

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION
DUE PROCESS HEARING

Name of Child: M.F.
ODR #00304/09-10 AS

Date of Birth:
[redacted]

Dates of Hearing:
November 20, 2009
January 6, 2010
January 26, 2010
January 29, 2010
March 12, 2010
May 11, 2010
June 14, 2010

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Upper Merion School District
435 Crossfield Road
King of Prussia, Pennsylvania 19406

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:
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June 24, 2010

July 1, 2010

Linda M. Valentini, Psy.D., CHO

Background

Student¹ is a primary grades aged student who is eligible for special education services under the current classifications of autism, speech/language impairment, other health impairment and emotional disturbance. Student received Early Intervention services through the [local] IU. The Parents delayed Kindergarten entrance for one year in favor of placement in a typical preschool and a specialized speech/language program with continued home-based services through the IU. The District evaluated Student and developed an IEP for the 2009-2010 school year over several IEP meetings in which the Parents and other private providers engaged by the Parents participated. Before the District issued its evaluation report and before the first IEP meeting the Parents had put down a deposit on a private school and Student was accepted into the private school. Prior to the beginning of the school year Student's Parents rejected the District's final offer of a program and placement and unilaterally placed the Student in the private school. They filed for this hearing seeking tuition reimbursement as well as an order that the District provide Student with additional related services in the form of ABA, OT and PT. The District holds that it offered Student an appropriate program and placement, that the unilateral private placement is not appropriate, and that the equities favor the District. Further the District argues that since its program is appropriate and contains the requested related services it is not obligated to provide these for Student.

For the reasons set forth below I find in favor of the District.

Issues

1. Did the School District fail to offer an appropriate program and placement for Student for the 2009-2010 school year?
2. If the School District failed to offer an appropriate program and placement for Student for the 2009-2010 school year, was the placement unilaterally chosen by the Parents appropriate?
3. If the School District failed to offer an appropriate program and placement for Student, and the placement unilaterally chosen by the Parents was appropriate, are there equitable considerations that would remove or reduce the District's obligation for tuition reimbursement?
4. Must the School District provide Student with ten-and-a-half [10 ½] hours of home ABA programming, one [1] hour of individual occupational therapy, and one [1] hour of individual physical therapy weekly?

¹ The name, age, gender and current school of the Student is not used in this decision in order to preserve the Student's privacy.

Findings of Fact

Sequence of Events:

1. In preparation for Student's transition to school-age programming for the 2009-2010 school year the District issued a Permission to Evaluate [PTE] on or about March 18, 2009. [S-11]
2. The Parents were concerned about the tests that would be administered and requested clarification. The District did not receive the signed PTE back until May 4, 2009, forty-seven calendar days after it had been issued. The evaluation was finished in less than one month from the date the District received the signed PTE. [NT 1259-1261, 1337-1358, 1374-1399; S-11, S-13, S-14]
3. Before the Parents signed and returned the PTE, at least as early as March 2009, they had discussed the specific private school with their consultant and home provider(s), completed the application to the private school, visited the school, submitted Student's current records to the school for review, and made a tuition deposit to the school. [NT 683, 1254-1255, 1337-1358, 1374-1399; S-11, S-14, S-47, P-34]
4. Student was accepted into the private school program on June 2, 2009, four days after the District issued its evaluation report but before the report was formally shared with the Parents and before revisions were made to include the emotional disturbance label at the Parents' request. [NT 434-436, 1272; P-43, P-47]
5. Student was accepted at the private school before an IEP meeting could be convened at the District. [NT 1272-1273; P-47, P-58A, P-58B]
6. The Parents were offered the opportunity to visit the District's Autistic Support classroom but the Parents did not contact the teacher for a visit.² [NT 999-1000]
7. The Parents rejected the District's NOREP even before they and/or the home team behavior specialist consultant had provided significant additional documentation about Student to the District. [NT 226-278, 1221, 1284; P-58]

² Parent(s) had visited the class the year before when there was a different group of students.

8. For the summer following the 2008-2009 school year the Parents placed Student in a typical day camp with the assistance of an aide. [NT 620-621, 890, 1171; P-42]
9. The mother's goals for Student are a decrease in anxiety, increased socialization, acquisition of academic skills and to get Student back into a typical setting. She sees increased language skills as intertwined with socialization and academics. [NT 1214-1216]

District's Offered Program:

10. The evaluation report completed by the District in May 2009 initially classified Student as a student with Autism. The Parents later asked that the classification include Autism as the primary disability category with Speech/Language impairment, Emotional Disturbance, and Other Health Impairment added as secondary categories. [NT 1355; P-50]
11. The IEP team which included the Parents, their educational consultant³, their private speech/language therapist, and their TSS/ABA providers met on two occasions for about three hours each to develop Student's program and placement. Multiple drafts were prepared and shared with the Parents as part of the collaborative IEP process. The IEP went through a number of drafts based on recommendations and concerns expressed by the Parent at these meetings and in light of data that was newly being shared with the District just before the IEP team meetings. [NT 176; S-18, S-19, S-20, P-53, P-58, P-58a, P-58b]
12. The IEP was based on data from evaluations completed by a private evaluator engaged by the Parents as well as two evaluation reports completed by the District's psychologist. While the home team did not share all the observational data it had available, the team did share a copy of the VB MAPP completed on the Student in the late Spring of 2009. [NT 933-1009, P-10, P-29, P-43]
13. The District staff person who drafted the IEP has been part of the Pennsylvania Verbal Behavior Project for the past eight years as a supervisor/trainer. She holds certification in Applied Behavior Analysis. She reviewed all documentation made available to her by the Parents from the year prior to Student's planned entrance into the District, but all information generated by the home team was not provided to her until very late in the process. [NT 935-937, 942, 945]

