

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: S.M.

Date of Birth: [redacted]

ODR No. 00856-0910 AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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Dates of Hearing:

July 6, 2010, August 18, 2010,
September 21, 2010, September 22,
2010

Record Closed:

September 29, 2010

Date of Decision:

October 14, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a teen-aged eligible resident of the Hempfield School District (District), presently in the eighth grade at a private school, the [Private School]. (NT 5-25 to 7-3, 25-10 to 26-6.) Student is identified with Autism and Specific Learning Disability under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (P-15.)

Student's Mother and Father, Parents, filed a Complaint Notice (complaint) requesting due process on March 22, 2010. Parents request a finding that the District failed to provide a free appropriate public education (FAPE) to the Student during the period from March 22, 2008 until the first hearing session in this matter, July 6, 2010. Parents also request that I order the District to provide compensatory education for failure to provide appropriate educational services from March 22, 2008 to the last day of school in the 2008-2009 school year, and tuition reimbursement for the Student's attendance at the Private School for the full 2009-2010 school year. The District asserts that it provided a FAPE at all relevant times.

The hearing was conducted and concluded in four sessions on July 6, 2010, August 18, 2010, September 21, 2010 and September 22, 2010. The transcript was received as complete on September 29, 2010, and the record closed on that day.

ISSUES

1. During the period from March 22, 2008 to July 6, 2010, did the District fail to offer or implement an appropriate Individualized Education Plan (IEP)?
2. Was the District's Re-evaluation Report dated November 2, 2009 appropriate?
3. During the 2009-2010 school year, was the Private School an appropriate placement for the Student?

4. Should the hearing officer order the District to provide compensatory education to the Student for deprivation of a FAPE from March 22, 2008 to the last day of school in the 2008-2009 school year?
5. Should the hearing officer order the District to pay tuition reimbursement for the Student's tuition at the Private School during the 2009-2010 school year?
6. Should the hearing officer order the District to reimburse the District for the independent educational evaluation dated February 1, 2010?
7. Should the hearing officer award prospective relief with respect to the remainder of the 2010-2011 school year?

FINDINGS OF FACT

1. The District issued an Evaluation Report in May 2007 that identified the Student with Autism and Specific Learning Disability in mathematics. The evaluation MDT considered a private evaluation in January and February 2006 that diagnosed the Student with Pervasive Developmental Disorder NOS, as well as the Parents' anecdotal information that the Student's performance in school was slipping in fourth grade and Student's frustration was intensifying. (S-7.)
2. Needs identified in the ER included organization, social skills, attention and focusing, mathematics including calculation and fluency, written expression, including handwriting and organization, and transitioning. (S-7 p. 8 to 9.)
3. By IEP in June 2007, the Student was placed in resource learning support for mathematics and writing. An aide was assigned to keep Student attentive to the work. (S-8, 9, 10 p. 5.)
4. The June 2007 IEP provided a goal with objectives that addressed self-monitoring, working with a group, demonstrating consistent effort even when assigned a non-preferred task, completion of tasks, compliance with directions, and identifying directions on tasks. (S-9 p. 12.)
5. The June 2007 IEP provided a goal for written expression with objectives that addressed fluency, organization, generation of ideas and conventions, and specially designed instruction in the form of explicit, systematic, direct instruction. (S-9 p. 13, 18 to 20.)

6. The June 2007 IEP provided goals for mathematics including computation and solving word problems, and specially designed instruction in the form of explicit, systematic, direct instruction. . (S-9 p. 15 to 20.)
7. The June 2007 IEP provided specially designed instruction to address social skills, including a therapeutic social skills group. No data were taken in the social skills group. There was not a systematic collaboration with teachers to implement explicit teaching of social skills in the regular education setting. (NT 153-24 to 155-9; S-9 p. 18.)
8. The June 2007 IEP provided specially designed instruction to address needs with regard to organization, attention, self monitoring, sensory integration and completion of work. (S-9 p. 18 to 20.)
9. The Student scored Proficient in reading and mathematics and Basic in writing on the fifth grade PSSA test. (S-27 p. 4.)
10. In November 2007, the Student's principal suggested performing a functional behavioral assessment for the Student, but District personnel, including the Student's social skills teacher, decided that it was unnecessary. The same teacher believed that no functional behavioral assessment was necessary during the 2008-2009 school year, when the teacher was the Student's learning support teacher. No functional behavioral assessment was performed until May 21, 2009, ostensibly based upon data collected by therapeutic support staff in October and November 2008. (NT 155-13 to 162-10, 200-18 to 203-20, 234-25 to 239-20, 328-1 to 9; P-23 p. 2, S-14.)
11. By IEP in May 2008, the Student was placed in resource learning support for language arts, including writing and reading. Student was placed in general education for mathematics. The IEP included psychological services as a related service. (S-10.)
12. The May 2008 IEP present levels section recognized needs with regard to written expression, including handwriting, social skills, organization, attention, completion of tasks, mathematics including computation and fluency, written expression including handwriting and organization, and transitioning. (S-10 p. 7.)
13. The May 2008 IEP provided a goal to address self monitoring with objectives to address self monitoring and completion of tasks. (S-10 p. 15.)
14. The May 2008 IEP provided a goal to address reading decoding and comprehension skills. (S-10 p. 11 to 12.)
15. The May 2008 IEP provided goals to address writing fluency, organization, generation of ideas and conventions. (S-10 p. 13 to 14.)

