

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: R.Q.

Date of Birth: [redacted]

ODR No. 00621-0910 AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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Date of Resolution Session

January 19, 2010

Dates of Hearing:

March 26, 2010, April 20, 2010, April 30, 2010, May 18, 2010, June 2, 2010

Record Closed:

June 29, 2010

Date of Decision:

July 9, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION

Student is a teen-aged eligible resident of the Wissahickon School District (District); Student is identified with Mental Retardation and Autism. (NT 12-21 to 14-7; S-3 p. 20.)¹ Student is presently enrolled at the [redacted] Center in [redacted], Pennsylvania. (NT 76-14 to 21.) Center is a private school for children with autism; Center follows the principles of applied Behavior Analysis. (NT 309-19 to 25.) The Student has never attended school in the District. (NT 76-22 to 25.)

Parents seek reimbursement of Center tuition for the 2009-2010 school year, asserting that the District failed to offer an appropriate program for the Student, for several reasons: 1) its offer was not timely; 2) the District predetermined the location of services to be in District facilities rather than in Center; 3) the offered program did not include an appropriate plan for transition from Center to a District facility; 4) the plan did not address the Student's behaviors adequately; 5) the offered program failed to address the Student's need for direct, explicit, one-to-one instruction during the entire school day and frequent community access as a reinforcer; 6) the District failed to offer coordinated home programming, shorter breaks in formal instruction during holidays and summer, material information on the District's ESY program, and assistance to Parents in providing continuity of instruction at home.

The District asserts that it offered an appropriate program in timely fashion, and that any delay in offering its program was due to delays either occasioned by the Parents' schedule or that of Center. It contends that its offered program was appropriate, addressed the Student's educational and behavioral needs, and offered the least restrictive

¹ The Parents assert that the primary exceptionality should be Autism. (NT 12-21 to 14-7.)

appropriate setting for addressing the Student's needs. It contends that the Center program fails to address various educational needs, such as placement in the least restrictive environment, development of social skills and qualified services from related service providers.

PROCEDURAL HISTORY

In June, 2008, the Student resided in [another Pennsylvania] School District. [That district] offered an IEP and NOREP specifying as a placement, "Full Time Autistic Support." (S-15, 17.) In July 2008, the Parents and [that district] signed a Settlement Agreement in lieu of FAPE, which provided that [that district] would pay tuition to Center and transportation costs for two specified years, the 2008-2009 and 2009-2010 school years. (S-18.)

The Parents moved to the [Wissahickon] District in July, 2009. Wissahickon offered to re-evaluate the Student in order to offer an IEP. The evaluation was delayed, and the District offered a NOREP dated August 29, 2009, which proposed to implement the June, 2008 [former district's] IEP. (S-32.) After the District's re-evaluation was completed, the District offered a NOREP on October 27, 2009, with placement in Full Time Autistic Support. Its IEP, dated October 23, 2009, offered to locate this placement in a District building. (S-36 p. 42.)

Parents commenced this due process request on January 7, 2010. They filed a motion to establish pendency in Center by letter dated March 18, 2010. On May 10, 2010, I ruled that the pendent placement is set forth in the June 2008 [other district's]

NOREP and IEP. (Ruling On Motion To Declare Pendency And Order Reimbursement Of Tuition And Expenses, May 10, 2010.)

The hearing was conducted over five sessions, from March 26, 2010 to June 2, 2010; the April 30, 2010 session was limited to oral argument on the Parents motion for an order declaring pendency. The record closed on June 29, 2010, upon the hearing officer's receipt of the parties' written summations.

ISSUES

1. Did the District offer to provide a free appropriate public education to the Student through an appropriate program and placement in the least restrictive appropriate environment for the 2009-2010 school year?
2. Was Center an appropriate placement for the Student for the 2009-2010 school year?
3. Should the hearing officer order the District to pay the cost of tuition and transportation of the Student on account of Student's attendance at Center for the 2009-2010 school year?

FINDINGS OF FACT

THE STUDENT'S NEEDS AND SKILLS

1. The Student's cognitive and adaptive functioning are assessed to be in the mild to moderate mentally retarded range of functioning (S-3, S-4.)
2. The Student also presents with Autism. (S-3, S-4, S-13.)
3. The Student is diagnosed with Apraxia, and demonstrates a significant receptive and expressive language delay, along with a significant articulation disorder. The Student is in need of professional speech therapy services. (NT 253-14 to 254-8, 264-25 to 266-12, 278-2 to 279-6, 280-5 to 11, 296-15 to 23; S-3 p. 2, 11, 23, S-4, S-13, S-17.)

4. The Student's acquisition of reading and writing skills is below Student's expected level of achievement for Student's age and grade. Student evidences needs in all basic academic skills. The Student needs a highly structured, systematic and consistent program with high rates of repetition and reinforcement. The program needs to include verbal and nonverbal cues and prompting, visual modeling and schedules, paired with verbal cues. (S-3, S-4, S-13, S-17.)
5. The Student evidences needs in all areas of adaptive functioning; however, Student has attained some level of self care skills in the areas of personal hygiene, self dressing, shopping and meal preparation. Student requires continued support in these and other life skills. (NT 103-21 to 104-4; P- 7 to P-9, S-3, S-4, S-13, S-17, S-20 p. 1 to 5, 32 to 33.)
6. The Student evidences needs in fine motor skills and requires professional occupational therapy services to address both handwriting and visual processing skills. (S-3, S-4, S-17.)
7. The Student has a history of displaying challenging behaviors, and requires a behavior intervention plan, as well as a transition plan for any move from one school to another. (S-3.)