³ Referenced as "Neurodevelopmental Case Manager" on IEP sign-in sheets. [P-58a, P-58b]

14. The IEP team was to be reconvened at the end of September after Student had been in the District for a month so that baselines could be established or adjusted. Student had never been in the District's schools before and because of the change in environment and program an observation and data collection period was needed. [NT 152-154, 880-881]
15. The District planned to do a formal Functional Behavioral Assessment in the District's settings during the first 30 days of the beginning of the 2009-2010 school year rather than rely on reports of past behaviors because Student would be in a completely different environment. [NT 111-112, 114-115, 880-881; P-58]
16. An independent psychological evaluator found Student had academic readiness skills in the areas of reading, writing, and math according to the Kaufman Test of Educational Achievement. The District's evaluator administered the Woodcock Johnson Test of Achievement on which Student attained average standard scores in letter-word identification, applied problems, and spelling when comparing grade norms and was at about a beginning kindergarten level. [NT 1352; P-29, P-43]
17. Student's mother agrees with the findings of the independent evaluator regarding Student's academic skills. [NT 1247]
18. The teacher⁴ at the typical preschool program Student attended the year prior to the 2009-2010 school year completed a BASC rating scale which resulted in Student's being average in every area except adaptive skills, which were borderline (at-risk). Student's scales indicated average (normal) scores in anxiety, depression, learning problems, aggression and emotional self control. [NT 1354-1355; P-43]
19. The teacher at the typical preschool program Student attended the year prior to the 2009-2010 school year completed a mid-year and end-of-year report card for Student. She noted that Student was meeting expectations in nearly every category in the typical preschool. She noted Student had grown significantly over the year and had become more socially competent. The mother had questions about the ratings but did not disagree with them. [NT 1270, P-45]
20. The observational data completed by the ABA/TSS team while Student was in the typical preschool program indicates Student made progress

⁴ Who has been a school guidance counselor. [NT 1271]

- socially, emotionally, and in the area of communication during the year prior to the 2009-2010 school year. [NT 229, 617-684; P-20, P-23, P-24]
21. One of Student's TSS providers, who was the in-school TSS, noted the level of prompting for Student while at the typical preschool decreased over the course of the 2009-2009 school year. [NT 668-669, 911; P-20, P-23, P-24]
 22. By the end of the year preceding the 2009-2010 school year Student had learned to function independently in a small specialized setting. [NT 512]
 23. The private speech/language therapist who provided the language class three half days per week testified that by the end of the year preceding the 2009-2010 school year, Student's primary issues were [Student's] speech and language delays and motor sequencing. [NT 516, 531-532]
 24. The private speech/language therapist who provided the language class accounted for Student's progress by "a combination of very intensive treatment...a typical preschool, a specialized language program, OT, PT, speech and ...a home program". [NT 517]
 25. Student works very hard. [NT 1215]
 26. Although the District has a full-day Autistic Support classroom the District members of the IEP team in reviewing the documentation available to them concluded that Student was at an ability level that did not warrant an all-day Autistic Support classroom. Student's skills were commensurate with the skills of the incoming Kindergartners, that is, needing to develop readiness and early academic skills. [NT 998-999, 1058-1061]
 27. The program the District proposed for Student consisted of a full day of Autistic Support programming, half of the day in a typical Kindergarten classroom and the other half of the day in a self-contained Autistic Support classroom. Student was to attend the typical Kindergarten class with four other students from the Autistic Support classroom. [NT 117-122; P-58]
 28. Student's IEP provided for a personal care assistant during the time Student was in the Kindergarten classroom. Additionally the aides from the Autistic Support classroom would be with Student at lunch, recess and special subjects. [NT 117-122, 991-992; P-58]