16. The May 2008 IEP provided goals to address mathematics concepts and problem solving. (S-10 p. 14.)
17. The May 2008 IEP provided no goals to address social skills needs, but did offer specially designed instruction to address these needs, as well as a therapeutic social skills group. (NT 168-24 to 173-17; S-10 p. 16.)
18. The May 2008 IEP provided specially designed instruction to address needs with regard to organization, attention, self monitoring and completion of work. (S-10 p. 16 to 18.)
19. The Student was assigned to the learning support classroom for the 2008-2009 school year, with a teacher of language arts whose background included clinical and educational work with persons diagnosed with autism, and persons with serious social skills deficits. The teacher received her state certification the year before; it was the teacher's first year teaching sixth grade learning support. (NT 152-23 to 153-1, 159-2 to 6, 265-16 to 268-25.)
20. The teacher had taught the Student social skills in a support setting during the previous year. (NT 153-2 to 23.)
21. The teacher was responsible for implementation of the IEP in all general education classes. The teacher attempted to implement these responsibilities by consulting with teachers and responding to the concerns that the teachers identified. (NT 269-25 to 271-8, 286-7 to 287-2.)
22. Aspects of the May 2008 IEP were not implemented systematically during the school year; there were no goals for social skills, incentives were created on an ad hoc basis rather than being created based upon existing data or a pre-determined plan, and no data were kept or reported to measure response to intervention or progress. Not all of the Student's teachers were aware of and implementing the specially designed instruction and accommodations set forth in the IEP. (NT 162-16 to 170-15, 175-17 to 176-23, 180-23 to 182-7, 196-14 to 197-16, 225-23 to 234-21, 254-23 to 257-9, 287-22 to 288-2, 345-7 to 346-4; P-23 p. 10 to 29, 41, 42.)
23. From October 2008 to the end of the 2008-2009 school year, a Therapeutic Support Staff (TSS) worker attended the Student while in school. (NT 329-13 to 333-6; S-27 p. 2.)
24. The Student scored Basic in reading and Advanced in mathematics in the sixth grade PSSA test. (S-27 p. 5.)
25. During the 2008-2009 school year, the Student's behavior continued to interfere with Student's education and that of others. Student engaged in clowning

behavior that disrupted Student's classes, oppositional behavior toward teachers, and aggressive behavior toward other students. (NT 256-21 to 257-9; 303-8 to 25, 305-6 to 13, 349-15 to 352-2; P-10, 23.)

26. Beginning in December 2008, and continuing through May 2009, the Student engaged in an ongoing dispute with another student in Student's class; the Student asserted that the other student had harassed and threatened Student. This dispute culminated in an incident in which the Student allegedly threatened the other student and that student's parents threatened to call the police. (NT 306-14 to 307-16; S-42, P-23, P-23 p. 36.)
27. The Student's teacher responded in December 2008 by separating the Students' desks. (P-23.)
28. In February 2009 the Parents asked for a meeting with the other student's parents and the students to address the ongoing conflict. No meeting took place. The learning support teacher promised, but did not provide, explicit teaching and procedures to allow the Student to seek protection from what Student perceived as bullying by the other student. On May 7, after further communication from the Parents, the District changed the Student's schedule to separate the two students. (NT 203-21 to 223-9; P-23 p. 9, 28, 31, 33, 38, 39, 49.)
29. From February to May 2009, the Student increasingly received detentions for various disciplinary infractions. (P-23.)
30. At some point in 2009, the learning support teacher offered to provide explicit social skills instruction to the Student, in response to the increasing conflict that the Student was having with the other student. (NT 166-20 to 173-17; P-23 p. 14.)
31. On May 21, 2009, the District conducted a functional behavioral assessment and on May 27, 2009, offered a Positive Behavior Support Plan. (NT 234-25 to S-14, 15.)
32. Progress monitoring indicated that the Student made progress within the sixth grade curriculum in reading, mathematics and written expression. (NT 313-23 to 321-15, 355-5 to 361-1; S-1, 2, 16 p. 24 to 27, 21.)
33. By letter dated June 5, 2009, the Parents' counsel advised the District of the Parents' intention to withdraw the Student from the District and place Student in the Private School. In the same letter, the Parents demanded tuition reimbursement for the placement at Private School for the 2009-2010 school year. (S-17.)

