a free appropriate public education (FAPE) in the least restrictive environment (is Student’s current placement appropriate) or does Student require an approved private placement?

¹⁷ L.E. v Ramsey Bd. Of Educ., 435 F.3d 384, 391 (3d Cir. 2006).

¹⁸ Greenwood v. Wissahickon Sch. Dist., Civ. Action No. 04-3880 (E.D. Pa. Feb. 3, 2006) (“Hence, because there is no Pennsylvania law imposing the burden on the district, *Schaffer* applies and the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP”.)

2. Is the proposed IEP, which provides for increased learning support services, appropriate and reasonable and calculated to provide Student with a meaningful educational benefit in the least restrictive environment?

3. Did the District agree to submit paperwork for Student to attend an approved private placement ([school name redacted])?

4. Should the 11/9/06 Reevaluation Report be revised to re-include all intelligence testing and the Mental Retardation designation?

Issue No. 1. In light of Student's minimal progress, has the District provided a free appropriate public education (FAPE) in the least restrictive environment –that is, is Student's current placement appropriate -- or does Student require an approved private placement?

Both the Parents, who requested the due process hearing, and the District believe and are in agreement that Student needs a more intensive educational program in order for Student to experience significant learning. Currently, Student's educational program provides 28% of her day outside of the regular education classroom.¹⁹ The District proposes increasing Student's time in the Learning Support classroom to 56%.²⁰ Parents propose an approved private school placement where 100% of Student's day will be in a segregated educational environment.

¹⁹ 22 PA Code §14 provides the definition of *Resource* -- Regular classroom instruction for most of the school day, with special education services and programs provided by special education personnel for part of the school day.

²⁰ 22 PA Code §14 provides the definition of *Part-time* – Special education services and programs outside the regular classroom but in a regular school for most of the school day, with some instruction in the regular classroom for part of the school day.

The IDEIA provides that identified students are to be educated to the maximum extent appropriate with children who are not disabled. To that end, “special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.” 20 U.S.C. Sec. 1412(a)(5)(A); 34 C.F.R. Sec. 300.550.

The Third Circuit addressed the issue of least restrictive environment in Oberti v. Board of Education of Clementon School District, 995 F.2d 1204 (3d. Cir. 1993).²¹ The court set forth what is now a famous two-part test to determine the appropriateness of a student’s placement. First, the court determines whether education in the regular classroom with supplementary aids and services can be achieved satisfactorily.²² To accomplish this, *Oberti* set forth three factors: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom with supplementary aids and services; (2) a comparison of the educational benefits available in a regular class and the benefits provided in a special education class; and (3) the possible negative effects of inclusion on the other children in the class.²³ If there is a determination that the child cannot be educated in the regular education classroom, the second part of the test is considered. At that point, the court must decide whether the district has mainstreamed the child to the maximum extent possible.²⁴

²¹Rafael Oberti was an 8 year old student with a history of behavior problems and had, by virtue of Down’s syndrome, severely impaired intellectual functioning and limited ability to communicate. *Id.* at 1207.

²²*Id.* at 1215.

²³*Id.* at 1220.

²⁴Girty v. Sch. Dist. of Valley Grove, 163 F.Supp.2d 527, 533 (W.D.PA 2001)

Part I of II-Part Test

Factor No. 1 – Reasonable efforts to accommodate in the regular education classroom with supplementary aids and services

Placement must be in the least restrictive environment where Student can receive a meaningful educational benefit.²⁵ Oberti requires that before a placement other than the regular education class can be considered, “the school ‘must consider the *whole range* of supplemental aids and services, including resource rooms and itinerant instruction,’ *Greer*, 950 F.2d at 696, speech and language therapy, special education training for the regular teacher, behavior modification programs, or *any other available aids or services* appropriate to the child’s particular disabilities. The school must also make efforts to modify the regular education program to accommodate a disabled child.” Oberti, 995 F.2d at 1216 (emphasis added). Absent this “serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, *then it has most likely violated the Act’s mainstreaming directive*. “The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad.” *Daniel R.R.*, 874 F.2d at 1048; see also *Greer*, 950 F.2d at 696.” Oberti, 995 F.2d at 1216 (emphasis added.)