29. The regular education Kindergarten teacher who would have been Student's teacher in the District for half the year in question holds dual certification as a regular education and a special education teacher and a Master's degree in educational leadership. She co-taught for many years in a full inclusion model in another school district, and as part of her mentoring at the Pennsylvania Governor's School for Teaching of Excellence she conducted a seminar on inclusion. [NT 27-28, 33]
30. The regular education teacher who was returning from maternity leave for the second half of the year is also dually certified in regular and special education. There would be a transition period with both Kindergarten teachers present in the Kindergarten classroom for as long as it took for the children to adjust. Both Kindergarten teachers kept in touch regarding curriculum and feedback during the maternity leave. [NT 45-46]
31. To assist with transition to Kindergarten, prior to the start of the school year the regular education Kindergarten teacher and the special education Autistic Support teacher held an open house for incoming students and their parents with activities including classroom projects and riding the school bus. On the first day of school both teachers greeted the students at the door of the school; the students in Autistic Support were met at the school bus. There was an additional prior day when incoming Kindergartners came in to school in small groups for brief skill assessments. [NT 35-36, 76-77]
32. If a particular child required additional visit(s) to the school to aid transition these are provided. [NT 77]
33. The Kindergarten class is held in the morning from 8:45 to 11:30, and the Autistic Support class is held in the afternoon. The regular and special education teachers worked out the best way to have the autistic support students transition down the hall from one room to the other, which is currently having them check in briefly with the teacher, leave one at a time two minutes before the other children are dismissed, and walk down to the end of the hallway where the special education teacher is waiting for them within sight and hearing distance. At the beginning of the year the instructional aide walked them down the hallway. [NT 40-41, 43-44, 54, 78-79, 90]
34. The Kindergarten class Student was offered had 22 students, with Student being the twenty-third. The class is staffed by the dually-certified teacher, an aide for the four special education children [Student would have been the fifth], and a TSS worker for one of the other children. So that they do not become prompt-dependent, the aide prompts the students as needed. Student also was to have a personal aide during the time spent in the regular Kindergarten program. Additionally, two parent volunteers come in three days a week to assist with writing instruction activities. [NT 37, 41-42, 56, 87]

35. The aide in the Kindergarten class is one of the assistants in the Autistic Support class and is therefore with the Kindergartners who attend the Autistic Support class throughout the day. [NT 187-188]
36. Once a week the Kindergarten class also has a reading specialist present so that differentiated instruction can be provided. On that day the children are divided into four homogeneous groups that meet with the reading specialist, a retired reading specialist, another reading teacher and the Kindergarten teacher. [NT 57, 65, 81-82]
37. The Kindergarten class and the Autistic Support class both use the District's curriculum. The phonics program is the Wilson Foundations program based on the Orton-Gillingham multisensory approach which is research based and designed for younger learners with language needs. The math program is Everyday Math, a research-based program supplemented by kinesthetic activities to reinforce the concepts. Instruction is differentiated for each student using small flexible groupings. The writing instruction is the KidWriting program. Social skills are addressed in the natural Kindergarten environment. [NT 37-40, 52-53, 72-73, 83-85]
38. The Kindergarten teacher and the Autistic Support teacher collaborate for about an hour on a daily basis before school starts so that continuity of instruction is maintained. In the afternoon the Autistic Support teacher reinforces the skills that the Kindergarten teacher has addressed in the morning. [NT 43, 51, 59, 78, 171-172]
39. The Kindergarten class follows a structured routine with six blocks per day. The first three blocks are identical each day; the remaining three blocks are adjusted to accommodate a block of "Specials" – library, computer lab and gym – that are scheduled twice a week. All instruction except for Specials takes place in the Kindergarten classroom. [NT 67-71; S-40]
40. The autistic support (special education) teacher holds a master's degree and is certified in elementary education and special education. She was employed by [the local] IU as a TSS worker for a year and a half following her undergraduate degree and was a BSC following her graduate degree. She worked in a program which utilized the principles of ABA and was trained in that methodology. In that program she was a site manager serving students with autism. She also worked in a residential facility for adolescents with emotional disturbance. [NT 94-95]
41. The Autistic Support class operates in the morning with a group of three students [two second and one fourth grader] who are joined by the Kindergarten students at 11:30⁵ for the afternoon session⁶. Student would be the fifth Kindergarten

⁵ One of the Kindergarten students comes to the Autistic Support classroom one half hour early because he requires extra IT. [NT 169]

- student joining the Autistic Support class and would be there from 11:30 to 3:30. The class is staffed with the special education teacher, two full-day aides, one half-day assistant, and a TSS worker for one child. [NT 97, 99, 103, 115, 194]
42. The Autistic Support classroom is based on the PA Department of Education's Pennsylvania Verbal Behavior Project which sends trained consultants into selected schools, IU's and home programs to provide the persons working with the students with evidence-based intervention to be implemented in those settings. [NT 163; S-39]
 43. Twice a month a team of two VBP consultants visits the Autistic Support classroom to analyze the VB-MAPPs [Verbal Behavior-Milestone Assessment Placement Program] records of the students, set up reliable data-gathering, and train the special education teacher and her staff in the principles of Verbal Behavior. [NT 164, 166]
 44. The principles of ABA and VB are embedded into the program in the Autistic Support classroom based on PDE's Verbal Behavior Project. [NT 165]
 45. In the Autistic Support classroom the students work all day depending on their individual needs on the VB areas of requesting, labeling, listening and following directions. Additional areas of VB addressed are visual perception, communication and socialization. [NT 127-128, 182]
 46. Student is in the high intermediate to advanced group of learners as assessed through the ABLLS and the VB-MAPP that the Parents shared with the District at the IEP meetings. The District worked to develop a cohort of peers for Student that functioned at about the same levels. Student's levels are commensurate with those of three of the four other Kindergarten students in the current Autistic Support class.⁷ The Autistic Support teacher planned to re-administer the VB-MAPP to Student near the beginning of the school year to check for any regression. [NT 127, 142, 175, 178-179; S-23 pages 4-5]
 47. The Autistic Support class addresses social skills training formally at least once a week as well as every day throughout the day, and provides the Kindergartners with "Intentional Teaching" [IT] of skills on a one-to-one basis or small group basis. The afternoon IT reinforces and targets the material taught in the morning Kindergarten class. [NT 101-102, 104-105, 109-111, 182-183, 185]

