

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

ODR No. 2287-1112 KE

Child's Name: T.S.

Date of Birth: [redacted]

Dates of Hearing: 2/1/12, 2/10/12, 3/13/12

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent

Parent Attorney

Judith Gran, Esquire
Reisman Carolla, Gran, LLP
19 Chestnut Street
Haddonfield, NJ 08033-1810

School District

Philadelphia
440 N. Broad Street, Suite 313
Philadelphia, PA 19130

School District Attorney

Anne Hendricks, Esquire
Levin Legal Group
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

Date Record Closed:

March 30, 2012

Date of Decision:

April 14, 2012

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student in this case entered the neighborhood high school during the current school year after participating in the District's high school selection process as modified for IDEA eligible students by a federal court consent order. Parent is not satisfied with Student's placement in terms of the level and types of services provided and the location where services are delivered. Specifically, Parent contends that Student does not have an appropriate peer group, spends too little time in challenging regular education classes and is receiving inadequate and inappropriate academic instruction. Parent also contends that the District violated the consent decree governing high school selection for IDEA-eligible District students by not assuring Student's attendance at a high school in which Student's academic, social and emotional needs can be appropriately met.

Parent's complaint originally included a claim for compensatory education for denial of services in the past, but the parties resolved all issues of past services, leaving only prospective issues to be heard and decided based upon the evidence adduced during three hearing sessions held in February and March 2012.

Based upon the findings of fact and discussion below, the District will be ordered to re-visit Student's high school placement in terms of the level and types of services provided in Student's IEP, and the location where services are delivered to assure full compliance with the terms of the consent decree entered in the case of *LeGare v. School District of Philadelphia*, No. 94-CV-4243 (E.D. Pa. 1995, 1998), as well as general requirements of the IDEA statute and regulations relating to goals and services that reasonably meet all of Student's identified needs and are reasonably calculated to yield meaningful educational progress in the least restrictive environment appropriate for Student.

ISSUES

1. Has the School District appropriately identified and provided/offered appropriate special education services reasonably calculated to meet all of Student's needs, including, specifically, academic and social/emotional needs in order for Student to make appropriate progress in all areas of need?
2. Has the School District provided and offered Student an appropriate placement in the least restrictive environment and fully complied with the *LeGare* consent decree with respect to the selection of a high school where services are delivered to Student?
3. Should the School District be required to offer Student additional or different services, such as a reading program, additional counseling services and/or one to one support throughout the school day?
4. Should the School District be required to deliver Student's special education and related services in a different setting, in terms of both the level of services and the location in which services are delivered?

FINDINGS OF FACT

1. Student is a [high school-aged] child, born [redacted]. Student is a resident of the School District of Philadelphia and is eligible for special education services. (Stipulation, N.T. p. 11)
2. Student has a current diagnosis of specific learning disabilities (SLD) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 12)
3. Student was placed in Parent's home as a foster child during the 2006/2007 school year. Parent subsequently adopted Student, who had previously resided in 10 other foster homes. Student had first been placed in foster care at age 2 and was subjected to abuse and neglect in prior foster homes as well as in Student's family of origin. (N.T. pp. 466—468; J-5¹ pp. 1, 2)
4. Between kindergarten and 4th grade, Student attended six District elementary schools. Prior to the 2006/2007 school year, Student had been diagnosed with Disruptive Behavior Disorder NOS and was accompanied to class by a TSS worker. (J-5 pp. 2, 5)
5. At Parent's request, Student was evaluated for special education services and an evaluation report (ER) was produced in February 2007. (J-5)

¹ Commendably, the parties agreed to submit joint exhibits in this matter, which avoided an unnecessarily long and repetitive documentary record. The joint exhibits are designated in the decision by the letter "J" followed by the exhibit number. As copied, however, many of the exhibits are marked "S" followed by the number, reflecting the party that copied and marked the documents. There is no difference in the exhibit numbers, just the letter designation.