34. By letter dated July 6, 2009, the District denied tuition reimbursement and invited the Parents to an IEP meeting to revise the IEP. (S-18.)
35. By IEP in May 2009, revised in August 2009, the District offered to place the Student in itinerant learning support for social skills instruction, three sessions per cycle. Student was placed in general education for all other subjects. The IEP included psychological services as a related service. (S-21.)
36. The May 2009 IEP, revised in August 2009, offered goals to address needs with regard to organization, completion of assignments, attention, studying and test taking, following directions, self monitoring and social skills. (S-21 p. 14 to 23.)
37. The May 2009 IEP, revised in August 2009, offered specially designed instruction to address needs with regard to social skills, organization, attention, self monitoring, sensory integration, study skills, test taking, written expression, mathematics fluency and completion of work. (S-21 p. 24 to 26.)
38. The May 2009 IEP, revised in August 2009, offered a Positive Behavior Support Plan with goals for behavior control. Although the goals were newly formulated and more detailed and measureable, through an oversight they were not communicated to the Parents until May 2010. (S-21 p. 34 to 41, P-12 p. 26 to 34.)
39. By email message dated August 26, 2009, the Parents advised the District that they would be sending the Student to the Private School at the beginning of the 2009-2010 school year. (S-23 p. 1.)
40. In August 2009, the District agreed to re-evaluate the Student upon receipt of a written permission to evaluate, to include evaluation of perception, motor skill, social and emotional adjustment, and speech and language, including pragmatic language. (S-22 to 23.)
41. The Student began attending Private School in the summer of 2009. In September 2009, Student scored within the average range in tests of achievement in reading, mathematics and writing. Student continued to demonstrate educational needs with regard to attention, organization, writing, mathematics and social skills. (P-18 p. 1, 11, P-19, 20.)
42. The Private School program, offers individual and small group settings for teaching, and staff who specialize in providing special education to children with autism. (NT 36-10 to 40-13.)
43. The Private School program addressed all of the Student's educational needs. (NT 50-24 to 66-9; P-18, 19, 20, 25.)

44. The Private School provided a daily, individualized session that addressed the student's needs with regard to organization, written language, pragmatic language, social skills and critical thinking. Each area of educational need was addressed through goals in these areas, as well as in reading, reading comprehension, mathematics and other academic areas. (P-18.)
45. In October 2009, the District received the Occupational Therapy evaluation report, which found that the Student does not have any disability in fine motor skills as related to legible writing, and thus did not qualify for Occupational Services. (S-25.)
46. In November 2009, the District issued a re-evaluation report that identified the Student with Autism but found no learning disability, emotional disturbance, or need for speech and language support, including pragmatic language support. (S-27.)
47. The November 2009 re-evaluation report identified educational needs with regard to social skills (reciprocal interaction, reading nonverbal cues, perspective taking and taking personal responsibility), organization, attention and time on task, and written expression, including legibility of handwriting, conventions and organization. (S-27 p. 12 to 13.)
48. The November 2009 re-evaluation report relied upon cognitive testing completed for the May 2007 re-evaluation report, including eleven subtests; then-current achievement testing for reading, mathematics and writing; a speech and language evaluation that relied upon three instruments assessing both articulation and pragmatics; PSSA scores for three years; a behavioral inventory from parents, teachers and the Student; grades from the District and from the then-current private placement; teacher report card comments; parental history and input; observation during testing; and observation in private school classroom. (S-27.)
49. In December 2009, the District offered an IEP placing the Student in itinerant learning support. The IEP reiterated the same goals as were offered in the May 2009 IEP, except for one minor change in frequency measurement. Specially designed instruction addressed the same needs as were addressed in the May 2009 IEP. No additional related services were offered. (S-30.)
50. On February 18, 2010, the District received a private psychological evaluation from the Parents. The evaluation diagnosed the Student with Attention Deficit Hyperactivity Disorder, Combined Type, with inattentive and impulsive tendencies, Pervasive Developmental Disorder, Not Otherwise Specified, Learning Disorder, Not Otherwise Specified, with executive functioning deficits, and Anxiety Disorder, by history. (S-28 p. 10, S-32.)

51. The private evaluator recommended interventions at school to address the Student's needs with regard to attention, organization and executive functions, including visually based interventions and classroom accommodations to account for auditory informational overload, explicit teaching of organizational and executive functioning skills. The evaluator also recommended speech and language pathologist services including group and individual intervention and consultation with school staff. Other recommended explicit instruction in social skills, including conversational pragmatics, reading of social cues, self monitoring in conversation. The evaluator also recommended a behavior management plan. (S-28.)
52. In February 2010, the District offered a social skills group to address the Student's educational needs in social skills, and accommodations in the regular education classroom to address the Student's educational needs related to executive functioning. A revised IEP reflecting this offer was conveyed to Parents in April 2010. (S-34, 36 to 38.)

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.¹ 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). 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.

¹ 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).

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 evidence² 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 Parent, who initiated the due process proceeding. If the evidence is in “equipoise”, the Parent will not prevail.

LEGAL STANDARD FOR TUIRION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student’s needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund 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 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.

² 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.

361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007).

FREE APPROPRIATE PUBLIC EDUCATION

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 educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his 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).

READING AND MATHEMATICS

I find that the District provided meaningful educational benefit with regard to reading and mathematics, as to which the District identified the Student with Specific Learning Disability (SLD) in May 2007. (FF 1.) The Student’s standardized achievement testing, given in 2007 and 2009, indicated performance within the average range. (FF 1, 46.) The Student’s PSSA scores, although somewhat variable, generally were consistent with achievement testing in that, in each grade for which tests were given, the Student scored at a proficient or advanced level, with anomalous exceptions. (FF 9, 24, 48.) The Student’s grades were largely at the A and B level, although there were accommodations that reduce the value of these data for measuring achievement. (FF 48.) On the whole, the preponderance of the evidence supports my finding that the Student made meaningful progress in these academic areas.

