

*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: E. B.

Date of Birth: [redacted]

ODR No. 18652-16-17-KE

### **CLOSED HEARING**

#### Parties to the Hearing:

#### Representative:

Judith A. Gran, Esquire  
Reisman Corolla Gran LLP  
19 Chestnut Street  
Haddonfield, N.J. 08033

Southern Tioga School District  
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Blossburg, PA 16912-1125

Christopher J. Conrad, Esquire  
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100 Corporate Center Drive, Suite 201  
Camp Hill, PA 17011

Dates of Hearings:

March 29, 2017; May 16, 2017; June 9,  
2017

Date of Decision:

July 10, 2017

Hearing Officer:

William F. Culleton, Jr., Esquire, CHO

## INTRODUCTION AND PROCEDURAL HISTORY

The child named in the title page of this decision (Student) is enrolled in and is a resident of the school district named in the title page of this decision (District).<sup>1</sup> Student is classified with Intellectual Disability and Autism pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and the Pennsylvania Code, 22 Pa. Code §14.151 et seq. Student was placed in a general education classroom for Student's third grade year, with supplementary aids and services; however, for Student's fourth grade year, the District proposes to place Student in a different school at greater distance from Student's home, so that Student can participate in a Life Skills Support classroom.

Parents, named in the title page of this decision, seek an administrative order that the District continue Student's placement located in the general education classroom in Student's neighborhood school<sup>2</sup>. The parties disagree regarding whether or not the District can provide Student with an appropriate fourth grade education in this placement. Parents assert that this can be accomplished with additional supplementary aids and services; the District asserts that Student's disability is such that it cannot provide appropriate services satisfactorily.

The hearing was completed in three sessions, and the parties provided written summations and briefs. I have considered these and all of the evidence of record. I conclude that the District has failed to consider the full range of supplementary aids and services, thus

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<sup>1</sup> Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality. References to Parent in the singular pertain to Student's Mother.

<sup>2</sup> While this is a rural district, and the term "neighborhood school" is inaccurate because of the significant distances involved, I will use the term to refer to the school closest to Student's home and preferred by Parents, in which Student is currently receiving education.

failing to comply with its obligations under the IDEA to provide education in the least restrictive environment.

### **ISSUES**

1. Is Student's current placement the least restrictive environment (LRE) for Student's fourth grade education in the 2017-2018 school year, as defined by law?
2. Is the District's recommended placement the least restrictive environment (LRE) for Student's fourth grade education in the 2017-2018 school year, as defined by law?
3. Is Student's current placement reasonably calculated to provide Student with a free appropriate public education (FAPE) for Student's fourth grade, 2017-2018 school year?
4. Is the District's recommended placement reasonably calculated to provide Student with a free appropriate public education (FAPE) for Student's fourth grade, 2017-2018 school year?
5. Did the District offer an IEP to Student for the Student's fourth grade, 2017-2018 school year that offered services to enable Student to be involved in and make appropriate progress in the general education curriculum?
6. Considering the equities, should the hearing officer order the District to provide any placement or educational services for Student's fourth grade, 2017-2018 school year?

### **FINDINGS OF FACT**

1. Student is enrolled in and is a resident of the District. (NT 6, 38.)
2. The District has identified Student as a child with the disabilities of Autism, Intellectual Disability and Speech or Language Impairment as defined in the IDEA. (NT 6; S 12.)

### **COGNITIVE ABILITIES AND NEEDED SERVICES**

3. Student's cognitive functioning is in the very low range as measured by standardized testing. Student displays many of the characteristics of an autism spectrum disorder. (S 12.)
4. Student's very low standardized cognitive ability scores are impacted significantly by Student's language deficits; Student's intellectual ability, although still within the very

low range, is significantly higher in tasks that do not require the use of language. (NT 139-141; S 12.)

5. Student's adaptive skills are significantly delayed and Student's academic achievement is very low. Student appears to function at a kindergarten or first grade level in school. (S 6, 12.)
6. Student has speech, language, sensory, fine motor and visual-motor delays that need to be addressed in the school setting. Student needs to improve skills in the following areas: basic academics; daily living including toileting; social interaction; work habits; speech and language; handwriting; cutting; and bilateral coordination. (S 6, 12, 18.)
7. Student will work for rewards. Student responds well to redirection. Student has a very supportive family. (NT 57-60; S 12.)
8. Student is very social and enjoys meeting new people; Student likes to hug others and needs to learn social boundaries and social communication skills. (NT 57-60; S 6, 14.)
9. In school, Student struggles with attention to task, finishing tasks, working independently, organization, asking for help, expressive language, fine motor actions and social skills. (S 12.)
10. Student needs specially designed and accommodated instruction, including modified curriculum; explicit instruction in social skills and daily living skills; frequent repetition and "over-learning" to improve retention; alternative assessments; social language modeling; speech modeling to increase Student's utterances to three or more words; visual supports and schedules; frequent breaks including sensory and movement breaks; manipulatives for mathematics and reading; verbal and physical prompts; preferential seating; and modified directions given in small steps and repeated. (S 12.)