6. Because the index scores on the WISC-IV, a standardized test of cognitive potential, were too scattered to rely upon the full scale IQ (FSIQ) as a meaningful measure of Student's intellectual ability, the District school psychologist also administered the C-TONI, a nonverbal measure of intellectual ability. Student's scores on all components of both the WISC-IV and C-Toni, except one ranged from 67—86, all in the extremely low to borderline range. (J-5 pp. 6, 7)
7. The ER concluded that the most accurate measure of Student's overall ability was the Geometric Reasoning Ability Score on the C-TONI, the only component score derived from either measure of cognitive ability that fell in the average range. (GNIQ= 94) (J-5 pp. 3, 6, 9)
8. Standardized assessments of academic achievement administered as part of the evaluation yielded reading standard scores that ranged from 92—98, generally in the average range. Student's lowest score in measures of language and verbal skills was 81 in listening comprehension (low average) (J-5 pp. 4, 5)
9. On the standardized assessments of achievement in math, Student's standard scores ranged from borderline in numerical operations (74) to average in math reasoning (91). (J-5 pp. 4, 5)
10. The ER further concluded that a learning disability was "suggested" by a significant discrepancy between Student's "demonstrated potential" and academic achievement in oral reading fluency, math computation and listening comprehension, justifying the conclusion that Student fit into the IDEA category of specific learning disability. All grade level equivalents to the reading and math achievement test standard scores were below Student's grade level. (J-5 pp. 3—5)
11. The ER noted that the discrepancy between Student's ability and achievement was not due to environmental factors. (J-5 p. 3)
12. Based upon the evaluation results, including the determination that Student has a specific learning disability, a determination that Student could not be successful in regular education classes without specially designed instruction, and the recommendation of Student's 4th grade teacher that smaller classes would be beneficial, Student was determined to be eligible for special education services in the SLD category and placed in a learning support class for all academic instruction at the beginning to the 2007/2008 school year. Student has continued to receive all or nearly all academic instruction in learning support special education classes since that time. (N.T. pp. 479, 480; J-5 pp. 3, 9)
13. The ER included a description of significant negative behaviors that Student exhibited in the classroom, including [redacted]. Student was also described as lacking self-

confidence, seeking attention and validation from adults and wanting assurance that others care about Student. (J-5 pp. 3, 11)

14. The evaluation also assessed Student's emotional functioning by means of the BASC-2 Teacher Rating Scales. The results indicated that Student was in the At-Risk range with respect to the Conduct Problems Composite, the Internalizing Problems Composite, the Adaptive Skills Composite, the Anxiety Scale, and the Leadership Scale. Ratings were in the Clinically Significant range on the School Problems Composite, Withdrawal Scale and Study Skills Scale. (J-5 pp. 7, 8)
15. During middle school, Student participated in CCTC, a school-based intervention provided by an outside facility that placed an adult mentor in Student's classroom, but not next to Student, to provide behavior support. Parent and District staff considered that intervention very effective in controlling Student's negative classroom behaviors. (N.T. pp. 140—142, 467, 473, 492, 493)
16. When Student's three year reevaluation was due in 2009, the District issued and Parent signed an Agreement to waive reevaluation. (J-8 p. 1)
17. Parent privately obtained therapy and counseling for Student from the time Student began living with her, but with little positive effect until Student began seeing the most recent therapist approximately a year ago. Student's current family/individual therapist determined that the source of Student's negative behaviors is post-traumatic stress disorder. (N.T. pp. 182, 183, 467—470)
18. The therapist also determined that Student's negative behaviors are often attributable to "flashbacks" of incidents of abuse triggered by circumstances that appear similar to Student and to which Student reacts with negative behaviors. (N.T. pp. 184, 469, 515, 517)
19. Student's current therapist has assisted Parent in both understanding the origins of Student's negative behaviors and better handling such behaviors. (N.T. pp. 470—473, 503, 504)
20. Another result of Student's difficult early history is an extreme need to be liked and accepted by peers. (N.T. pp. 187, 194)
21. Student's therapist believes that Student needs extended behavior and emotional support across all environments by a counselor or therapist with skills and experience in trauma therapy. (N.T. pp. 197—199)
22. In the fall of Student's 8th grade school year, the District began the process of high school selection. Guidance counselors visited the special education classroom to distribute applications and booklets describing the District high schools, explained how to complete an application, discussed admission requirements and how to choose an appropriate school. (N.T. pp. 153—155; J-24 pp. 1, 37—92)