Significant to my weighing of the evidence in this regard is the questionable nature of the Student's SLD. While the record did not contradict that the Student was identifiable with this educationally defined disability in 2007, it supports a finding that the Student did not manifest this disability during the 2008-2009 and 2009-2010 school years. (FF 11, 32, 47, 48, 50.) By the end of the 2008-2009 school year, whether due to original misidentification, natural cognitive development and maturity, or the success of specially designed instruction, the Student's performance and achievement in these areas were commensurate with Student's known cognitive potential, and Student's achievement was within the average range in both subjects.

In sum, the evidence is preponderant that the District provided what the Student needed – or perhaps more than what the Student needed – to derive meaningful educational benefit with respect to reading and mathematics. (FF 2 to 18.) Thus, the District did not deny a free appropriate public education in these two respects.

WRITING

I find that the District provided a plan and program of special education in written expression, including goals and objectives that were measurable, and implementation of the IEP with adequate professional competence and adequate performance data and progress monitoring. (FF 2 to 18, 32, 35, 37, 47, 49.) The record indicates that the Student's problems in writing were illegible handwriting, significant mistakes in conventions, and difficulty generating written information on non-preferred topics. (FF 11, 47.) On the whole, the record of progress was weak. While there was subjective

evidence of improvement, the Student came to Private School exhibiting the same problems that the District identified and addressed. (FF 41.)

Nevertheless, weak evidence of progress after the fact does not compel a finding that a local educational agency failed to provide an appropriate education. Rather, the agency's offered and implemented services must be judged in the context of what was known at the time the services were planned and rendered. The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Here, I find by a preponderance of the evidence that the District's services and plan were reasonably calculated to provide meaningful benefit with regard to written expression; thus, evidence of a lack of progress in written expression is immaterial.

ORGANIZATION AND TRANSITION

Similarly, the District provided a plan and program to address the Student's needs with regard to organization and transitional difficulties that are inherent in the Autism spectrum disorder with which the Student is identified. The June 2007 IEP provided a goal addressing this need, as did all subsequent IEPs. (FF 4, 8.) The Student's placement was calculated to address these issues through explicit teaching, and there was progress monitoring data that showed some benefit from this teaching. (FF 3, 11, 35, 47.)

SOCIAL SKILLS

I find that the District failed to provide meaningful educational opportunity with regard to social skills. There is no question that the Student had a prominent educational need to learn social skills. (FF 2, 12, 22, 30, 40, 46, 50.) Indeed, the preponderance of the evidence in this matter shows that social skills were the Student's single greatest educational deficit.

The District was well aware of this need, and expressly recognized it, throughout the relevant period; indeed, the District recognized this need well before the relevant period began. The Student was identified with autism, and I find that the District and its assigned personnel knew that autism commonly presents with severe deficits in social skills. Despite its knowledge of the need, the District failed to provide either a plan or a program that was reasonably calculated to provide meaningful educational benefit with regard to social skills.

The plan offered by the District through the IEP team did not provide for a single goal with regard to social skills during the relevant period; no such goal was included in the IEP until May 2009. (FF 3 to 6, 17, 36.) Consequently, there was no offer to provide progress monitoring to determine whether or not the Student was learning social skills during that time. At the hearing, the District was unable to point to any data to support its contention that the Student learned social skills during the relevant period. (FF 22.)

Rather than provide a data-based, sequential plan for addressing this need in the IEP, the District included in the IEP a social skills group, sometimes referred to as a "therapeutic" group, three times per cycle. (FF 7, 17.) The District introduced no evidence that this social skills group was actually implemented during the relevant

period. There was no documentation to indicate what the group leader addressed in the group, no identification of specific skills that would be addressed through the group, and no data from the Student's experiences in the group to show that the Student learned anything. (FF 22.)

During the relevant period, the Student's behavior evidenced no meaningful learning with regard to social skills. The Student had frequent negative interactions with peers, had difficulty maintaining friendships, and repeatedly and prominently acted in ways that peers found to be unusual and off-putting. (FF 25 to 30.) The Student was unable to take the perspective of others in relationships, was unable to engage in reciprocal conversations, engaged in numerous conflicts with other students during play periods, and misinterpreted others' reactions to Student's behavior as hostile aggression toward himself for no good reason. (FF 2, 12.)

The above deficits and social difficulties escalated during the 2008-2009 school year. The Student became embroiled in a running conflict with another student, in which both students exhibited aggressive and inappropriate conduct toward each other. (FF 26 to 28.) In April 2009, the Student was accused of a threat that, if proved, could have resulted in juvenile delinquency proceedings and either expulsion from school or a change in placement. Based upon this record of escalating difficulties with social interactions, and the lack of any evidence of learning in the social skills group offered in the IEP, I find by a preponderance of the evidence that the Student did not receive meaningful educational benefit from the District with regard to social skills learning.

The District's 2008-2009 learning support teacher testified that the District was indeed providing explicit teaching of social skills, and that she herself taught such skills

in her learning support class. (FF 20, 30.) However, the record preponderantly show that any such teaching had little effect on the Student's skills as demonstrated in day to day interactions in the school.