PROGRAMMING HISTORY

8. The Student has never attended a public school. (NT 913-25 to 914-18.)
9. The Student attended the [redacted] Institute for elementary school from 1997 to 2005. (NT 914-1 to 18; S-3 p. 2.)
10. The Student attended the [Private] School in the 2005 – 2006 and 2006-2007 school years. The Parents withdrew Student from [the Private School] in May 2007. (NT 913-16 to 914-17; S-5, S-6, S-7, S-25 p. 9.)
11. At Private School, the Student was reported to make progress in speech, writing and reading skills. (NT 923-9 to 933-21; S-4.)
12. The Student attended Center beginning in May 2007, and in the 2007 -2008 and 2008-2009 school years. (NT 314-23.)

TIMELINESS

13. The Parents notified the District in May 2009 that they intended to move to the District as of July 2009. The District began gathering documentation from Center before the Student moved into the District. (S-19, S-21 p. 50, S-38.)

14. Prior to the July IEP meeting, the District received an IEP created by Center. Only during the IEP meeting on July 29, 2009 did the District realize that the document could not be implemented because it was not provided by a local education agency. (S-8, S-9, S-38.)
15. The District held an IEP meeting on July 29, 2009, six days after the Student became a resident of the District. The Student's Mother attended, along with representatives of Center, District special education and regular education teachers, The District's behavior specialist participated by telephone. (S-3 p. 1, S-26 p. 3.)
16. A Permission to Evaluate was presented to the Parents on July 30, 2010, and they signed it. The evaluation was initiated and expedited because the District did not have a public school IEP as of July 30. (S-3 p. 1, S-26 p. 9.)
17. The District paid the tuition for the Student's ESY program at Center for the summer of 2009. (S-31, S-33.)
18. On August 4, 2009, the District's school psychologist visited Center to observe the Student and the Center program. The psychologist administered standardized testing on that date. (S-3 p. 6 to 10.)
19. The District's speech and language pathologist evaluated the Student at Center on August 5. (S-3 p. 10.)
20. The District's Occupational Therapist evaluated the Student in September 2009; she was scheduled to meet with the Student on August 18, but the Student became ill and the appointment was rescheduled. (NT 618-16 to 619-12, 769-24 to 771-19; S-3 p. 11, S-30, S-47, S-48.)
21. The District issued a NOREP for full time autistic support, to be provided at a District facility, [a District public school], in August 2009. The District offered to implement the last agreed upon public school IEP, an IEP offered by the [former] School District in June 2008. (S-32, S-34.)
22. Parents rejected the District's August 2009 offer and indicated that the Student would not start the school year at a District school. The District agreed to complete needed assessments and testing at Center. (S-35, S-38.)
23. On September 4, 2009, Parents' counsel advised the District that the Parents rejected the District's offered services, and withdrawing consent for any further assessments at Center, indicating a willingness to bring the Student to a District facility for any further assessment, and raising the possibility of a due process request for tuition reimbursement. (S-43.)

24. The Parents delayed in returning completed Vineland Adaptive Behavior Scales forms. (S-49.)
25. The District offered a Re-evaluation report on September 22, 2009. (S-3.)
26. The Re-evaluation Report contained a “descriptive” Functional Behavior Assessment, authored by the District’s behavioral specialist. This assessment was not based upon tabulated data: however, it was based upon the specialist’s record review, interview with the Center’s Board Certified Behavior Analyst (BCBA), and August observation of the student at Center. (NT 97-5 to 25; S-3.)

PREDETERMINATION

27. Before moving to the District, the Student’s Mother called the District twice to ascertain its intentions regarding paying for the Student’s tuition at Center. (NT 760-9 to 763-14; S-46.)
28. Before the second IEP meeting in October, 2009, the Parents’ attorney notified the District that the Parents were requesting reimbursement for tuition at Center. (NT 1248-18 to 1251-8.)

PROGRAM OFFERED BY THE DISTRICT

29. In October 2009, the District offered placement in full time autistic support, to be located in its [redacted] School, along with an IEP prepared by its staff. (S-35, P-4.)
30. The District autistic support class provides a program called the Competent Learner Model. This is a research based program that incorporates principles and techniques of Applied Behavior Analysis in a multi-sensory environment. (NT 576-18 to 579-5, 702-8 to 703-1, 1033-18 to 1036-24, 1045-3 to 18, 1058-22 to 1061-1; S-40, S-41, S-53.)
31. The program is staffed with competent professionals and adequately monitored for integrity of service delivery. It provides a curriculum of appropriate scope and sequence. (NT 576-1 to 577-1, 584-1 to 588-7, 607-1 to 610-14, 1035-1 to 15, 1036-25 to 1040-12, 1041-1044, 1051-2 to 1052-18, 1055-4 to 8; S- 40, S-41, S-53.)
32. The autistic support program offered by the District included an adequate number of hours of one to one instruction, including one to one instruction by the classroom teacher and by related service providers, for most of the hours of Student’s school day. (NT 1080-16 to 1084-20; P-4 p. 37.)