23. District high schools are divided into three categories, Citywide Schools, Special Admission Schools and Neighborhood Schools. All students are guaranteed admission to the neighborhood school for which the middle school they attend is a “feeder” school. Students who meet the basic admission criteria for Citywide and Special Admission High Schools participate in a computerized lottery for the initial selection of students who are considered for those schools. (N.T. pp. 157, 599; J-24 p. 49)
24. All District students, regardless of disability status, are permitted to apply for admission to a maximum of five high schools, including all Citywide and Special Admission Schools. (N.T. pp. 598, 600; J-24 p. 43)
25. Parent attended the District’s High School Expo, where representatives of the District high schools were present to answer questions about the various high schools. (N.T. pp. 497; J-24 p. 42)
26. Parent also attended a general informational meeting for the parents of special education students and met individually with a guidance counselor to complete Student’s high school application. The form submitted on behalf of Parent identified four choices: two career/technical schools and a military academy that are Citywide schools and a Special Admission school. Parent selected one of the technical schools and the other schools were suggested by the counselor. Based upon the differences in handwriting, some of which does not match either Parent’s or the counselor’s writing, the form was completed by several people. (N.T. pp. 495—497, 499—501, 552, 553—555; J-24 p. 4)
27. Parent believed that Student’s choice of high school was limited because the schools did not accept the number of special education students the schools are required to admit. (N.T. pp. 556—558, 563)
28. In order for Student to participate in the lottery for admission to the Citywide and Special Admission high schools, waivers of certain admission requirements were needed and approved for Student. Although Student entered the District lottery for a place in all of the schools, Student was not selected for two of the Citywide choices. (N.T. pp. 505, 506, 558, 601, 602, 604, 605, 609, 610; J-24 pp. 5, 17—20)
29. Student needed to have an interview in order to be considered for the Special Admission high school, but because Parent was unable to take Student to the scheduled interview, Student was not offered or considered for admission to that school. (N.T. pp. 558, 559; J-24 p. 82)
30. Student was admitted to a Citywide career and technical high school, but Parent had rejected the counselor’s suggestion that Student should apply to that school from the start, and declined admission based upon Parent’s concerns that it would not provide a good peer group for Student. (N.T. pp. 501, 502, 554, 555 608)

31. Student imitates and takes on the characteristics of people around [Student], a strategy developed because of the lack of parental support and guidance during the early childhood years. Because of that, Parent is particularly concerned that Student is surrounded by peers who are motivated and well-behaved. A teacher has observed that Student will work harder when a classroom friend increases class work. (N.T. pp. 188, 190—192, 428, 502, 503, 511, 535)
32. At the beginning of the current school year, Student entered the neighborhood high school that Student is entitled to attend based upon the family's residence. Parent did not want Student to attend that school because of its size. Parent believes Student would do better academically in a school where Student could participate in regular education classes smaller than available at the high school Student is presently attending. (N.T. pp. 37, 532, 535)
33. The high school Student attends is on the list of persistently dangerous high schools, entitling Student to a transfer to a different high school on that basis. (N.T. pp. 304, 312, 613, 614)
34. Student exhibited an increase in cutting classes and missing assignments during the current school year. Student continues to exhibit disruptive behaviors in some classes [redacted]. (N.T. pp. 185, 186, 193, 279, 280, 429, 445, 446, 448, 522, 527; J-20 pp. 1, 4)
35. Student's current guidance counselor tries to meet with Student at least once/week and can monitor class attendance and grades. The counselor was unaware of the number of times Student was cutting class until informed by Parent and asked to intervene. (N.T. pp. 279—281, 290)
36. In other classes, teachers reported good work habits and no problem behaviors. (J-20 pp. 2, 3)
37. The school guidance counselor believes that although Student made some bad choices at the beginning of the school year, Student is now doing "okay," seems to be adjusting well to the high school and to be happy there. (N.T. pp. 289—291, 294)
38. Student's behaviors at home have also deteriorated since the school year began. Because of Student's mental health diagnoses, Student receives wrap around services from a mobile therapist who is also a behavior specialist. The services were ordered for Student because of concerns about peer interactions at school, Student's discomfort in the new school and poor decisions/choices Student makes in an effort to "fit in." The behavior consultant has been in contact with Student's counselor and other school staff and has Student observed at school several times in various classroom settings. (N.T. pp. 75—83, 121, 188, 189, 193, 511, 512)
39. The wrap around service provider observed one class, in particular, that was in a nearly constant state of significant disruption that the teacher has great difficulty controlling,

which creates a very difficult atmosphere for Student's ability to learn, particularly given Student's tendency to imitate peers. (N.T. pp. 86—90)