I give reduced weight to the teacher's assertions as to the breadth and depth of her teaching of social skills in her learning support class, and her general statements about the Student's progress with regard to social skills and behavior control. I do not doubt this teacher's sincere good intentions; however, I found her testimony to be defensive in purpose and somewhat embellished. The teacher defended the educational plan, and not surprisingly, her stewardship of it, in almost every respect. There was never a concession or doubt about the appropriateness of the program, which had obvious flaws, not the least of which was the absence of goals for social skills during the 2008-2009 school year. Along the way, the teacher made somewhat glowing assertions about what programming was delivered that were not corroborated in the voluminous written record. (FF 22, 23, 28.)

I also find that the teacher was not entirely prepared for the crucial role she would play in the special education of the Student. This teacher was only freshly certified, and was embarking on her first year teaching as a sixth grade special education teacher. (FF 19, 21.) Yet she was responsible for coordinating an inclusion program for a student with autism whose needs were complex. (FF 21, 22.) The teacher was responsible for the implementation of the IEP in all general education classes. The record shows that the teacher took a reactive approach, rather than establishing expectations for implementation and monitoring the implementation in each class. (FF 21.) The record also shows that

the teachers did not all know what accommodations were required in the IEP, and that the inclusion program in general was not well coordinated. (FF 22.)

The Parent directly contradicted the teacher in several respects with regard to what services the teacher asserted had been delivered. In weighing the testimony of each witness, I give more weight to that of the Parent. Her assertions were corroborated in many instances through prior consistent written statements. The record in this case, to which I give substantial weight because it was contemporaneous with events and prior in time to the inception of litigation, painted a picture of programming that was not comprehensive, sequential and data driven with regard to the important areas of learning social skills, including social communication skills, and behavioral regulation and self control.

BEHAVIOR CONTROL

I find that the District failed to provide meaningful benefit with regard to behavioral control. Re-evaluation reports that pre-dated the relevant period showed that the Student presented with behavioral challenges that are not unusual for children with autism. (FF 1, 2, 12, 36, 46, 50.) The Student exhibited sensory integration issues, stereotypic behaviors, and impulsive self expression. (FF 50.) Due to both autism and the Student's negative self image as a result of Student's social skills deficits, the Student exhibited inappropriate behavior such as being the class clown to the point of disrupting Student's classes, and sometimes frightening peers so that they perceived Student as a bully. (FF 25 to 31.) Due to Student's autism, the Student also exhibited inflexibility and oppositional behavior. (FF 12, 36, 46, 50.) All of these negative behaviors are

reflected in the evaluations and present levels of performance included in the District's IEPs. (FF 3 to 8, 12.)

Despite its knowledge of the Student's serious needs with regard to behavioral self-monitoring and self-control, the District failed to address this behavioral need directly and systematically until the Student's inappropriate behavior reached the crisis stage in May 2009. (FF 3 to 8, 10, 12, 22, 23, 31.) The District also failed to conduct a data based Functional Behavioral Assessment, or provide a Positive Behavioral Support Plan, until May 2009. Ibid. Indeed, the Student's principal suggested conducting an FBA in 2007, but District personnel decided that it would be unnecessary. (FF 10.) District personnel continued in their judgment that an FBA was unnecessary throughout the 2008-2009 school year, when the Student's inappropriate behavior was escalating, leading to more detentions for disciplinary reasons, and culminating with the deteriorating relationship with a peer that led to an allegation that the Student made a serious threat to that peer. (FF 10, 25 to 31.) Rather than rely upon a more intensive and carefully planned program of teaching to help the Student learn to control Student's own behavior, the Student's learning support teacher endorsed the idea that the Student's behavior would be best controlled by increasing the hours of the TSS worker, to monitor the Student and essentially intervene when Student's behavior became inappropriate. (FF 21 to 30.)

On May 21, 2009, the District finally provided an FBA, but that document is seriously flawed. (FF 31.) It is not based upon contemporaneous data taken in the environment in which the behavior was manifest, and focusing on the behavior of most concern. Rather, the only data included in the FBA was data taken by the Student's

behavioral health agency aides, the Therapeutic Support Staff, who had taken behavioral data in the Fall of 2008. The District's FBA set forth goals for behavior that were taken directly from the Specially Designed Instruction in the governing IEP.

The record shows by a preponderance of the evidence that the District failed to provide an educational plan through its IEPs to address the Student's need to learn behavioral control. It offered no goals, and failed to conduct an FBA or provide a Positive Behavioral Support Plan, until May 2009. There was inadequate coordination among the educational staff, especially with regard to the Student's inclusion in regular education classes. This failure was a failure to provide or offer educational services that were reasonably calculated to provide the Student meaningful educational benefit with regard to behavioral self control.

EVALUATION

The hearing officer must determine whether or not the District's evaluation was appropriate. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3). In making this determination, the hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311.