To determine whether Student has received her education in the least restrictive environment that would provide her with a meaningful educational benefit we must look to see if supplementary aids and services and modifications to the curriculum have been provided. See Girty, 163 F.Supp.2d at 536 (“simple techniques exist which could be used to facilitate Spike’s inclusion in regular education instruction....with a small amount

²⁵ See S.H. v. State-Operated Sch. Dist. of the City of Newark, 336 F.3d 260, 272 (3d Cir. 2003).

of research into the methods that many school districts already use, a program beneficial to Spike could be developed.”); Blount, 2003 LEXIS 21639 at 27 (“A review of the record... does not show that the IU proposed any specific supplementary aids and services,....The IU did not present any evidence as to what specific supplemental aids and services it considered. Its exhibits...make no reference either to those specific supplementary aids and services typically available to comparable children, or to any actually considered by the relevant decision-makers in the instant case.”) and Oberti, 995 F.2d at 1211 (“a number of commonly applied strategies...could be used, in combination, by the School district to integrate Rafael in a regular classroom, including: (1) modifying some of the curriculum to accommodate Rafael’s different level of ability; (2) modifying only Rafael’s program so that he would perform a similar activity or exercise to that performed by the whole class, but at a level appropriate to his ability; (3) ‘parallel instruction,’ i.e., having Rafael work separately within the classroom on an activity beneficial to him while the rest of the class worked on an activity that Rafael could not benefit from; and (4) removing Rafael from the classroom to receive some special instruction or services in a resource room, completely apart from the class. Dr. Brown explained that with proper training a regular teacher would be able to apply these techniques and that, in spite of Rafael’s severe intellectual disability a regular teacher with proper training would be able to communicate effectively with Rafael. Dr. Brown also testified that many of the special educational techniques applied in the segregated Winslow class could be provided for Rafael within a regular classroom....[Further] speech and language therapy Rafael needs could be most effectively provided within a regular classroom....language and speech therapy could easily be provided by a therapist

inside the regular class during ongoing instruction if the therapist were able to collaborate ahead of time with the instructor regarding the upcoming lesson plans....Dr. McGregor...testified that, given the resources and expertise available to public schools ... the School District should be able to design an inclusive program for Rafael with assistance from professionals who have experience integrating children with disabilities in regular classes.”) Steps such as these are what Oberti referred to as “reasonable efforts to include [Student] in a regular classroom with supplementary aids and services”. Oberti, 995 F.2d at 1204.

The record is clear that this is a child with multiple, complex needs and that the parties, both District and Parents, have striven to find the correct mixture of supplementary aids, services, and modifications to the curriculum to allow Student to experience a meaningful benefit from her educational experience. In first grade, Student received academic instruction in a Learning Support classroom. That year, she knew 32 out of 73 words from the Edmark Reading Program and received year-end grades varying from 80 to 94. In second grade, Student was in a full-inclusion class until approximately February, at which time Student went to the Learning Support classroom for Language Arts. At year’s end, she knew 70 out of 73 words from the Edmark Reading Program and could count and complete addition/subtraction problems up to sums of 18 and had some abilities in adding and subtracting two-digit problems. Her final grades that year were two 76s and one 82. This year (3rd grade), Student is in Learning Support for 28% of the academic day, which comprises the majority of her academics, but is in a regular education class for Science and Social Studies. Student is still in a first grade reader but knows 30-40 sight words and reads between 8-12 wpm using the Wilson Reading

Program. Her third-quarter grades ranged from 79-97. All of her academic subjects are highly modified to meet her needs.

Factor No. 2 - A comparison of the educational benefits available in a regular classroom (with supplementary aids and services) and the benefits provided in a segregated, special education class room.