40. Both Parent and the wrap around therapist learned from Student that a peer was taking Student's money or that Student felt compelled to give the other student money. Parent brought the situation to the attention of Student's school counselor, who investigated but Student denied a problem. The guidance counselor concluded that Student and the other child are friends and believes that there is no cause for concern, although when Parent was present, Student did state that the other student was taking money. (N.T. pp. 282—286, 295, 307, 308, 512—514, 531, 532)
41. During a lunch observation, the wrap around therapist observed behaviors directed toward Student by peers that was consistent with the situations Parent described, based upon information received from Student. Part of the services Student is receiving from the wrap around therapist is directed toward helping Student recognize when peers are trying to take advantage and realize that Student does not have to permit that. Student has begun to avoid those peers and seek new friends. The wrap around therapist noted positive social interactions in Student's physical education class, but Student remains impressionable and vulnerable to negative peer influences. (N.T. pp. 94—98, 104, 105, 126—128)
42. Student has social deficits, particularly difficulties with interpreting social cues and understanding social roles. If those deficits are not addressed, Student's academic, as well as social progress will be impaired. (N.T. pp. 99—102, 111)
43. The therapist has concerns about Student absorbing and exhibiting social limitations if placed in social situations with students functioning at a lower level of social skills development. Positive interventions that are likely to be successful include pre-conferencing with teachers before class to focus on expected behaviors in class, specifically chosen seating arrangements and facilitating a "buddy system" with peers likely to exert a positive influence on Student. (N.T. pp. 109—111, 114)
44. The most recent IEP for Student was developed in December of 8th grade and was intended to encompass the first several months of high school. The IEP notes that a reevaluation of Student was not due during that cycle. (J-17 pp. 6, 11)
45. The continuing interference of disruptive behaviors on Student's learning and that of others was acknowledged in the section of the IEP entitled "How Student's Disability Affects Progress in the General Education Curriculum." In the "Special Considerations" section, the question whether Student exhibits behaviors that impede Student's learning or that of others is answered "No." (J-17 pp. 13, 14)
46. Student's need for specially designed instruction and emotional support in a small group setting is noted in the IEP, but there is nothing checked in the "Educational Placement" section, where the IEP team is expected to answer questions relating to supplementary aids and services that were considered, rejected or needed for Student to make progress in

general education classes, the benefits or harmful effects of participation in regular education classes, and the extent of Student's participation in extra-curricular activities w/non-disabled peers. (J-17 pp. 14, 27)

47. The December 2010 IEP includes no reference to selecting a high school for Student. (J-17)
48. The IEP includes one goal for reading: Demonstrate fluency and comprehension in grade level passage with teacher-made tests at 80%. Student's instructional reading level is identified as 6.0. (J-17 p. 21)
49. The IEP includes one math goal: Given problems on grade level, invent, select, use and justify appropriate methods, materials, strategies to solve problems with teacher-made tests at 80%. Student's math instructional level was identified as 6.2. (J-17 p. 22)
50. The final IEP goal is for transition, directed toward demonstrating behaviors necessary to seek, secure and maintain employment with adjustments to competitive standards. (J-17 p. 23)
51. The IEP specifies the following items of specially designed instruction (SDI): Use of calculator; monitor test response; reduce distraction; extended time. (J-17 p. 24)
52. Information concerning Student's present levels of performance compiled during the current school year places Student's instructional reading level at level at 6.3 and independent reading level at 4.2. (N.T. pp.; J-20, p. 1)
53. School-based counseling for 40 minutes per IEP term is listed as a related service in the 8th grade/9th grade IEP. The high school does not provide a behavior support program similar to the middle school program that Parent considered so helpful to Student. Parent was able to arrange for Student to see a therapist from a different outside agency who works with students in the high school Student is attending. (N.T. pp. 300, 506, 507, 519; J-17 p. 24)
54. When Student was given the choice whether to see the therapist, Student usually declined. At Parent's insistence, Student is now required to keep the therapy appointments as scheduled, and Parent believes the work the therapist is doing will help Student choose more suitable friends. (N.T. pp. 300, 519—521)
55. Student currently participates in [a program] receiving after school tutoring for app. 1½ two days/week and for app. 6 hours on Saturdays from graduate students in subjects within the 9th grade curriculum and SAT preparation. The program also includes a weekly after school empowerment class to teach participants how to succeed in school, including social skills development. (N.T. pp. 509—511)

DISCUSSION AND CONCLUSIONS OF LAW

I. General Legal Standards

Before considering the facts in light of the parties' contentions, it is helpful to set out the very basic and familiar legal framework that governs consideration of the issues in dispute in this case.