The IDEA obligates a local educational agency to conduct a "full and individual initial evaluation" 20 U.S.C §1414(a)(1)(A). The Act sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to "determine the educational needs of such child" 20 U.S.C. §1414(a)(1)(C)(i). In 20 U.S.C. §1414(b)(1)(A)(ii) and (B), the Act requires

utilization of assessment tools and strategies aimed at enabling the child to participate in the “general education curriculum” and “determining an appropriate educational program” for the child. The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally” 20 U.S.C. §1414(b)(3)(A)(ii).

The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes “social and emotional status” 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must “include those tailored to assess specific areas of educational need” 34 C.F.R. §300.304(c)(2).

The IDEA requires the use of “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information” 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors” 20 U.S.C. §1414(b)(2)(C). The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally” 20 U.S.C. §1414(b)(3)(A)(ii).

Further, the regulations require that the evaluation procedures “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs” 34 C.F.R. §300.304(c)(6). At least one federal court has interpreted the

IDEA to require that the evaluation be “sufficient to develop an appropriate IEP” *Brett S. v. West Chester Area School District*, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The IDEA requires the local educational agency to conform to specified procedures in order to be deemed appropriate. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., *Eric H. v. Judson Independent School District*, 2002 U. S. Dist. Lexis 20646 (W.D. Texas 2002). The agency may not use “any single measure or assessment” as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2). The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

The agency must utilize information provided by the parent that may assist in the evaluation. *Ibid.* This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R.

§300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.533(a)(1)(i). As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

I find that the November 2009 re-evaluation meets the above legal standards. (FF 46 to 48.) The District obtained parental input, both anecdotal and through the behavior inventory it collected from them. The evaluation was sufficiently comprehensive to gather relevant functional, developmental and academic information; it addressed all areas of suspected disability, with instruments designed to address cognitive functioning, academic achievement, speech pragmatics, and social and emotional issues (through the behavior inventory, parental input and review of school history.) There was no evidence to suggest that the selected instruments were inappropriate or misused.

Parents argue that the District’s evaluation was not sufficiently comprehensive, because it relied upon cognitive scores from four years prior to the date of the re-evaluation. This is not a sufficient basis for me to find the evaluation inappropriate, because the District’s psychologist deemed appropriate the decision to utilize these scores, (NT 690-7 to 25), and I find that witness to be credible and reliable. Thus, I defer to the expertise of the District psychologist in determining to rely upon these scores.

My reliance upon this witness' opinion is based upon his reserved and professional demeanor and the way in which he chose to answer questions. He declined to render an opinion for which he lacked adequate information, and readily admitted weaknesses in the data underlying his report. I conclude that this witness was credible and that his opinions were reliable, because he exercised independent judgment and remained faithful to appropriate professional standards during his testimony.

APPROPRIATENESS OF THE PRIVATE SCHOOL PROGRAM

I find that the Private School program was appropriate for the Student's educational needs. The school is devoted to providing for the needs of children with learning differences, including autism. (FF 42.) It provides individual and small group instruction, which enables its staff to address the Student's unique needs explicitly, directly and immediately as they arise. (FF 43, 44.) Its documentation shows that it addressed all of the Student's educational needs, including academics, attention and organization, social skills and behavioral needs. (FF 43.) A preponderance of the evidence shows that the Private School addressed the Student's academic needs, while providing specially designed instruction to permit the Student to achieve in spite of the disabilities that are recognized by all parties in this case – difficulties maintaining attention and achieving organization of work, social skills deficits, including socially pragmatic communication deficits, and attendant behavioral dyscontrol with its negative emotional consequences.

As a private school specializing in educating children with learning disabilities, the school is more restrictive than the District's program would be, and the school does

not provide the same procedural protections and planning documents, such as goals in an IEP document, that the District is required by law to provide. However, the Supreme Court has ruled that a private school placement may be appropriate, even though it fails to provide an IEP or meet state educational standards. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14-15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993). When a local educational agency has failed to provide a free appropriate public education to a student, a parent is not required to select a perfect private placement. Ridgewood Bd. Of Educ. v. N.E., 172 F.3d 238, 249 n. 8 (3d Cir. 1999); Mary T. v. Sch. Dist. of Philadelphia, 575 F.3d 235, 242 (3d Cir. 2009). I find that the Private School provides an appropriate placement for the Student; its failure to provide the procedures and planning tools established for public schools by the IDEA is not inconsistent with this finding.

I find that the Parents' expert was qualified, honest and credible. The expert is both a licensed clinical psychologist and a certified school psychologist, with experience in the public school system. The expert's demeanor was relaxed and even humorous. She answered questions without any visible sign of watching her words, yet her answers revealed an effort to be exact. She readily conceded important points that seemingly cut against the Parents' case, including that the August 2010 IEP offered by the District appeared to meet the expert's minimal standards for appropriateness, and that the Student does not present with Specific Learning Disability.

Although I find her credible, I give limited weight to the expert's testimony about the appropriateness of the Private School program. From her responses, it was apparent that the expert had not evaluated that program carefully, nor had she obtained important facts about it, such as whether or not the program kept data on the Student's educational

goals, even though the expert worked for Private School as a consultant for one year. Nevertheless, her opinion is entitled to some weight, and it corroborates the information provided by the Private School's director of admission and outreach, who testified. The testimony of both of these individuals is further corroborated by the documents admitted in this matter.