This portion of the analysis requires (1) a heavy reliance on the “testimony of educational experts”, and, (2) a requirement that the Hearing Officer “must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with nondisabled peers. See *Daniel R.R.*, 874 F.2d at 1049 (‘a child may be able to absorb only a minimal amount of the regular education program, but may benefit enormously from the language models that his non-handicapped peers provide’); *Greer*, 950 F.2d at 697 (language and role modeling from association with non-disabled peers are essential benefits of mainstreaming).”²⁶ (emphasis added.) The second element was discussed at length by the Oberti court. It found a “fundamental value of the right to public education for children with disabilities is the right to associate with non-disabled peers....Thus, a determination that a child with disabilities might make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment. We emphasize that the Act does not require states to offer the same educational experience to a child with disabilities as is generally provided for non-disabled children. [cites omitted.] To the contrary, states must address the unique needs of a disabled child, recognizing that that child may benefit differently from education in

²⁶ Oberti at 1216.

the regular classroom than other students. See *Daniel R.R.*, 874 F.2d at 1047. In short, the fact that a child with disabilities will learn differently from his or her education within a regular classroom does not justify exclusion from that environment.” Oberti at 1216-1217.

A. Testimony of Educational Experts

Dr. F, a developmental neuropsychiatrist with 30 years’ experience, testified her preference for a full-time learning support which would be highly structured and include, *inter alia*, a high degree of drill and repetition with peers who are engaged in the same kinds of activities, a modified curriculum, behavioral reinforcers, and access to expert consultation. Her professional opinion was, due to Student’s focal seizures, verbal apraxia, and ADHD, she would benefit from an approved private placement, but posited that Student could receive a meaningful educational benefit from a full-time learning support placement in the District.

Also persuasive was the District’s Director of Special Education’s testimony that Student’s needs could be met within the District. Additionally, Student’s Learning Support classroom teacher testified very credibly that although Student has learned numerous sight words this year she would benefit from additional time in Learning Support. This testimony was supported by the Regular Education 3d grade teacher’s testimony concurring that while learning was taking place with supplemental supports and services, that it is at a slow rate and that additional time in Learning Support is needed.

B. Requirement that Hearing Officers “must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment.”

In comparing the benefits, this Hearing Officer must again turn to Oberti. “[A] determination that a child with disabilities might make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment.”²⁷ Further, the Blount court found a Congressional preference for mainstreaming children “at the earliest possible time, rather than assigning a disabled child to special education with the hope that he will improve sufficiently to go into a mainstream educational setting.”²⁸

It appears to this Hearing Officer that while a segregated classroom at an approved private placement could possibly offer a higher degree of personal attention, the testimony of Dr. F, the Director of Special Education, and the Learning Support and Regular Education teachers leads to the conclusion that if Student is provided with supplementary aids and services individualized to Student’s educational needs, which includes a greater percentage of the academic day spent in Learning Support, Student could experience a meaningful educational benefit from the regular education class within the District. As in Oberti, of course, there is the possibility that as Student reaches higher grades, “inclusion in regular academic classes may become less appropriate” for Student.²⁹ That decision is not before this Hearing Officer, however, and it would certainly be premature to speculate upon.

²⁷ Oberti at 1217.

²⁸ Blount, 2003 LEXIS 21639 at 41, fn. 5.

²⁹ Oberti, 995 F.2d at 1224.

Factor No. 3 - The possible negative effects of inclusion on the other children in the class.

Oberti requires a consideration of any disruptive behaviors which could negatively impact upon the education of other classroom children.³⁰ There is no dispute regarding Student's behaviors, therefore, this is not a concern.