33. The October 2009 IEP offered a highly structured and consistent program with high rates of repetition and reinforcement, low student to teacher ratio, verbal and non-verbal prompting and cues, visual modeling paired with verbal prompting, a behavioral plan, a plan for transition to post-secondary training and inclusion opportunities. (P-4, S-53.)
34. The October 2009 IEP offered to address all of the Student's identified educational needs through goals, specially designed instruction, or both. Goals were offered in the areas of letter-sound recognition, sight-word reading in transitional instruction, vocabulary, functions of items, simple mathematics calculation, money identification and use of money to purchase items, writing skills, articulation, social language skills, pragmatic language skills, answering "wh" questions, reciprocal play, remaining on task, reinforcement of self care skills in transitional instruction, bilateral motor control, and fine motor dexterity. (P-4.)
35. The goals offered by the District differed from those offered by Center, in that they did not include the same degree of direct instruction in self care skills, and they included fewer objectives in skills pertaining to engaging in community activities. The District IEP goals offered more emphasis on academic skills, including writing, more detailed post-secondary transitional instruction, opportunities for generalization and inclusion, and more extensive speech and language and occupational therapy services. (NT 1082-17 to 1083-10; P-4, P-5.)
36. The October 2009 IEP offered to provide specially designed instruction, implemented through qualified staff, including a highly structured multi-sensory environment, one to one and small group instruction, intensive direct instruction, visual cues and supports paired with verbal supports, scripting, differential reinforcement, ABA behavioral techniques, fading of supports through a hierarchy, techniques to promote generalization of skills, repetition for skill maintenance, use of keyboard and computer, community based instruction, assistive technology assessment, and calculator. (NT 258-2 to 275-19, 280-12 to 281-8, 566-10 to 580-23, 1027-13 to 1032-8; P-4, S-42, S-45.)
37. The specially designed instruction included specific reinforcement services for self care skills – including tooth brushing, personal hygiene, dressing and feeding, as part of the adaptive physical education program. The offered placement included Life Skills Support. (NT 1216-1 to 17; P-4 p. 38, 42.)
38. The October 2009 IEP offered to provide related services in the form of speech and language therapy through a certified speech and language pathologist, occupational therapy through a certified occupational therapist, group counseling through a school counselor, adaptive physical education and transportation. (NT 231-24 to 232-9, 233-14 to 239-10; P-4.)

39. The October 2009 IEP offered to address the Student's behavior as needed through a classroom behavior system and a Positive Behavior Support Plan, which was included in the IEP verbatim. (P-4.)
40. The District offered to provide educational services through more qualified teachers, aides and related services providers, as contrasted with the staff qualifications at Center. (NT 566-10 to 580-23, 1027-13 to 1032-8; S-42, S-45.)
41. The October 2009 IEP offered to assess eligibility for ESY services in February 2010, pursuant to PDE regulations and policy. (P-4.)

TRANSITION

42. The District's school psychologist recognized the importance of a planned and supported transition for the Student from Center to the [District's] School, and recommended transition planning in her reevaluation report. (NT 106-10 to 107-5, 120-7 to 121-18, 134-2 to 139-3, 148-15 to 151-4; S-3 p. 23.)
43. The October 2009 IEP, in the Specially Designed Instruction section, offered to provide transition services to the Student. (P-4.)
44. The Autistic Support program of the [District's] School is staffed with teachers and allied staff who are experienced in dealing with placement and setting transitions and who do not need to be told to implement ABA techniques to address the needs their students exhibit during transitions. (NT 159-2 to 160-23, 138-21 to 139-3,
45. The District did not develop a detailed transition plan because the Parents had not yet indicated that they would send the Student to the District's program. A target date would be needed to enable the District teachers to finalize the details of a transition plan. (NT 133-10 to 138-10, 602-2 to 603-22.)

BEHAVIORS

46. The October 2009 IEP includes both a Functional Behavioral Assessment and a Positive Behavior Support Plan. (P-4.)
47. The District's plan is based upon a Functional Behavioral Assessment (FBA) that identified the Student's current behaviors that interfere with Student's learning or that of others. (NT 620-17 to 637-17; P-4.)
48. The FBA was based upon a review of records of the Student's behaviors both in Center and at home, as well as Student's behaviors in other school settings in the past, an interview with the Center's BCBA, and multiple observations of the

Student in Center by District staff. This was an appropriate methodology for the purpose of the FBA. (NT 621-20 to 637-12; P-4, S-50.)

49. The District review did not include actual data gathering on behaviors during the District staff observations. (NT 637-3 to 10.)
50. The District's plan is appropriate to address the known behaviors of the Student that interfere with Student's education or that of others. (NT 637-18 to 649-2, 653-12 to 654-15, P-4.)