A. Obligation to Provide FAPE/Role of the IEP

The legal obligation of to provide for the educational needs of children with disabilities has been summarized by the Court of Appeals for the 3rd Circuit as follows:

The Individuals with Disabilities Education Act ("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). 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)

The IEP and its role in fulfilling the obligations imposed on school districts by the IDEA statute and regulations has been further described as follows:

The centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir.2003). The IEP consists of a detailed written statement developed for each child summarizing the child's abilities, how the disability affects performance, and measurable annual goals. *Id.* The IEP specifies the special education services and supplementary aids the school will provide the child, explaining how these will allow the child to progress. *Id.*

Damian J. v. School District of Philadelphia, 2008 WL 191176 (E.D.Pa. Jan. 22, 2008) at *1,

FN.2.

C. Least Restrictive Environment Criteria

The federal IDEA regulations provide that an eligible student's program is to be delivered in the least restrictive environment ("LRE") appropriate for the student, *i.e.*, one in which the student is educated with children who are not disabled to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2)(i). In order for a placement to meet LRE requirements, school districts must, at a minimum, assure that placement decisions are "made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options" §300.116(a)(1); are "determined at least annually" §300.116(b)(1); are "based upon the child's IEP" §300.116(b)(2). In addition, unless an eligible child "requires some other arrangement, the child [must be] educated in the school he or she would attend if not disabled." §300.116(c).

The United States Court of Appeals for the Third Circuit provided additional guidance for applying LRE requirements in *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). In accordance with *Oberti*, the first step in evaluating a program and placement to determine whether it meets LRE criteria is an assessment of whether the student can be educated satisfactorily in the regular classroom with supplementary aids and services. In making that determination, a school district is required to consider the full range of aids and services available, with the goal of placing the student with a disability in the regular classroom as much as possible. Consideration must also be given to the unique benefits that a student with a disability will derive from placement in a regular classroom, and those benefits must be compared to the benefits likely to be derived from a more segregated setting. Consideration must also be given to whether there are likely to be any negative effects upon the education of the other children from placement of a particular student with a disability in the regular classroom.

Finally, if education outside of the regular classroom for all or part of the school day is found necessary, the proposed placement must be evaluated to determine whether it provides for contact with non-disabled peers to the greatest extent appropriate. In *Oberti*, the court noted that the continuum of placements mandated by the IDEA statute and regulations is designed to assure that a school district does not take an “all or nothing” approach to the placement of a student with a disability, but considers using a range of placement options to assure that the unique needs of each child are met. In *Oberti*, the Third Circuit described the IDEA LRE requirements as a “presumption” in favor of educating an eligible child with non-disabled peers. 995 F.2d at 1214.

A school district’s obligation to place an eligible student in the least restrictive environment does not diminish its responsibility to educate an eligible student appropriately.

D. Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, because Parent has challenged the District’s actions, Parent must establish the violations alleged.

The Supreme Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding. Allocating the burden of persuasion affects the

outcome of a due process hearing only in that rare situation where the evidence is in “equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

In *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3rd Cir. 2006), the Court of Appeals for the Third Circuit explicitly extended the *Schaffer* burden of proof analysis to a parental challenge to an IEP based upon an LRE violation. It can be somewhat challenging to determine whether allocating the ultimate burden of persuasion to parents with respect to an LRE violation requires some shifting of the burden of going forward with the evidence (burden of production) in light of the affirmative duty placed on school districts by both the IDEA regulations and controlling case law to assure that an eligible child is removed from the regular education environment only to the extent necessary to appropriately meet the student’s needs. In this case, however, there is no difficulty in concluding that neither of the burden of proof components affect the outcome of the case with respect to LRE or any of the other issues in dispute. The evidence in this case is far from equipoise. The IEP currently in place is minimal in terms of goals and services and devoid of any reference to LRE requirements. (FF 44—51)

II. Legal/Factual Issues—Parties’ Contentions

The issues remaining for decision in this case encompass the appropriateness of Student’s current program and placement and the District’s future FAPE obligation to Student. Broadly at issue here is whether the District is required to fundamentally revise the services Student is receiving as well as where and how the services will be delivered in terms of both academic instruction and additional services to meet Student’s social and emotional needs. Much of the testimony from District witnesses, and the District’s arguments, focused on the mechanics of the high school selection process by IDEA eligible students in the District. Although the reasons

that Student is attending the neighborhood high school are implicated to some extent, this case involves far more fundamental issues of program and placement. Nevertheless, those issues are intertwined with the process by which students entering high school in the District select from among many available choices. (FF 22, 23, 25, 26) Consequently, consideration of the broader program and placement issues will initially be undertaken in the context of the process by which District students are admitted to high school.