⁶ This year the four Kindergarten students chose to unpack in the autistic support class and then they walk one by one down the hall to the Kindergarten class. Student would have the choice depending on what was most comfortable. [NT 98, 116]

⁷ To illustrate Student's comparability to the peer group in the Autistic Support class the District provided an exhibit showing data taken on three of the four Kindergartners in October 2009. [NT 180, 197; S-23 pages 6 though 11]

48. Daily art activities in the Autistic Support classroom [as opposed to the art Special] build on KidWriting and address fine motor skills, motor planning and sequencing. Specials are art, music, gym and health and guidance. [NT 101- 102]
49. Students in the Autistic Support class receive their related services during Specials time so that they do not miss any academic instruction or reinforcement of the Kindergarten material. The Autistic Support teacher consults with the parents to decide which Specials each child will miss. [NT 172, 195]
50. The Autistic Support special education teacher has ongoing contact and collaboration with the related service providers [speech/language, physical therapy and occupational therapy]. [NT 172, 956]
51. The District's speech/language therapist holds a master's degree in speech and language, a Certificate of Clinical Competence from the American Speech and Hearing Association (ASHA), and has completed all coursework toward a doctorate in reading and language arts. She holds a reading specialist certification. She is licensed to conduct a private practice in speech pathology by the Commonwealth of Pennsylvania. [NT 1304]
52. The District's speech/language therapist has experience in working with students with apraxia [motor planning difficulty] in all the settings in which she has worked over the past 12 years. She has treated between 25 and 50 such students. [NT 1322-1323]
53. The District's speech/language therapist intended to provide services to Student to meet Student's needs, whether the need was for individual sessions in the speech room or in the classroom, or group sessions, or pushing in to the regular education Kindergarten or the Autistic Support classroom. [NT 1313, 1321, 1331-1332]
54. The District's speech/language therapist participated in creating IEP goals and Specially Designed Instruction for Student. [NT 1314-1321]
55. Baselines on the speech/language goals were to be collected at the beginning of the school year to afford the child the opportunity to demonstrate skills/needs in the new environment. [NT 1316-1317]
56. The District's occupational therapist holds a master's degree in occupational therapy, and pediatric certification, has 13 years experience in his field and also has worked for 12 years as a social skills coordinator for children with needs in the areas of socialization, communication and play skills. [NT 1445-1447]
57. Based on a six-skill area assessment, the OT found Student has needs in ocular motor skills; visual motor control (tracing, coloring and cutting); visual motor integration (drawing shapes, numbers and letters); and praxis skills (attention to task, motor planning, overall quality of fine motor skill performance). IEP goals

- and objectives and SDI were written to address Student's areas of need in OT. [NT 1448, 1450-1455; P-58]
58. The OT did not assess Student's sensory processing needs prior to Student's entrance into the District because sensory processing tends to be idiosyncratic depending on the environment and the OT wanted to assess Student's sensory processing in the District environment. [NT 1460-1461, 1464]
 59. Student's sensory needs would be provided for in collaboration with the Occupational Therapist on District staff. [NT 123,]
 60. OT goals/objectives baselines were to be established when Student entered the District's program. [NT 1465-1467, 1470-1471, 1473-1475]
 61. Given reported anxiety the OT collaborated with the IEP team to include a visual schedule and verbal notification to ease transitions. [NT 1456-1457]
 62. OT services were to be delivered to Student in a pull-out program as well as in a push-in consultation mode. [NT 957-958, 1457-1459]
 63. Student's program was to include Adaptive Physical Education [APE] because the District's Physical Therapist observed Student and determined that it would be best if certain skills and rules were pre-taught. [NT 1000-1001, 1022]
 64. Because Student has a bleeding disorder the District put a plan into place that provided for monitoring and a crisis plan. Student's personal aide was put into place partially to assist in this monitoring. The school has the services of a nurse. [NT 1002, 1066-1068]
 65. For purposes of progress monitoring and reporting, in addition to the VB-MAPP, the proposed IEP includes multiple data collection tools including use of skill tracking forms on a daily basis to identify the date new skills have been targeted or introduced. The IEP also provides for the use of a daily communications log book to include what Student worked on during the day. [P-58]

Private School Selected by the Parents:

66. The private school has no staff trained in the areas of autism and emotional disturbances, two of Student's disability categories. There are