METHODOLOGY

51. The Center program emphasizes one to one instruction with a strict contingency based approach. This allows maximum control of the Student's disruptive and stereotypical behaviors. (NT 881-7 to 22; S-3 p. 7 to 8, S-13 p. 8, 9, P-7 p. 35 to 38.)
52. Nevertheless, the Student continues to display some unwanted behaviors at Center. (P-8 p. 36 to 40, P-9 p. 38 to 43.)

ESY

53. The District promised to evaluate the Student's eligibility for ESY services in February. (P-4.)

HOME PROGRAM

54. The October 2009 IEP did not offer to provide educational or support services in the home. (P-4.)
55. The Center program includes extensive services in the home, including direct instruction. (P-13, P-14.)
56. The Parents did not keep data at home on a number of the Student's goals. (P-6 p. 20 to 23, P-7 p. 32 to 38, P-8 p. 33 to 36, S-20 p. 38 to 42.)
57. The Student has displayed disruptive and aggressive behaviors at home despite the intervention of the Center home program. (NT 944-2 to 945-15; P-13, P-14.)
58. The Parents believe that the Student is under control at home due to the support of the Center home program. (NT 885-11 to 22, 897-4 to 22, 899-11 to 23.)

59. The Parents believe that the Center home program is necessary for the Student to develop self care skills needed to permit Student to attain appropriate residential placement in the future. (NT 901-6 to 902-13.)
60. The behavioral training provided in the Competent Learner Model offered by the District applies to all settings, including the home. (NT 609-24 to 612-2, 1033-20 to 1034-22.)
61. The CLM curriculum is carried over to the home through homework and reports on current skills being worked on. (NT 274-24 to 275-7, 1087-11 to 23, 1175-4 to 17; S-39 to S-41.)
62. The District speech therapist plans to train Parents to provide speech training at home. (NT 281-15 to 282-7.)
63. The District coordinates with the home program providers, invites them to observe in the school, and trains them if necessary. The District also offers to train parents in the Competent Learner Model that it is using. The assigned teacher is available to parents by telephone from seven A.M to 7:30 P.M. (NT 609-24 to 612-2, 672-20 to 673-1, 1179-9 to 1180-3, 1203-18 to 21.)
64. The District does not provide direct services in the home, but relies upon TSS workers funded through the Pennsylvania child welfare system to provide direct training and parent support in the home. (NT 1179-9 to 1180-3.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.² The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

² The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence³ to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student’s Parents, who initiated the due process proceeding. If the evidence is in “equipoise”, the Parent will not prevail.

APPROPRIATENESS OF THE DISTRICT’S PROGRAM

Legal Standard

Although the parent is always free to decide upon the program and placement that Student or she believes will best meet the student’s needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private placement. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district’s program legally adequate? Second, is the parents’ proposed placement

³ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007). I find that the program offered by the District in this case was adequate under the standards of the law, and therefore I do not reach the second and third questions above.

What programming is considered adequate under the law? The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child’s IEP must specify instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board

of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

Where, as here, the child has not received the educational services offered in the IEP, its appropriateness must not be judged in retrospect. Rather, its appropriateness must be determined as of the time it was made, and the reasonableness of the school district’s offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

The District Offered an Adequate Program and Placement

I find that the program implemented by the District in this matter satisfied these requirements of the law. The program was individualized to address the educational needs of the Student. (FF 1 to 7, 34, 37 to 39.) It was based upon a thorough and timely re-evaluation. (FF 3 to 7, 25, 26.) The District’s program addressed educational needs

throughout a broad range of academic, social, and cognitive educational needs. (FF 34, 37 to 39.) These goals generally were measurable and research based. (FF 30, 34.)

The program that the District offered is research based, multi-sensory, and heavily imbued with ABA approach and technique, but offers a broader range of teaching methods than that provided at Center. (FF 29 to 33.) It includes in substantial measure most if not all of the attributes that the Parent finds essential in persuading her to keep the Student at Center. (FF 30, 32, 33, 36 to 39.) Its staff are well trained and supervised to insure fidelity in implementation. (FF 31, 40.)

In finding the District's program adequate under the law, I rely upon the weight of the documentary and testimonial evidence, which I find to be preponderant in favor of this finding. This finding is in substantial part based upon my observation of the witnesses and my conclusions as to their veracity and reliability.

In particular, I rely upon the extensive testimony of the teacher that the District would have assigned to the Student. This witness presented as well trained, highly knowledgeable, professional, attentive to detail, and sincere. Under searching cross examination, this first time witness appeared somewhat defensive, but nevertheless was willing to concede numerous points that seemed adverse to her; these points did not defeat the basic thrust of her testimony in my view, but her willingness to concede them, along with her demeanor, demonstrated her basic honesty and reliability.

Credibility and Reliability of Parents' Evidence

Against this reliable testimony from an educational professional, the Parents testified to their own evaluation of the District's program. The Parents asserted that the

program was not what the District promised it to be, and that many elements of the program were unnecessary, while their own concerns were not addressed adequately. I find their evaluation of the District program to hold little weight, because they are not trained educators; their experience is almost entirely within the constellation of the Institute and its satellite schools, including Center, and because they are deeply and emotionally invested in keeping the Student at Center, an investment that affects their judgment about other alternatives and at times distorted the accuracy of their testimony.