A. High School Selection under the *LeGare* Consent Decree

The District's high school selection process is modified for IDEA eligible students to assure that to the greatest extent possible, students with disabilities are not precluded from attending selective and highly desirable high schools due to disability-related characteristics and issues that prevent such students from meeting all of the admission criteria for such schools. (FF 24, 28)

The high school selection/admission process currently in place for special education students arose from a lawsuit against the District commenced in 1994 by plaintiff Lamar LeGare and others, which resulted in a detailed original consent decree, entered in 1995, and a 1998 modification, together referred to as the "*LeGare* Consent Decree" or "*LeGare* Order." (N.T. 615; J-31). A significant part of the *LeGare* Consent Decree specifies the modified application/admission procedures available to special education students. (J-31 pp.6, 7, ¶¶ 8e, g, h.; 9)

Not surprisingly, the evidence produced by the District, and its arguments, focused narrowly on the District's compliance with the application/admission criteria provided in the *LeGare* Order and suggests that Parent, disappointed with the high school Student is attending based on the family's residence, initiated her due process complaint to circumvent the procedures

and obtain admission to a different District high school. The District's attempts to reduce the issues to the high school selection process omits significant concerns raised by Parent in her due process complaint and during the hearing, including whether program and placement options for Student have been designed to reasonably and appropriately address all needs and provide Student with the opportunity to be educated in the least restrictive environment (LRE) in which Student can make meaningful progress.

An objective view of the evidence in light of the entire *LeGare* Consent Decree establishes that the District did not fully implement the provisions of the *LeGare* Order with respect to Student, disregarding provisions that were particularly important and necessary to assure that the District fulfilled its underlying obligations to provide Student with an appropriate IEP that addresses all of Student's academic, social, emotional and behavior needs and to provide a placement in the least restrictive environment appropriate for Student. Those obligations are ongoing and are embodied in fundamental IDEA policies and procedures, as well as the procedures the District agreed to implement when it entered into the Consent Decree that now stands as an order of the U.S. District Court.

The District's failure to fully implement the *LeGare* Consent Decree, and otherwise fulfill its IDEA obligations to Student, began with the initial steps of the high school selection process. The *LeGare* Order requires the District to ensure that

Each student with disabilities and his or her family receives timely information and guidance concerning the full range of high schools and high school programs that are available within the District ; the procedures for obtaining admission; and the nature of the accommodations and supports that will be made available within these schools and programs for students with disabilities.

J-31 p. 2, ¶2b. Although Parent was provided with information concerning District high schools, admission procedures, and waivers of admission criteria that regular education students are

required to meet were waived for Student, guidance to assist Parent and Student in selecting an appropriate high school setting was entirely lacking. (FF 22, 25, 26) Parent was left to sift through the general information concerning each high school provided to all District families. (FF 24, 25, 26) Parent chose to request admission for Student to one Citywide high school, based upon knowing other special education students who attended that high school, and her belief that high school choices for special education students were limited. (FF 27)² When Parent sought assistance from Student's 8th grade guidance counselor, the counselor unilaterally chose several high schools in addition to Parent's single choice. (FF 26, 27)

The District suggested through the testimony of its witnesses and questions addressed to Parent at the hearing that Parent was at least partially at fault for the limited high school choices ultimately available to Student for failing to seek more information from District staff or request an IEP meeting. See, e.g., N.T. p. 565. The *LeGare* Consent Order, however, does not place the burden on Parent to unilaterally seek information about high schools appropriate for an eligible Student. Rather, there are specific procedures designed to assure that the decision concerning the high schools appropriate for an eligible student are identified by a team of knowledgeable persons, including District representatives.