In contrast, the District's director of special education, who was responsible for the Student's education in the 2008-2009 school year, testified to a classroom observation at Private School and to her review of the Private School records. From this data the Director concluded that the Student was not making progress at Private School and that the District's programming had addressed the Student's needs appropriately.

While I found this witness to be credible, due to her care and precision in answering questions and her willingness to concede an adverse point, I accord this testimony reduced weight because the witness plainly and understandably was defensive of the District's program for the Student, and negative about the Private School program. I find that the factual basis for the Director's comparative judgment – one classroom observation coupled with a review of records - was not sufficient to justify the generalizations that the Director made about the Private School program or the Student's progress at Private School. This testimony was undercut further by the Director's severe limitations of memory for the actual District programs that were implemented, and the history of events that led to the unilateral placement.

I agree that the record is sparse regarding that progress – mainly documentary or subjective and anecdotal rather than data driven – yet in these circumstances, a lack of firm data showing actual progress is not fatal to the appropriateness of the program at

Private School. (FF 43, 44.) On the contrary, I consider that the Student was in Student's first year at Private School, presented a complex set of needs, and was fresh from a year in which Student had experienced subjective feelings of worthlessness and inability to succeed, with a succession of escalating disciplinary infractions that could only exacerbate such feelings. Under these circumstances, I rely more upon the evidence that Private School addressed the Student's needs in a way calculated to help Student achieve. In contrast, there is no data from the District program to suggest that its program was comparable in scope or effect. On balance, the evidence is preponderant that the Private School placement was appropriate.

BALANCE OF EQUITIES

I find that equitable considerations balance in favor of ordering tuition reimbursement. In favor of reimbursement, I am most concerned that the Parents found themselves in the very kind of dilemma that the courts have recognized as the basis for tuition reimbursement: they were put to a choice between unilateral placement and continuing to cooperate with the District's planning process in circumstances in which the Student was placed in jeopardy. In particular, I am most concerned that the Student's escalating disciplinary infractions had reached the point where Student was directly exposed to possible juvenile court proceedings, as well as either expulsion or change of placement. (FF 25 to 29.) All that stood between the Student and these consequences was the judgment of the adults in interpreting Student's inappropriate behavior: they determined, first, that this behavior was not a realistic threat to other students; they determined, second, that the behavior did not warrant expulsion because it was a

manifestation of the Student's disability. The Parents decided that the Student could not remain in District facilities under these circumstances, especially after a year of neglect of the social and behavioral needs that were the root of the inappropriate behavior. (FF 33.) I find that they were justified in being concerned that the Student continued to be at risk of serious consequences from Student's then uncontrolled behavior, if Student should remain at a District school.

In this regard and generally, I give great weight to the testimony of the Student's mother (Parent). Throughout the hearing, I was impressed by the Parent's demeanor, which evidenced a balanced attitude, an open mind and a sense of integrity during the proceedings. The Parent maintained a businesslike approach, and an ability to interact pleasantly with District personnel. Her testimony was frank and understated; for example, when her attorney asked about her feelings, she responded that she had been "concerned." She was not glib, voluble or attempting to sell a point of view. She admitted adverse points made on cross examination. The written record corroborates this view. From the record, it appears that the Parent always interacted with District staff respectfully and cooperatively. When she had a concern, she expressed it without accusation. I find that this Parent was not looking for an excuse to get something extra for her child. If she unilaterally withdrew the child, it was the product of reason and prudence.

I weigh these considerations against the equitable consideration favoring denial of tuition reimbursement: that the District did address many of the Student's needs. Thus it can be concluded that full tuition reimbursement would be a remedy that is disproportionate to the degree to which the District failed to provide appropriate services.

On balance, I find this consideration less weighty than the equities in favor of reimbursement, because the Parents were forced into enrolling their child in order to protect the Student, and they did not have the luxury of parsing out the degree to which the unilateral placement was needed – whether it was necessary for some or all of the Student’s needs. Even if it was necessary for only some of the Student’s needs, the only choice was to fully enroll the Student at Private School and pay the full tuition. Therefore, I will award the full amount of tuition at Private School for the 2009-2010 school year.

COMPENSATORY EDUCATION

I will order the District to provide compensatory education to the Student. However, compensatory education is an equitable remedy, and I must balance the equities in determining the amount of relief. In addition, I must consider what relief would be appropriate to restore the Student to the level of attainment that Student would have reached if the District had implemented an appropriate educational program from September 2008 to April 2009. See, B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlth. 2006) .

Compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. B.C., 906 A.2d at 648; M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to

correct the deficiency. Id. Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Thus, I take into account the periods of time in which the District did succeed in providing benefit.

Here, I find that the District failed to address all of the Student's very serious educational needs, and therefore denied the Student a free and appropriate public education for the 2008-2009 school year. Consequently, compensatory education will be awarded.

I find that the record is very sparse regarding what would be an appropriate award of compensatory education. It supports an award based upon an hour-for-hour deprivation of educational services, M.C., 81 F.3d supra., and does not support a finding as to the position the Student would have been in if provided with a full year of FAPE, B.C., 906 A.2d supra.