The Parents are not educators and, like anyone else, they regard all educational issues through the imperfect prism of what they have learned about education as non-professionals. (NT 990-12 to 991-11, 1247-15 to 24.) In this case, most of their knowledge of education, as demonstrated in this hearing, is the Institute/ Center methodology, which is said to be an all encompassing approach to educating children with autism. (NT 309-19 to 25, 316-3 to 319-3.) Parents evidenced an emotional attachment to the Center program, and its constellation of sister schools, all apparently generated to some degree by the Institute. (NT 997-6 to 16.) They frankly consider the Center approach to be the best approach for all children with autism. (NT 875-1 to 2, 921-6 to 15)(Institute is the “best” school in the country for autistic students.) I conclude from all of this evidence that the Parents’ evaluation of the District’s offered program is not based upon a comprehensive understanding of education as a profession and as a body of knowledge and skill.

The Parents’ reaction to what they saw at the [District] School demonstrates this understandable but limiting penchant for judging educational issues with relation to what they have experienced at Center and the Institute. (NT 964-3 to 966-4; 990-12 to 993-1;

S-37.) They reacted with shock at their observation of a classroom in which children were not strictly controlled behaviorally, and in which the programming was not readily apparent to someone trained only to recognize one methodology. (NT 1233-1 to 1239-3.) They concluded that there was a lack of “instructional control.” (S-37.) They were so confident in that conclusion that they formally wrote to the District Special Education Director to assert it, (S-37), and they testified with conviction to the same effect at the hearing in this matter. The record shows that it did not occur to Parents that they might not fully understand what they were seeing. (NT 1139-12 to 1144-4; S-37.)

In accord with the Center philosophy, the Parents are convinced, against the explicit opinion of the District’s trained and experienced speech and language pathologist, (FF 3), that a professional speech pathologist’s services can be dispensed with, even in the area of apraxia and articulation. Similarly, (FF 6), they profess no need for occupational therapy services, having abandoned all hope of ever seeing the Student write or print more than Student’s name – indeed, more than the first letters of Student’s first and last name. Again, their frame of reference is that the “orthodox” methodology was unable to accomplish more - ergo more cannot be accomplished. This syllogism assumes the superiority and exclusive effectiveness of “orthodox” methodology, an assumption that is not established by the preponderance of evidence in this case.

I find that, as much as the Parents may wish to believe – and have me believe - that they were open minded in coming to the District, the Parents never intended to enroll their [child] in a public school. The record contradicts their elaborate and passionate testimonial assertions to that effect. (FF 8 to 12, 27, 28, 57 to 59.) Even before moving to the District, the Student’s Mother called the District and pointedly asked if she could

“feel comfortable” that the District would continue to pay for the Student’s education at Center. (NT 760-9 to 763-14; S-46.) Again, shortly before settlement on a home in the District, the Student’s Mother asked the District Special Education Supervisor to estimate “the chances” that the District would pay the tuition. (S-46 p. 4.) Although there is dispute as to the exact language and intent of the Parents’ expressions during the IEP meetings in July and October, they did not communicate an open mind about sending the Student to the District’s offered program. (NT 783-12 to 785-5, 820-6 to 21, 873-7 to 876-5, 1124-15 to 1126-3, 1196-12 to 1197-6, 1209-4 to 16, 1239-5 to 24, 1241-20 to 25, 1248-4 to 17.)

The Parents have a powerful personal interest in continuing placement at Center. The Student’s Mother frankly testified that the Student recently had exhibited seriously disruptive and aggressive behavior at home, (NT 876-6 to 18), and she also noted that Student’s self care skills have not risen to a level of independence, (NT 877-15 to 878-1). The Parents clearly are afraid that they might have to institutionalize the Student if Student’s home behavior is not brought under control. (883-4 to 17, 902-7 to 13.) Their expert witness and adviser reinforced this fear in testimony. (NT 934-16 to 19.)

The Student’s Mother lost her composure in contemplating the prospect of withdrawing the Student from Center. In describing the Student’s admittedly difficult – even painful - visit to the [District’s] School for assessment (after the Parents abruptly forbade further testing or observation at Center), the Student’s Mother narrated as follows:

Student was screaming. Student was banging on the desk. Student was pretty much out of control. It took everything I had not to jump in. Student just kept screaming, Center, back to Center. You can’t – you would destroy this child –

Q. Do you need a moment?

A. – if you would bring Student back to the District.

(NT 885-11 to 22.)

The Student's Father also was upset visibly as he testified, using emotionally laden terms like "shocking" and "chaos" and accusing District staff of a "blatant lie" in testimony – yet subsequently retracting the latter under gentle cross examination. (NT 1233-2 to 1241, 1248-4 to 17.) He insisted that the Parents never took the position that the Student was not coming to the District – even at the October meeting, weeks after their lawyer had written demanding tuition reimbursement. This assertion simply is not credible in the circumstances.