In ¶8, , e.g., the *LeGare* order provides that the high school selection process is to begin a year prior to high school admission with a timely evaluation and development of an IEP in anticipation of the transition to high school. (J-31 p.5) After the evaluation is completed, the MDE team, including District staff "knowledgeable about high schools and high school

² There was some conflict in the testimony with respect to whether anyone from the District suggested to Parent that desirable and highly selective high schools do not fully comply with the admission requirements of the *LeGare* Consent decree in terms of the number of special education students admitted to Citywide and Special Admission high schools. Parent's testimony established, however, that she held that belief, and limited her consideration of high schools for Student based on that belief, whether it was erroneous or not and whether or not it was based upon information from District staff members.

programs” is to meet “well in advance of the deadline for the student’s applications to schools and programs to which s/he seeks admission” in order to “assist the student and family to consider a range of possible high schools and high school programs, identify those in which the student may be particularly interested and identify the types of accommodations and supports, if any, that the student will require to participate in these schools and programs.” (J-31 pp. 5, 6, ¶¶8 a, b, d) Moreover,

The IEP for the student’s first year in high school will be based upon the MDE report and will identify the accommodations, supports and services that s/he will require in the school and program to which s/he is to be assigned.

(J-31 pp. 6, 7, ¶8 f) Finally,

If an IEP team believes that, for a particular student, a specific high school or high school program is the only setting in which s/he can receive an appropriate education, the team retains the right **and duty** to **recommend** that the student **be placed in that school or program.**

(J-31 p. 7, ¶ 8 I; emphasis added)

Not only were none of those provisions of the *LeGare* Order fulfilled in this case, the District never addressed those provisions of the Consent Decree, seemingly oblivious to the idea that the Order imposes any obligations other than to assure that the families of eligible students are aware that applications may be made to all high schools and that waivers are available.

The only evaluation of Student by the District occurred in 2006. (FF 5) When the time for a three year re-evaluation arrived, the District sought and obtained from Parent a waiver of updated testing, and noted in the IEP developed in the fall of Student’s 8th grade year that an evaluation was not due. (FF 16, 44) Under the *LaGare* Order, however, a full multi-disciplinary evaluation was due at that time, since it was the year that Student was required to select and apply to District high schools.

Also contrary to the explicit terms of the Consent Decree, the IEP developed to cover the first part of Student's first year in high school included no discussion of high school options appropriate for Student and no identification of supports and services Student would need for any high school Student might select. (FF 46, 47)

The District attempted to reduce the issues related to selection of a high school for Student to Parent's disappointment in the high school Student attends and an attempt to circumvent the admission process for desirable high schools with limited space. The evidence establishes, however, that the District completely ignored its obligations to Student under the *LeGare* Order to assure that Parent and Student would receive the thoughtful guidance contemplated by the Consent Decree to select a high school location that would be appropriate for Student. Several District witnesses expressed the opinion during testimony that various high school options would not be appropriate for Student. *See, e.g.*, N.T. pp. 159, 162, 163. Such opinions were expressed far too late and in the wrong context to carry any weight with respect to the issues in dispute at the due process hearing. The time to express those opinions was in the fall of Student's 8th grade year in the context of an MDE or IEP meeting prior to the deadline for Student's high school applications.

The broad equitable powers available to redress IDEA violations as described in *Ferren C. v. School District of Philadelphia*, 612 F.3d 712 (3rd Cir. 2010) will be invoked to require the District to belatedly fulfill the all of the terms of the *LeGare* Consent decree, beginning with conducting a full multi-disciplinary evaluation of Student that fully explores all areas of academic, social, emotional needs and reasonably suggests how such needs might be met.

In addition, the District will be required to consider a high school setting appropriate for Student in the next school year in full compliance with the *LeGare* Consent Decree, specifically

including a meeting that includes District staff knowledgeable about both District high schools and Student's needs in the areas of behavior, social skills development and emotional functioning, as well as academic needs.

It is important to note, however, that the District will not be required, at this time, to definitely transfer Student to a different high school, unless Parent invokes Student's right to transfer from a persistently dangerous high school. (FF 33) Whatever Parent decides with respect to transfer on the grounds of danger, and regardless of any proposal for Student to remain in the current high school, the District shall fully consider all options for an appropriate high school setting for Student, including all reasonably necessary supports and services. In light of the assignment of all students to small learning communities beginning in 10th grade, it may be possible for the District to appropriately meet Student's needs in all areas in the current high school, provided that the MDE and IEP teams carefully delineate the characteristics of a peer group and the size and location of instructional groups to which Student may be assigned to reasonably assure that all of Student's needs will be appropriately met.