- no students categorized as emotionally disturbed at the private school.⁸
[NT 411-412; P-50]
67. Student's teacher at the private school has no training in autism or emotional disturbance. [NT 488]
68. The private school has one part-time speech language pathologist who is at the school part of the day, two and a half days a week. [NT 430-431, 488]
69. The Student does not receive Occupational Therapy or Physical Therapy at the private school; there are no OT or PT providers on staff. [NT 420-421, 1261, 1279]
70. Teachers are not occupational therapists and cannot perform the tasks of an occupational therapist. [NT 749-750, 760]
71. Student is currently being instructed in the Take Flight⁹ reading program from the [redacted] Hospital. Take Flight is a program designed for students with dyslexia, ages seven and older, and is not being used by any other educational entity, public or private, in the Commonwealth of Pennsylvania. Student is not dyslexic; Student is apraxic. Student's reading skills were at a grade-appropriate level as assessed by the private evaluator and the District evaluator. [NT 424-429, 495, 903; P-63]
72. The private school does not have a formal written curriculum for each subject area. [NT 499-500]
73. The head of school at the private school testified that the school is not addressing all the needs the Parents put forth in a letter of August 24, 2009 describing Student's needs. For example, ocular motor deficits are not being addressed and the private school does not have a healthcare plan in place regarding Student's bleeding disorder, only having a nurse at the school once a week. [NT 435-436, 1233-1234]

⁸ Again it must be noted that the Parents wanted this diagnosis conferred.

⁹ Take Flight has only been researched by the [redacted] Hospital affiliates; it was not independent peer reviewed research. [NT 903-904; P-63]

Requested Additional Related Services:

74. The private occupational therapist sees Student once a week for an hour at a clinic and tries to visit Student at the private school once per month. From September through January she visited the private school only three times. She had never observed Student at the typical preschool program or the private speech/language classroom during the year prior to the 2009-2010 school year. [NT 734-735, 739]
75. Student continues to require occupational therapy, and the private OT's opinion is that Student needs it privately once a week for 60 minutes on an individual basis. However, this opinion was rendered in light of the fact that the private school has no pull out or push in professional OT services. [NT 737]
76. The private OT did not review Student's proposed District IEP. [NT 760]
77. Student received ABA at home through at least two TSS workers under the direction of a behavior analyst after school during the year prior to the 2009-2010 school year. Over the course of a week Student was receiving about 15-17 hours of ABA at home. Student exhibited anxiety behaviors predominantly in the afternoon in the home when provided with one-to-one therapies. Student's behavior at home was considerably worse as rated by the Parents than ratings of behaviors either at the typical preschool or the language class. [NT 649, 658, 665, 67, 699-700, 1248]
78. One of Student's TSS workers who provided ABA both at the typical preschool and at home under the supervision of a behavior analyst did not recall whether there was ever a determination of the function of home manifestations of anxiety. [NT 652-653, 657]
79. Student did not manifest anxiety behaviors in the typical preschool to the same extent as at home; the TSS testified that "the behaviors that we were seeing at school were not high enough frequency that we felt we should start introducing the behavioral protocol" [in the typical classroom]. [NT 658]
80. The TSS during her testimony called into question the information she herself had provided to the independent evaluator through the BASC which indicated borderline anxiety, normal range social skills, normal range adaptability, normal range attention skills, and normal range functional communication. [NT 662]
81. The ratings from the afternoon language class were similar to those of the TSS's BASC results. [NT 663-664]
82. The TSS who provided typical preschool and home interventions testified that in school she was "prompting [Student] all of the time". However, observations recorded by the behavior analyst supervising the TSS indicated that Student was making progress in doing activities appropriately and independently. [NT 66, 675-680; P-20]

Credibility Findings

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹⁰ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. Credibility is discussed as follows:

Kindergarten Teacher – This witness has a great deal of relevant experience related to inclusion and working with special education teachers. She presented a comprehensive picture of the Kindergarten program offered to Student and established that Student would have a cohort of similar peers in the Kindergarten classroom with whom to move to the afternoon Autistic Support classroom.

Autistic Support Teacher – This witness has considerable relevant experience and her testimony established that she is a highly competent teacher and has the additional qualifications of experience in ABA as a function of having worked as a TSS and a BSC.

VB Project Coordinator/Author of the IEP – This witness was eminently qualified to design an appropriate program for Student and testified credibly and sincerely to her willingness to modify Student's IEP in whatever ways the Parents thought were needed.

District's Psychologist – This witness was clear in explaining why he chose the instruments he used and knowledgeable in explaining the data his instruments generated. He helped to establish that Student has significant strengths in the average range.

District's Occupational Therapist – This witness was most impressive in that he listened to questions and answered them without extraneous comments, his responses were organized and clearly stated and he was able to provide a rationale for each aspect of his input into Student's planned program at the District.

District's Speech/Language Therapist – This witness holds robust professional credentials in her field and additionally holds reading specialist certification and is completing requirements for a doctorate in reading and language arts. She has taught 25

¹⁰ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

to 50 apraxic students and was convincing in her explanation that she expected to offer Student whatever types of speech/language intervention Student required across school settings.

Former Director of Special Education – This witness established the fact that Student had been accepted at the private school even before the day that she and the mother visited there. She was exact and credible in her account of the events.

Private Evaluator (Psychologist) – This witness testified clearly and presented a good rationale for choosing the assessment instruments she administered. It was of note that given her extensive evaluation she did not diagnose Student with Generalized Anxiety Disorder. She established that Student has many strengths commensurate with typical peers. Her testimony, although offered in support of the Parents' position, was balanced and low-keyed.

Private Speech/Language Therapist – This witness presented herself in a confident but not overbearing manner and offered balanced testimony about Student's progress over the year Student was in the typical preschool.