I attribute the emotionality of the Parents' testimony to the extreme fear the Parents share about removing the Student from Center. Without demeaning this fear or disrespecting the Parents' ultimate judgment about the best course for their child, I find that this fear colors all of their testimony and reduces its weight as a basis for determining the adequacy of the District's program – which is the only issue for me to determine under the law.

The Co-Director of Education for Center supplemented the Parents' assessment of the appropriateness of the District's offered program. This individual has numerous and diverse responsibilities for Center. She performs intake interviews and assessments, interviews parents "to determine if they are in agreement with our philosophy", interviews, hires and trains new staff, supervises programming for a portion of the student body, manages the "collaborative process" of writing an IEP, assesses students

with behavioral issues, creates behavior plans, and participates in the budget process.

(NT 311-2 to 312-20.)

This witness' qualification to perform all of these educational and administrative tasks is that she is a Board Certified Behavior Analyst with a Masters Degree in Applied Behavior Analysis. (NT 304-2 to 8.) She did not testify to any education, training, certification or experience as a teacher, either in a private or a public setting. She is not a speech and language pathologist, or an occupational therapist. While she demonstrated credibility, her applicable expertise is very narrow: she is an expert in Applied Behavior Analysis, and nothing else.

This witness expressed broad opinions about the Student's educational needs, despite her inexperience in a whole range of educational concerns, including curriculum, methodology and, in particular, speech and language pathology. Regarding the latter, this witness testified in effect that anything that a speech and language pathologist can teach can also be taught through discrete trial. (NT 346-14 to 354-5.)

I find this testimony to be unreliable, because the witness lacks the professional qualification to venture the range of opinions which she felt free to assert. This compromises the witness' reliability on all issues, because it shows that she views discrete trial as a kind of panacea for all educational needs. I accord little weight to this witness' testimony with regard to the adequacy of the District's offered program.

Permissible Scope of the IEP and Record of Program Not Reflected in the IEP

The IEP did not include all of the operational details of the District's program. Parents cite the D.S. v. Bayonne case for the proposition that the Third

Circuit Court of appeals will look askance at an educational program in which specifics of programming are not expressly laid out in the IEP. The Bayonne case does not support that proposition. On the contrary, the Court there recognized that the IEP does not need to contain every detail of programming as long as it can be shown that the programming itself was offered. In upholding an administrative law judge's finding that a program was deficient because of the absence of a Wilson or Lindamood-Bell reading program, the Court cautioned against reading its holding "overly broadly".

Similarly, the Parents cite Christen G. v. Lower Merion School District, 919 F.Supp. 793 (E.D. Pa. 1996), in support of their argument. However, while the Court in Christen G. spoke firmly in support of the procedural requirements of the IDEA generally, especially the timely provision of a NOREP, the decision cannot be read to suggest that omission of an educational service from an IEP renders such service irrelevant in considering whether or not FAPE was offered. Likewise, Lauren P. v. Wissahickon School District, 310 Fed. Appx. 552 (3d Cir. 2009), is inapposite. There, a student attending the District's school was exhibiting behaviors that interfered with learning, and the District failed to intervene effectively. The case does not stand for a general proposition that all educational interventions must be stated in the IEP.

On the other hand, Dumont Board of Education v. J.T., No. 09-5048, 54 IDELR 231 (D.N.J. 2010), does hold that an IEP must be evaluated based upon its contents, rather than any promise of services in the future. However, in that case, the oral offer of services was made in the context of litigation and the services set forth in the IEP were

inadequate. I find that the IEP in the present matter stands on its own, and that the District demonstrated good cause for not including the details that the Parents demand.⁴

The language in Dumont is not as sweeping as the Parents suggest. One would reduce Dumont's holding to absurdity by suggesting that it requires such an unreasonable degree of specificity in an IEP. Based upon hundreds of hearings in which a variety of public and private autistic support programs have been demonstrated and documented before me, I find that it is not credible to suggest that established systems of instruction must be spelled out - in detail and in their entirety - in every IEP. Much of the underlying organization and many of the instructional tools and techniques simply are part of the infrastructure of each class. There is a coordinated team with experience working together, and there is a variety of instructional resources and skills available, precisely for the purpose of being able to fit the team's services to the unique educational needs of the child.

Timeliness

I find by more than a preponderance of evidence that the District offered an educational program with diligence and speed. Contrary to the overwhelming weight of evidence, the Parents argue that the District delayed its evaluation and educational planning for the Student, and as a result, that its offer of services in October 2009 was not timely.

This record clearly contradicts such an assertion. The District began gathering data in the Spring of 2009, when the Parents notified it that they were moving to the

⁴ Parents also cite Lascari v. Board of Education, 116 N.J. 30, 560 A.2d 1180, 1189 (N.J. 1989). This New Jersey Supreme Court case was based upon a state regulation setting a higher standard for establishment of FAPE, and the trial court in Lascari identified woeful deficiencies in the IEP bearing no resemblance to the alleged deficiencies in the District's offer in the present matter.