B. Student's Special Education Needs, IEP Goals and Services

Although Student's IEP includes considerable information concerning Student's behavior issues, as well as academic needs and deficits, the IEP fails to address Student's non-academic needs at all, and addresses Student's academic needs poorly, with minimal and vague goals in reading and math only, along with specially designed instruction that has no apparent connection to either the goals or Student's needs. (FF 45, 48, 49, 51) In addition to a lack of behavior and social goals, the District refused to acknowledge Student's significant behavior needs in the section of the IEP that requires the District to develop a positive behavior support plan if Student exhibits behaviors that interfere with Student's learning or that of others. (FF 45)

In light of the wealth of information concerning Student's social, emotional and behavior needs presented at the due process hearing by two therapists working with Student, as well as the evaluation that will be completed as part of the District's *LeGare* obligations, the District will have an ample basis for developing an IEP that fully addresses all of Student's needs. The District will be required to explicitly take into account current information to be provided by Student's wrap around therapist and family/individual therapist who testified at the hearing. (FF 17, 18, 31)

The District should also re-visit Student's eligibility category once new standardized cognitive and achievement assessments are completed. Although Student will certainly need special education services in order to make meaningful educational progress, the District must understand that SLD is not the only eligibility category that supports providing such services. The Student's current diagnosis is strained, at least, since achievement measures administered in connection with the 2006 evaluation generally exceeded Student's cognitive ability scores with the exception of one obscure subtest score, chosen as the best representation of Student's actual ability with no explanation as to why that score is more significant than other, much lower scores. (FF 7—10) Moreover, it is difficult to understand how the District could have concluded that Student's learning difficulties are not the result of environmental factors in light of Student's sad and unfortunate early history before living with Parent. (FF 3, 4) Such factors should at least be considered to the extent that different or additional academic instruction might be warranted, particularly in light of Student's social and emotional difficulties.

In short, once a full multi-disciplinary evaluation is conducted, the District must fully consider the results and all aspects of Student's functioning to develop an IEP that is reasonably calculated to yield meaningful progress. The District is charged, in particular, to consider the

type of reading instruction and/or specific program Student needs to improve reading skills. The evidence in this case provides insufficient evidence to make that determination, and the new evaluation is required before choosing reading instruction.

Although the District must fully consider the level and type of emotional and behavior support appropriate for Student, including more counseling services and a behavior support plan, there is insufficient evidence to conclude that Student definitely needs a one to one aide at all times during the school day. Student's treating therapists did not suggest that high level of support.

C. Placement/Least Restrictive Environment

The record in this case leaves no doubt that from the time Student was determined to be IDEA eligible, the District gave no serious consideration, or even passing thought, to whether Student can be successfully educated in a regular education classroom of appropriate size and appropriate peers with sufficient supports and services. (FF 46) Despite the "Supplemental" designation as the level of special education services in the IEP, Student's time in the regular education classroom, 29% of the day, is far less than the 40—79% of the day contemplated that actually fits the description of "supplemental" services. The amount of time Student spends outside of the regular classroom fits the definition of "Full Time" special education services. (S-17, pp. 27, 29) The District provided no justification for keeping Student out of the regular education classroom for all academic instruction.

With the next IEP developed for Student, the District must fully comply with the IDEA LRE requirements. The obligation to educate an IDEA eligible student with non-disabled peers to the maximum extent appropriate is a mandate and, as noted, there is a presumption that the regular education environment is the appropriate setting unless there are reasons that an eligible

student cannot be successfully educated in that setting. At the very least, the District needs to fully consider where Student can make meaningful progress in the areas of academics, social skills, behavior and emotional functioning and assure that to the extent Student is removed from the regular classroom, the decision is based on Student's needs, not disability category or administrative convenience.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District of Philadelphia is hereby **ORDERED** to take the following actions:

1. Conduct a full multi-disciplinary evaluation of [Student] that fully explores all areas of academic, social, emotional and behavior needs and reasonably suggests how such needs can be met;
2. Within ten (10) days of the completion of the reevaluation report, convene a multi-disciplinary and IEP team to fulfill the obligations set forth in the ¶8 a—c, f, i of the *LeGare* Consent Decree and fully consider high schools that will appropriately meet Student's needs;
3. Convene an IEP team meeting in accordance with IDEA statutory/regulatory requirements to fully consider the results of the evaluation and propose an IEP that includes appropriate identification of Student's IDEA eligibility category and appropriate goals, specially designed instruction and related services to appropriately address all of Student's needs identified by the evaluation, with special and explicit consideration given to the reading instruction/program(s);
4. Assure that regardless of the high school to which Student is ultimately assigned, educational and related services are provided in the least restrictive environment appropriate for Student and determined by Student's IEP team in full compliance with the IDEA statute and regulations.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

April 14, 2012