Private Occupational Therapist – This witness was not able to establish Student's need for OT services in the clinic setting. Her testimony seemed to ignore the fact that the District was offering Student OT in various modalities in the proposed program.

Head of School at Private School – This witness testified directly and candidly and did not evade questions directed at bringing out ways in which the private school was not offering some of the important components Student requires.

Teacher at Private School – This witness testified in a forthright manner and made sure she understood the questions before answering. She presented what the private school offers Student without embellishment.

TSS worker at Typical Preschool and at Home – This witness held up very well under fairly intensive cross-examination, even though she disavowed her previous ratings on the BASC. Given this, she was impressive in that she did not become defensive and answered the questions simply and honestly. This hearing officer commended her on the record for her overall demeanor which showed considerable respect for the process. Her testimony was not given a great deal of weight in light of the fact that she was willing to say that ratings she had provided many months previously were incorrect. However, her ratings, completed contemporaneously with her provision of service in the typical preschool, prior to the commencement of litigation, were given considerable weight.

Behavior Specialist Consultant – This witness reached the Master's Level in September 2009, a point after the relevant period of this hearing. The testimony she provided was tarnished by the fact that although she attended the IEP team meetings she did not participate and did not recommend a home ABA program be included in the IEP even though she did not recall anyone else recommending it and believes that one is

necessary[NT 240]; although she was asked to provide information to the District she sent only recorded data and not observational notes which for example documented her witnessing Student in the typical preschool classroom at the end of April 2009 “appropriately and independently complet[ing] the painting center”, “continuing to make progress with peer play”, “imitated [Student’s] peers” and “engaged in [an activity with peers] and really enjoys it” [NT 226; P-20]. Most troubling, this witness audaciously asserted, “But whether [Student] made that progress because [Student] was in the [typical preschool] class or why [Student] made that progress *was because we did things at home*” (emphasis added) inexplicably ignoring the panoply of services Student was receiving from other providers. Although her testimony was not given great weight, her observational notes (samples quoted above) taken contemporaneously with Student’s participation in the typical preschool program were given considerable weight as they pre-dated this litigation.

Educational Consultant – This witness was in command of the material she presented although it seemed that in working with the Parents to present information to the District she did not ensure that the mother understood all the information. Perhaps because this witness took such an active and direct part in the family’s decision to place Student in the private school, the mother herself was not well-equipped to respond to challenges to the decision. It is difficult to understand, given her knowledge base, how this witness could support the private school over the District’s offer given the richness of the District’s program and the lack of fit of the private school for this particular Student.

Mother – It would be difficult to find a more dedicated and committed parent than Student’s mother. There is no question that this mother wants her child to have a program that addresses her child’s needs. It seemed, however, that her primary focus was on having Student in a small private setting in reaction to the belief that the typical preschool had caused Student to become anxious and that whatever the important program components the District offered, and whatever the deficits of the private school, she remained wedded to the private school placement. It was notable that she delayed the District’s evaluation by nearly seven weeks, had Student accepted into the private school before the District issued its evaluation or convened the IEP meetings, and rejected the NOREP before reviewing Student’s file at the District. She expressed concerns about Student’s feeding issues vis a vis the District’s program but not that the private school has no feeding plan in place, expressed concerns about the District’s plan to address Student’s bleeding disorder but seemed unperturbed by the private school’s not having a plan in place, was not critical of the private school for not having OT and PT services, and was not critical of the relatively limited amount of speech/language therapy at the private school. She did not seem fazed by the fact that the private school is designed to serve dyslexic students while Student is not dyslexic, nor troubled by the fact that although Student is autistic and carries the classification of emotional disturbance (that she wanted conferred) the private school has no staff trained to teach autistic students or emotionally disturbed students. The mother was hard-pressed to come up with specific problems she had with Student’s District IEP; the Parents’ case seemed almost entirely focused on their desire for a small private setting regardless of what the District offered. Although it is understandable that the Parents were concerned about the level of anxiety

Student reportedly demonstrated at home, it is unfortunate that they were fixed on drawing a direct line of causality between the typical preschool and Student's anxiety and did not consider the impact of the length of Student's day, the number of services Student received in up to four settings daily (related therapies, typical preschool, language class and home) and the intensity of ABA provided for several hours in the afternoon or evening after a full day. It is unclear why the professionals in the best position to help the Parents take a more careful look at all the possible causes of Student's anxiety in the home did not assist the family in this regard.

Discussion and Conclusions of Law

Legal Basis:

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion, as one element of the burden of proof, for cases brought under the IDEA, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion analysis does not enter into play unless the evidence is in equipoise, that is, equally balanced so that by definition the party seeking relief has not presented a preponderance of the evidence. In the instant matter, the evidence is not in equipoise as the Parents presented preponderant evidence on the issues.