In this matter, because I find that the District did address appropriately the student's needs with regard to academics and attention, based upon the minimal standards of the IDEA, I will not award compensatory education on a full day basis. Rather, I will award compensatory education on the basis of the hours of explicit instruction in social skills and behavior control skills that the District failed to provide appropriately or effectively. In so doing, I rely upon the Private School's model, in which the Student has been receiving an initial period of explicit teaching to address the Student's individual needs, as well as testimony and conclusions in the District's documentation that support the provision of a coordinating staff person who can manage coordinate all of the Student's special education. Based upon these two models of service delivery, I find that the appropriate amount of such explicit teaching would have been one and one half hours

per school day of explicit instruction and support, directed to explicit teaching of social skills, including social communication, and skills for behavioral self control.

REIMBURSEMENT FOR INDEPENDENT EXPERT REPORT

I find that the independent expert report did not sufficiently contribute to the educational planning process to justify reimbursement of its cost by the public. The report was provided months after the Parents withdrew the Student from the District. (FF 50.) While it shed light on the cognitive dynamics of the Student's disability, (FF 51), I am persuaded by the testimony of the District's witnesses, as corroborated by the documents in the case, that the District had an adequate understanding of the Student's educational deficits for purposes of education. I find that this does not necessarily require the kind of refined, even esoteric, modeling of cognitive function that the Parents' expert very credibly and capably provided. Since this information was not essential to an adequate evaluation for educational planning purposes, I will not award reimbursement for it.

PROSPECTIVE RELIEF

Much of the evidence concerned the efforts of the District to amend its offered IEP and address the social and behavioral needs that I find were neglected in the 2008-2009 school year. (FF 45 to 52; S-30 to 38.) The Parents request an order that the Private School remain the placement for the 2010-2011 school year. I decline to issue such an order.

I am impressed by the radical improvement of the IEP documents offered after the unilateral placement took place. (FF 45 to 52; S-30 to 38.) New goals were devised. The goals were drafted to be more clearly measurable. Specially designed instruction was better calibrated to the goals. Improved progress monitoring was offered in these documents as a result. Related services were addressed appropriately. In all, the District's offer was far better than that of the previous years, and even the Parents' expert conceded that the ultimate iteration of these documents met the minimal standard of appropriateness under the law, in her opinion.

Therefore, I find that the District placed on the table an adequate educational program and that, based solely upon the record before me, tuition reimbursement is not justified for the 2010-2011 school year. I will order the District to convene an IEP meeting within fifteen days of the order in this matter, in order to assess whether or not any additional facts warrant further assessment, further amendment to the IEP, or other appropriate action for the educational benefit of the Student.

CONCLUSION

For all of the reasons set forth above, I find that the District failed to provide a free appropriate public education to the Student during the 2008-2009 school year.³ It did appropriately re-evaluate the Student. The Parents unilaterally withdrew the Student to an appropriate placement because of the District's failure to provide appropriate services, and the equities favor tuition reimbursement in this matter. I award

³ I am cognizant that the claim includes the period of March 2008 to the end of the 2007-2008 school year. As to this period of time, I deny relief, because I find the evidence to be preponderant that the District was addressing all known educational needs appropriately, based upon what it knew of those needs. I base this finding largely upon the documents describing the District's evaluation and its prevailing IEP at the time. (FF 1 to 9, 11 to 18.)

compensatory education for services the District failed to provide in the 2008-2009 school year, and I award tuition reimbursement for the 2009-2010 school year. I find no basis to award reimbursement for the independent educational evaluation. I find no basis to award tuition reimbursement for the 2010-2011 school year. I order the convening of an IEP meeting so that the parties may collaboratively determine the next appropriate steps in planning for the Student's education. Any claims not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. During the period from March 22, 2008 to July 6, 2010, the District failed to provide the Student with a free appropriate public education.
2. The District's Re-evaluation Report dated November 2, 2009 was appropriate.
3. During the 2009-2010 school year, the Private School was an appropriate placement for the Student.
4. The District is hereby ordered to pay for compensatory education to the Student in the amount of one and one half hours per school day for the period from the beginning to the end of the 2008-2009 school year, only while school was in session during that period.
5. The compensatory education ordered herein shall take the form of appropriate developmental, remedial or enriching instruction or services that further the Student's attainment of social skills, social communication skills, and behavioral self control skills. Compensatory education may occur after school, on weekends and/or during the summer months, when convenient for the student and the family, and may be utilized after the Student attains 21 years of age. Compensatory education must be in addition to the then-current IEP and may not be used to supplant the IEP. The hourly cost for compensatory education shall not exceed the hourly cost of salaries and fringe benefits for qualified professionals providing similar services at the rates commonly paid by the District.
6. The District is ordered to pay tuition reimbursement for the Student's tuition at the Private School during the 2009-2010 school year.
7. The hearing officer will not order the District to reimburse the Parents for the independent educational evaluation dated February 1, 2010.
8. The District will convene an IEP team meeting within fifteen days of the date of this Order, in order to assess whether or not any additional facts warrant further assessment, further amendment to the IEP, or other appropriate action for the educational benefit of the Student, and to plan for provision of a free appropriate public education to the Student according to law.

William F. Culleton, Jr. Esq.

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

October 14, 2010