Part II of II-Part Test

The second part of the test, which is a determination as to whether the school has mainstreamed the child to the maximum extent appropriate, is reached only if there is a finding that placement outside of the regular classroom is required. Oberti held "even if a child with disabilities cannot be educated satisfactorily in a regular classroom, that child **must** still be included in school programs with nondisabled students whenever possible." Oberti, 995 F.2d at 1218 (bolding added). It also adopted the viewpoint of the Fifth Circuit court in Daniel R.R. v. State Bd. Of Educ., 874 F.2d 1036 (5th Cir. 1989):

"the school **must** take intermediate steps whenever appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with non-handicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops."

Oberti, 995 F.2d at 1218 citing Daniel R.R., 874 F.2d. at 1050 (bolding added).

Student requires more than a "resource" period of time in the Learning Support classroom. Currently, Student is in a regular education 3d grade class for Science and Social Studies and in Learning Support for all other academic subjects. Her Science and Social Studies curriculum are highly modified so she can learn; she has a 1-on-1 aide; she receives additional instruction from her 3d grade teacher; she has preferential seating; and

³⁰ Id. at 1217.

scaffolding is used to introduce the lesson plan to her prior to the rest of the class. The 3d grade and Learning Support teachers testified persuasively that Student needed more intensive instruction. Although Parents argue, from the heart, that they do not see Student making progress, that she does not feel wanted or included in her school setting, and that she needs a full-time private placement, the evidence shows Student is learning and making progress, albeit slowly. The next step on the continuum of services is a part-time placement in Learning Support. The increase to 56% with the balance of Student's academic day in regular education is reasonable and permits Student to be mainstreamed to the maximum extent appropriate.

This Hearing Officer does not dispute that the private placement could be the optimal placement. Nonetheless, the legal standard is not what is optimal. Rather, it is the least restrictive environment where student can obtain an adequate or "meaningful educational benefit in light of his individual needs and potential."³¹

As a matter of dicta, this Hearing Officer must state that it is certainly a concern that this Student feel welcome and a part of the student body. Father testified – and this hearing Officer could see the hurt he felt when he recounted the incidents – how Student said to him that her first grade teacher did not want her in class and how, currently, other students rudely tease and mock her for going to the learning support class. This must end! The District should take whatever steps are necessary to ensure faculty and students are enlightened and sensitized to diversity in all of its aspects. Regarding this, the Third Circuit stated:

"Courts should also consider the reciprocal benefits of inclusion to the non-disabled students in the class. Teaching non-disabled children to work and

³¹ T.R. v Kingwood Township Bd, of Educ., 205 F.3d 572, 578 (3rd Cir. 2000).

communicate with children with disabilities may do much to eliminate the stigma, mistrust and hostility that have traditionally been harbored against persons with disabilities.”

Oberti at 1217, n. 24.

This Hearing Officer finds the evidence preponderant that Student’s educational needs can be met in the District’s proposed placement with increased time in the Learning Support class.

Issue No. 2. Is the proposed IEP, which provides for increased learning support services, appropriate, reasonable and calculated to provide Student with a meaningful educational benefit in the least restrictive environment?

Yes. The proposed IEP contains, *inter alia*, a five-page recitation of Student’s present levels of academic achievement, 12 measurable annual goals with multiple short-term objectives/benchmarks, 14 separate modifications and SDI, provides for ESY as necessary for FAPE, a functional behavioral assessment based on 4 observations and a behavior support plan designed to meet her ADHD needs. This is a well-prepared, well-considered document that addresses Student’s identified needs. It proposes an increase in the learning support environment yet it continues to provide learning in a regular education classroom.

The increase in learning support is the next logical step in a more intensive approach to Student’s special education needs. While the law does not require that students experience a continuum of more restrictive special education services incrementally or *ad seriatim*, it is important to weigh each step carefully to ensure a student is not placed in an overly-segregated environment without considering the

benefits and efficacy of a less restrictive alternative. Even where a measure on that continuum has been utilized previously, the Third Circuit (which incorporated the Fifth Circuit analysis of LRE) requires school districts to take intermediate steps whenever appropriate and gave voice to its hope that the appropriate mix would vary “from year to year as the child develops.” Oberti, 995 F.2d at 1218.