District as of July. (FF 13.) Quite reasonably and appropriately, the District did not begin its evaluation process until after the Parents settled on their new home in the District; the District did not have any legal responsibility for the Student until Student was a resident of the District. (FF 15.) Within six days of settlement, the District met with Parents, and they started the evaluation process the next day, after finding out that they could not implement the IEP that had been sent to them. (FF 15, 16.) Within the month they had completed several visits to Center to observe the Student and the program and to conduct assessments. (FF 18 to 20.) The evaluation would have been completed within a month, except that the Student was unavailable for a scheduled evaluation and the Parents, through counsel, withdrew permission to evaluate the Student at Center in early September, requiring the Parent to bring the Student to the District, thus slowing the pace of the evaluation. (FF 20, 22 to 24.) The Evaluation was completed in September, and the IEP was offered in October. (FF 20, 25, 29.) Meanwhile, the District implemented the last agreed upon public school IEP, the 2008 IEP from the Student's previous school district. (FF 21.)

The Parents suggest that the District was unreasonably insisting on numerous unnecessary assessments at Center in order to build a case against private placement. Based upon the weight of the evidence, I find this argument to be frivolous. The Student's educational needs span the spectrum of sensory, cognitive, academic, adaptive, social and behavioral functioning. (FF 1 to 7.) To suggest that Student should not have been assessed in all these areas of functioning is surprising, given the District's broad obligation to address these needs under the IDEA. The Parents adduced absolutely no

reliable evidence of negative animus, conspiracy or bad faith in the design or implementation of the evaluation.

Predetermination

I find no evidence of “predetermination.” The Parents do not assert that the District flatly refused to consider Center as a placement; rather, the Student’s Mother, when pressed on cross examination, admitted that her assertion to this effect was based upon an impression, rather than upon any specific statement. (NT 987-6 to 988-2.) Parents rely upon Deal v. Hamilton Co. Board of Education, 392 F.3d 840 (6th Cir. 2004), for the proposition that a school district must not determine the child’s placement before developing the IEP. Id. at 857. However, this matter is distinguishable from the Deal case. There, the administrative law judge found that the school district came to the IEP meetings with a closed mind and was not willing to consider information provided by the parents demonstrating that the Student needed a Lovaas style ABA program. Id. at 858. The judge found that the district had a policy against providing Lovaas programming, due in “large part” to its cost. Id. at 855-56. The district in Deal was found to have excluded input from ABA providers. Ibid.

In the present matter, there is no such evidence. There is no evidence that cost played a part in the District’s offer to provide service in its own program. The District made substantial efforts to review the Center program and the Student’s progress in it. (FF 18 to 20, 23, 24.) The record was mixed as to the Student’s success in Center as opposed to the previous program at Private School; thus, the record in this case does not

demonstrate by a preponderance that the Student needs the program offered at Center and no other. (FF 11, 51, 52.)

While the District began its analysis by considering a District placement, they convincingly assert that they are bound to consider the public placement first, because of the strong state policy in favor of the least restrictive appropriate setting. 22 Pa. Code §14.102(a)(1)(iii); Basic Education Circular, Least restrictive Environment and Educational Placement for Students With Individualized Education Plans (July 1, 2002). This policy itself derives from the IDEA's strong preference for inclusive education. 20 U.S.C. §1412(a)(5). The District cannot be faulted for implementing this policy through its educational planning process.

Perhaps most telling, the District in this case disagreed with the Parents regarding the need for Center because it disagreed with the Center educational approach and philosophy. District personnel considered the Center approach to be inadequate because it does not provide for a variety of learning settings, methodologies and opportunities, does not adequately address social skills, does not adequately provide inclusion with typical students, and does not provide qualified providers for related services including speech and language therapy and occupational therapy, and the Student needs such services to be provided by competent professionals. The District also gave slightly more weight to addressing the Student's academic needs, as opposed to Student's life skills needs, which the Center program emphasized more heavily.⁵ (FF 35.)

The IDEA does not require school districts to abandon the judgment of their trained professionals as to the appropriate blend of academic, social, adaptive and

⁵ This was only a matter of degree. The District's program thoroughly addressed the Student's need for further education in life skills.

behavioral training for a given school year. Lachman v. Illinois State Board of Education, 852 F.2d 290, 297 (7th Cir. 1988); Bayonne, 602 F.3d at 564-65; Greenwood v. Wissahickon Sch. Dist., 571 F.Supp.2d 654, 663 (E.D.Pa.2008). The IDEA vests in parents the right to have their concerns heard and seriously weighed in the process of balancing competing educational goals; they do not have the right to dictate to school districts what that proper balance should be. Ibid. I find no evidence of predetermination.

Transition

Parents did not raise an issue with the post secondary transition plan provided in the IEP. Rather, they complained that the District failed to provide an adequate plan for transitioning the Student from Center to the [District] School. I find that the District offered an adequate plan. The IEP references and thus offers a “smooth transition” from Center, through the District’s collaboration with Center staff. (FF 42, 43.) The District’s school psychologist also recommended a transition plan in her reevaluation report. (FF 42.) The psychologist and the District’s behavior specialist both testified that their autistic support program has the capacity and skills to provide appropriate transition support for children entering their program. (FF 44.) Moreover, both testified that more detailed transition planning could not occur until the Parents agreed to enroll the Student in the program, and a target date was known. (FF 45.) I find that the District was not negligent about this need, and offered appropriate services.