FAPE: Having been found eligible for special education, Student is entitled by federal law under IDEA, and by state law under the Pennsylvania Special Education Regulations, to receive a free appropriate public education (FAPE). FAPE is defined in part as special education and related services: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP). 20 U.S.C. §1401(9); 34 C.F.R. §300.17; 22 PA Code § 14 *et seq.*

However, "The IDEA's requirements regarding a FAPE are 'modest'." Z.W. v. Smith, C.A. No. 06-1201, 2006 WL 3797975, *3 (4th Cir.), quoting A.B. v. Lawson, 354 F.3d 315, 325 (4th Cir. 2000). A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). Districts need not provide the optimal level of service, maximize a child's opportunity, or even offer a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001

(4th Cir. 1998); Lachman, supra. What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). The purpose of the IEP is not to provide the “best” education. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993). Recently, the Eastern District Court of Pennsylvania reiterated, “districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” S. v. Wissahickon Sch. Dist., 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008), citing Carlisle, 62 F.3d at 534, citations omitted. See also, Neena S. ex rel. Robert S. v. School Dist. of Philadelphia, 2008 WL 5273546, 11 (E.D.Pa., 2008). Rather than simply providing a basic floor of opportunity, the program offered by the District in this case goes well beyond “appropriate” and is in fact excellent.

Least Restrictive Environment: A plethora of case law supports IDEA’s mandate that education must occur in the least restrictive environment appropriate for the individual child. The least restrictive environment (LRE) is defined in several ways – distance from a child’s home, amount of contact with typical peers, and positioning of the proposed placement within a well-defined hierarchy of educational placements. The expectation of least restrictive environment is so rigorous that the courts have held, for example, that a school district is prohibited from placing a child with disabilities outside of a regular education classroom if educating the child in the regular classroom with supplementary aids and support services can be achieved satisfactorily. If the district fails to offer the student a program and placement which occurs in the least restrictive environment, it has failed to offer FAPE. The two concepts (LRE and FAPE) are inextricably intertwined. Children who are not provided with educational services in the LRE appropriate to their needs are not provided FAPE. Millersburg Area School District v. Lynda T., 707 A.2d 572 (1998).

One of the landmark Third Circuit cases on inclusion, Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993) 19 IDELR 908] counsels that the failure to consider the full range of supplementary aids and services to enable a student to be educated in regular class to the maximum extent appropriate is sufficient to establish liability for violating the mainstreaming requirement of the IDEA. “If the school has given no serious consideration to including the child in a regular class with supplementary aids and services and modifying the regular curriculum to accommodate the child, then it has most likely violated the Act’s mainstreaming directive.”

If a school district has failed to offer an appropriate program and placement, and parents decide to place their child in an appropriate private placement, the fact that the placement serves only children with disabilities does not violate the IDEA’s LRE requirement. This is, however, not the case here as the Parents’ unilateral placement is not appropriate for Student.

Tuition Reimbursement: An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress. Parents who believe that a district's proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement. The IDEA's implementing regulations at 34 C.F.R. §300.148 (c), make it clear that tuition reimbursement can be considered under specific conditions:

“If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency enroll the child in a private...school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment...”

Before becoming a matter of statute, the right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in Burlington School Committee v. Department of Education, 471 U.S. 359, 374 (1985). A court may grant “such relief as it determines is appropriate”. “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” Burlington, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

Then, in 1997, a dozen years after Burlington, the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i)In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(ii)Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii)

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Discussion:

In deciding the issues in cases involving tuition reimbursement, a hearing officer must conduct three lines of inquiry. First, was the program offered by the district appropriate? If the answer to that question is yes, the inquiry stops there. If the answer is no, then it is necessary to determine whether the program the parents chose was appropriate. If that answer is no, the inquiry stops there. If the answer is yes, then the hearing officer must examine the equities, that is any actions by the parents that would reduce or eliminate the district's responsibility for tuition reimbursement. In this case, the program the District offered Student was appropriate, and in fact went well beyond the fairly modest requirements of the IDEA. Had it been necessary to reach the second question, the conclusion would have to have been that the Parents' unilateral placement was not appropriate. Had it been necessary to reach the third question, the equities in this case favor the District such that its responsibility for tuition reimbursement would have been eliminated or reduced. Since the first prong of Carter has been decided in the District's favor, this decision will not go into extensive discussion of the second and third prongs.

An appropriate program must be reasonably calculated to confer meaningful educational benefit. It does not have to include everything that loving parents want for their child and it does not have to be the best possible program. In deciding the first question, 'Was the District's program appropriate?' it is necessary to look at Student, as an appropriate program must be designed to address Student's needs. The Parents were granted considerable time to present a significant amount of background information on Student. The testimony and documents conveyed that Student has several needs, primarily those created by Student's Autism and Student's Speech/Language Impairment. The Parents requested, and the District agreed, to add the classification of Emotional Disturbance based on a generalized anxiety disorder¹¹ and Student's Other Health Impairment is a bleeding disorder that requires careful monitoring but does not affect learning on a daily basis. Given that the final IEP offered by the District was an excellent product of approximately six hours of face-to-face meetings and additional hours of revision, this hearing officer is hard-pressed to agree with the Parents' contentions that it is inappropriate. What seems clear, given that the private school does not afford Student with many of the components of the District's proposed program (for example, OT, PT, ABA and Verbal Behavior, peer-reviewed scientifically based reading program, and nursing availability, all in the least restrictive environment) is that the Parents strongly prefer that for the present Student be educated with other disabled peers in a very small

¹¹ This classification is not in dispute, although this hearing officer found it difficult from the testimony offered to differentiate the anxiety Student manifested from the anxiety that frequently accompanies Autistic Disorder. The Parents' independent evaluator who did extensive assessment of Student did not confer the diagnosis of Generalized Anxiety Disorder. [NT 1227; P-29]

environment. The Parents seemed to base their position that Student required a small specialized private school setting with no contact with typical peers on their unsupported belief that in Student's previous preschool setting with typical peers Student did not make progress and in fact became anxious. [NT 1201-1203, 1205] However, they failed to meet their burden of proof in two regards – whether Student in fact failed to make progress, and whether the reported increase in anxiety at home during the one-to-one ABA therapy was the product of being in a typical preschool setting during the day.