This IEP provides an increased intensity of educational learning with the high level of repetition and drill which Parents’ expert, Dr. F, opined Student needed to succeed, without violating the “fundamental value of the right to public education ... to associate with non-disabled peers.” *Id.* at 1216, 1217.

Issue No. 3. Did the District agree to submit paperwork for Student to attend an approved private placement ([school name redacted])?

Yes. It is clear that not only was Mother under the impression that the District, through the statements of the acting LEA (now Principal), had agreed to submit paperwork to parents’ preferred approved private school, but Mrs. M. and Dr. F all heard the same thing. On the other hand, the Principal denies making any such agreement.³² Nonetheless, several weeks later, not only did the District LEA encourage Parent to look at an IU program, but she accompanied Parent to see the IU program located in the [redacted] School District and also viewed [school name redacted] with Parent. Further, this LEA then reported her findings about [school name redacted] to the District and there was testimony that the District does not view other placements unless considering an out of district placement. Lastly, Principal testified that the District changed the Student’s

³² The 3d grade regular education teacher stated he was not at this November 2006 IEP meeting for its duration and he did not recall any discussion. The Learning Support teacher recalled discussion regarding outside placement but not to hearing the Principal make any concessions regarding [school name redacted].

primary disability designation because Parents needed the mental retardation diagnosis removed because [school name redacted] does not accept students who are mentally retarded.³³

In light of the foregoing, it is the cumulative recitation of facts which is persuasive and which strains even the boundaries of credulity to ask this Hearing Officer to believe no offer of private placement – or at a minimum – investigation of a private placement, was made, or that, if made, it was made just to pacify Parents. While Principal may sincerely not recall making any statements about [school name redacted] which have been construed as an offer to investigate or initiate paperwork for placement, the fact remains that the District actually visited outside placements with Parent.³⁴ Even more egregious is that the District led Parents to have these expectations when it knew it was fully capable of providing FAPE in a LRE. Therefore, while this Hearing Officer finds the District did agree to initiate paperwork for an approved private placement, it is, for Parents, a Pyrrhic victory. While Parents certainly have the right to apply to a private school for placement for their daughter, the District is not responsible for the tuition as it can provide an appropriate education in a far less restrictive environment. The District is not Ordered to complete paperwork for Student’s admission to [school name redacted].

As a matter of dicta, this Hearing Officer notes that the District – which has experienced a turnover in personnel which can be likened to a revolving door – has not

³³ The [school name redacted], created by [redacted organization addressing needs of individuals with learning disabilities] is a segregated, specific learning disabilities-exclusive facility. [Its] mission is “to serve individuals with SLD, the school *does not serve* children with any of the following primary diagnoses: mental retardation, emotional disturbance, chronic medical conditions, blindness, or deafness.” (emphasis added.) In light of [school name redacted]’s refusal to accept children with chronic medical conditions, this Hearing Officer questions whether [school name redacted] would consider accepting Student, even without a MR designation, due to her involved seizure disorder.

³⁴ The adage “actions speak louder than words” is highly vocal here.

been honest or dealt fairly on this issue with these Parents who are obviously caring, hardworking, honorable people and this Hearing Officer is left with a profound disappointment in the District's conduct in this matter. However, there are new administrators and it is to be hoped that they will work diligently to mend this relationship.

Issue No. 4. Should the 11/9/06 Reevaluation Report be revised to re-include all intelligence testing and the Mental Retardation designation?

No. In the line-by-line examination of both testimony and exhibits, which included a close reading of Student's evaluations, this Hearing Officer was struck by the complexity of this child's disabilities and the rather off-hand manner in which the IEP team and the District have bandied around with Student's primary disability diagnosis. This is unacceptable. The District cannot cavalierly decide one day that a student has one primary diagnosis, abandon it the second day, and then reinstate it the third. A disability diagnosis is to be based upon facts and need and not upon whim and caprice.