I base this finding on the weight of the evidence and in particular my finding that the District’s school psychologist and its behavior specialist were credible and reliable

witnesses. The school psychologist is well qualified, with state certification and twenty eight years' experience. (NT 65-1 to 70-9.) She gave straight-forward answers to questions, admitted facts that appeared to tend against the District, and repeatedly showed careful attention to precise characterizations and the limits of her knowledge. There was no hint of embellishment or obfuscation. The behavior specialist was likewise qualified, with a Masters degree in special education, recent board certification as a behavior analyst and several years of experience both within and outside of the District. (NT 570-18 to 578-10.) She demonstrated exceptional knowledge of applied behavior analysis, and she is especially well trained and certified in the application of the District's selected methodology, called the Competent Learner Model. Ibid. Although she jousts with Parents' counsel on cross examination, I concluded that this was a product of inexperience in the hearing setting, rather than any vested interest. On the whole, I find that her testimony is reliable – indeed impressive.

Behaviors

The Parents' criticism of the District's offer with regard to behavior control is facially surprising. The October 2009 IEP includes both a Functional Behavioral Assessment and a Positive Behavior Support Plan. (FF 46.) As noted above, the District's behavior specialist (now behavior analyst after obtaining her BCBA in November 2009) is both qualified and believable. She attested to the appropriateness of the District's offered behavior control program. (FF 47 to 50.)

The Parents' primary criticism seems to be that the District's FBA fails to identify the Student's behavioral needs because it was conducted through an interview with the Center's BCBA. (FF 48, 49.) I find that this is an acceptable methodology. (FF 50.)

Indeed, it is intuitively appropriate, since both the Center and the District's behavior analysts were highly qualified to identify behaviors of concern, their antecedents and consequences. Moreover, Center had behavior data spanning years, data which the District staff reviewed in producing the FBA. (FF 48.)

Home Programming

I find that the absence of direct instruction or parental training in the District's offer does not render it inappropriate. (FF 54.) The District's Competent Learner Program in its autistic support class includes substantial communication and coordination with parents. (FF 60 to 63.) It explicitly provides training to parents who desire to provide continuation of skills training in the home. Ibid. The program is data based and if the Student were not learning skills according to Student's IEP or generalizing them across settings, this would be a basis for criticizing the program. As it stands, however, there is no such evidence. Thus, based upon the facts known at the time the program was offered in October 2009, the District was not reasonably on notice that it needed to provide services directly in the home in addition to the coordination and training that it provided in conjunction with its offered program.

I am fully cognizant that the Parents profess to need direct support as they implement behavioral programming for the purpose of controlling the Student's behavior. The District's program would not have prevented them from obtaining such help. If it were necessary, they could obtain complete home programming through the Pennsylvania behavioral health system. (FF 64.) Nothing in the record suggests otherwise. Based upon this record, I conclude that the District's offer was reasonable based upon what it knew at the time of the offer.

The Center educational director's testimony suggests that direct home programming was necessary. (FF 55 to 59.) However, her testimony is given less weight for the reasons set forth above at pages 19 to 20. District witnesses, all of whom I found to be credible and reliable, all testified that the District's offer was appropriate. (FF 63.) Thus, the preponderance of the evidence in this matter is that the District's offer of services was appropriate, even though it did not offer direct services in the home.

ESY

Pennsylvania law requires that local education agencies evaluate each child with an IEP to determine whether or not the child needs ESY services. 22 Pa. Code §14.132(a)(1). This must be completed in a timely fashion; for the highest risk students, this evaluation is required to be provided in February. 22 Pa. Code §14.132(d), (e). The District promised to do this. (FF 53.) There is no evidence that the District failed or refused to provide ESY services to the Student.

The Parent was concerned that the District's program would not be provided in the same physical location as its autistic support class. I find that this concern alone does not establish prospectively that the District would offer an inappropriate ESY program to the Student. It is not necessary to adjudicate this issue at this time. The Parents precluded the District from making an offer by deciding not to send the Student to the District. Thus, the issue is not ripe for determination, and is certainly not an appropriate basis on which to find that the District's offered program and placement was not reasonably calculated to provide a FAPE.

APPROPRIATENESS OF THE CENTER PROGRAM

The above findings render the controversy about the appropriateness of the Center's program moot. Therefore I do not reach the issue.

CONCLUSION

For the reasons set forth above, I find that the program and placement offered by the District on July 2009 is appropriate. The Parents are not entitled to tuition reimbursement. Any claim by the parties not addressed in this decision and order is denied.

ORDER

1. The District did make a free appropriate public education available to the student through an appropriate program and placement for the 2009-2010 school year.
2. The District was not required to offer ESY services in the October 2009 IEP, and any criticism of the prospective adequacy of ESY services to be offered by the District is not ripe for adjudication.
3. The appropriateness of the Center placement and program is moot and therefore I do not reach this issue.
4. The District will not be ordered to pay the cost of tuition and transportation of the Student on account of Student's attendance at Center for the 2009-2010 school year, including ESY services.

William F. Culleton, Jr. Esq.

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

July 9, 2010