The preschool teacher, whom the Parents did not invite to testify, documented progress in written form contemporaneous with the year's reporting periods prior to litigation. The argument that the preschool teacher was one step removed from Student because the TSS worker served as a sort of filter between Student and the preschool teacher fails; absent contradictory testimony from her, the progress report by the preschool teacher who had only 12 students in her class is given considerable weight. The progress report reflects progress, as does the BASC filled out by the TSS who was with Student every day in the preschool¹². Observations of the behavior analyst support the finding that Student was progressing. Part of the Parents' belief that Student required a small private placement was their noting an increase in anxiety at home, particularly after school during ABA training. This level of anxiety was not present in the typical preschool setting as reported by the TSS worker. There is no convincing evidence that Student's anxiety was a function of being in a typical preschool as the Parents believe. Receiving related therapies (speech and physical therapy) two mornings a week before preschool [NT 1243-1244] and traveling several days a week after preschool to an afternoon language program, followed by the demands of the intensive ABA programming Student received at home after school could just as well have been the source of Student's reported anxiety which, according to the TSS was not present in the typical preschool to an extent requiring intervention.

For purposes of argument, even if one attributes Student's anxiety at home after school to being in a typical preschool setting in the morning, it does not follow that Student would become anxious in another typical educational setting. The typical Kindergarten program the District proposed is not comparable to Student's previous year's preschool programming in a typical setting: 1. The District proposed a full-day autistic support program, carried out in one building in two classrooms right down the hall from one another. 2. In the regular education classroom the teacher(s) are also certified special education teachers. 3. The aide in the morning kindergarten classroom is one of the assistants in the afternoon special education classroom. 4. Student would have a personal assistant in the regular education classroom. 5. Student would have a cohort of four other Kindergarten autistic support students at Student's developmental level. 6. The regular education teacher and the special education teacher confer for an hour daily to coordinate programming for the autistic support students. 7. Student would have the chance to practice interactions with typical peers in a setting monitored by teachers who are experienced in working in inclusion settings.

¹² Notably this TSS disavowed her BASC endorsements during cross-examination.

In addition to the overlap between the regular education classroom and the special education classroom described above, the special education classroom has significant advantages for Student: 1. The teacher is trained in principles of ABA and has experience using the method outside as well as in the school setting. 2. The classroom is participating in the PA Verbal Behavior Project. 3. The classroom is very small with a high ratio of adults to students. 4. There is not a need for a personal assistant in the Autistic Support classroom which will help fade prompt dependency. 5. Related services are provided during the school day in an integrated fashion both in and outside the classroom and there is on ongoing communication between the teachers and the related services professionals that allows for practice of skills during the school day. 6. Because therapies are integrated into the school day Student's day is shorter and Student will have some breathing room at home after school rather than having to participate in intensive ABA programming for several hours.

Given that the District offered Student an appropriate program and placement, it is not necessary to examine whether or not the private school unilaterally chosen by the Parents is appropriate. However, even in light of the abbreviated findings of fact included above, although the private school seems to be appropriate for learning disabled, dyslexic children, the private school cannot be found to be appropriate for Student.

Given that the District offered an appropriate program and the Parents' unilateral program is not appropriate, consideration of the equities is not required. It is clear, however, that the Parents determined that Student should attend private school even before the District had the opportunity to perform an evaluation or convene an IEP meeting and that no IEP revisions or assurances from the District altered their decision. The record makes it very clear that the Parents were not considering anything less than the private school for Student. Parents' actions can compromise their entitlement to tuition reimbursement. Pennsylvania's federal court in the Eastern District established that when parents have decided before the District is even afforded the opportunity to offer and provide FAPE to place the child in a private placement, a claim for tuition reimbursement must fail. See Lauren V. v. Colonial School Dist., 49 IDELR 13 (E.D. Pa. 2007).

Given that the District has offered an appropriate program that includes intensive ABA in the Verbal Behavior Project, speech/language therapy, occupational therapy and physical therapy, Student is not entitled to the additional related services the Parents are requesting.

Order

It is hereby ordered that:

1. The School District did not fail to offer an appropriate program and placement for Student for the 2009-2010 school year.
2. The placement unilaterally chosen by the Parents was not appropriate.
3. The equities favor the District.
4. The School District does not have to provide Student home-based ABA programming, community-based occupational therapy or community-based physical therapy.

Any claims not specifically addressed by this opinion and order are denied and dismissed.

July 1, 2010

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.

Pennsylvania Special Education Hearing Officer

NAHO Certified Hearing Official