Dr. F was an exceptionally credible witness and her testimony was persuasive that Student's involved seizure disorder as well as her verbal apraxia affects her ability to effectively express her intellectual abilities and that these effectively mask her knowledge which can lead to a misdiagnosis of mental retardation. When the District's certified school psychologist tested Student over 3 years ago, she did not administer nonverbal IQ tests which could more accurately assess Student's true intellectual abilities. More recently, Parents obtained a Neuropsychological Evaluation Report from [redacted facility]. This report explained that pervasive difficulties in Student's attention,

communication and motivation affected her Verbal Comprehension scores on the WISC-IV, and therefore a valid F/S IQ score was unattainable, that the Similarities subtest responses were echolalic and that on the Comprehension subtest, Student just shrugged her shoulders and did not respond.

Therefore, based on the nature of the IQ testing itself and that there was no accommodation for Student's neurological and verbal disabilities as well as the fact that the District's testing was administered over 3 years ago, the District's request that this testing and the diagnosis of mental retardation be reinserted into the latest RR is denied. Instead, the District is ordered to administer IQ tests which provide the necessary accommodations to reach an accurate picture of Student's intellectual abilities. Tests, such as the Test of Nonverbal Intelligence (TONI), the Peabody Picture Vocabulary Test (PPVT) where results correlate with IQ and/or the Leiter International Performance Scale-Revised (Leiter-R) which assesses nonverbal intelligence and problem-solving are possible options, as is the nonverbal portions of the WISC-IV. The District is not limited to, nor required to administer, these particular instruments, but it shall administer a minimum of 2 assessments to ensure an accurate result.

After the updated testing is completed, a revised evaluation report, incorporating the results of the testing, is to be presented to Parents and the IEP team and the IEP team will carefully and deliberately examine the results of the testing and decide – based on the testing results and not on any preconceived determination of where the child should attend school – what the nature of Student's primary and/or secondary disability category.³⁵ At such time, the IEP team will also review the proposed IEP to ensure the

³⁵ The District's obligation does not hinge on a label or designation; rather, it is required to provide Student

appropriate SDI is provided and the identified goals and objectives reflect the findings of the RR.³⁶

ORDER

For the reasons hereinabove discussed, it is hereby ordered:

1. The District has provided a free appropriate public education in the least restrictive environment and Student does not require an approved private placement.
2. The District's Proposed IEP provides for meaningful educational benefit in the least restrictive environment.
3. The District agreed to initiate paperwork to the [school name redacted] , but because the District can provide FAPE within the District, it is not Ordered to complete same.
4. The District will not revise the 11/9/06 Reevaluation Report re-include all intelligence testing and the Mental Retardation designation;

an opportunity to make educational progress in the least restrictive environment appropriate to that child's individual needs.

³⁶ The Pennsylvania Board of Education Regulations, found at 22 PA Code, §14.141, provides definitions for educational placements.

“Learning support – Services for students with a disability whose primary identified need is academic learning.

“Part-time – Special education services and programs outside the regular classroom but in a regular school for most of the school day, with some instruction in the regular classroom for part of the school day.

“Resource -- **Regular classroom instruction for most of the school day, with special education** services and programs provided by special education personnel for **part of the school day.**” (Bolding provided.)

The District proposes increasing the amount of time Student spends in the special education classroom to 56% of the academic day. This means the majority of Student's academics will be provided outside the regular education classroom. The proposed IEP should correctly reflect that. This requires changing the Educational Placement, Type of Service, from “Resource” to “Part-Time.”

The District shall administer an IQ assessment, using a minimum of 2 instruments which accommodate Student's identified disabilities. The results of that assessment shall be incorporated into an updated Reevaluation Report and submitted to Parents and the IEP team which shall, after deliberation, decide Student's Primary and/or Secondary Disability Categories.

Margaret Drayden

Hearing Officer

May 24, 2007