## EDUCATIONAL HISTORY

11. Student received preschool intervention services due to significant developmental delays. Student attended a cyber charter school for two years of kindergarten, first grade and second grade. Parents enrolled Student in the District for third grade because they wanted Student to be exposed to social interaction with peers and learn social skills. (NT 349-350, 379-380; S 6, 12.)

## DISTRICT'S OFFER AND PROVISION OF SERVICES

12. On June 9, 2016, at the first meeting with Parents prior to Student's third grade year, the District's Director of Special Education recommended that Student be placed in the District's Life Skills Program, which is provided at a school about 45 minutes' drive from Student's home. (NT 102; S 6, 22.)

13. The Director based this recommendation upon Student's IEP with the cyber charter school, which provided a supplemental level of support; the belief that Student had been provided an alternative curriculum; Student's IQ and adaptive functioning on standardized tests; and the programs that were available within the District. (NT 89-93.)
14. The Director's recommendation was not based upon consideration of whether or not Student's needs, as understood at that time, could be met in the general education classroom with supplementary aids and services. (NT 92.)
15. Parents considered but rejected the Director's recommendation, requesting placement in Student's current District elementary school. Parents rejected the District's recommended placement because the placement was located in a school that was too distant from Student's home. (NT 102-109, 379-380, 395-396; S 22.)
16. The regular education and special education teachers, and the paraprofessional assigned to Student, had some understanding of alternate eligible content and the techniques of essentialization, embedding, curriculum modification and prompt hierarchy that are used to modify the regular education curriculum and specially design instruction for purposes of educating children with disabilities in the regular education environment. However, these educators did not receive administrative direction, up to date training or coaching in order to individualize and provide these services to Student consistent with Student's needs. (NT 71-99, 160-161, 170-182, 187-188, 251-252, 262-267, 286-288, 470; S 24; P 3 p. 11.)
17. At a meeting on August 22, 2016, the District agreed, on a trial basis, to place Student in a regular education classroom with itinerant learning support services for mathematics and reading; a full-time educational paraprofessional to assist Student with communication and toileting needs; speech therapy and occupational therapy. (S 6, 7, 22.)
18. On August 22, 2016, the District offered and Parents accepted an Individualized Educational program (IEP), which provided goals at a first grade level for reading and mathematics. At the same time, the District obtained Parents' permission to re-evaluate Student. (S 6, 8.)
19. District staff adapted the third grade curriculum and modified service delivery in order to allow Student to learn in the regular education setting at a lower, kindergarten-to-first-grade level. (S 22.)

#### BENEFITS RECEIVED BY STUDENT

20. Student demonstrated the ability to benefit from participation in school with typically developing same-age peers. Student imitated peers in following classroom routines. Student socialized with peers to a limited extent. Student demonstrated awareness of

being part of a larger group; exchanged valentines; accepted assistance and redirection from peers in attending to classroom activities; and attended a peer's birthday party. Student demonstrated motivation to engage in social interactions with peers. Student was challenged to respond to greetings and inquiries. Student experienced opportunities to learn when Student's behaviors were inappropriate with same-age peers and the need to apologize for such behavior. (NT 322, 347-348, 368-370, 392, 415-416, 427-428; S 24.)

21. Student's teachers had difficulty adapting the District's curriculum to meet Student's needs. The paraprofessional made unplanned adaptations frequently as the paraprofessional deemed appropriate. Student often did not participate in classroom instruction with peers; instead, Student's paraprofessional and Student often worked in isolation from the rest of the class. (NT 279-283, 286-288; S 22.)
22. Student was distracted in the regular education classroom and in one-to-one settings. (P 3 pp. 8, 10-11.)
23. Student was prompt-dependent on the paraprofessional for transitioning from one activity to another. (S 22.)
24. Student needed more repetition than the pace of third grade regular education permitted, compromising Student's mastery of academic skills. (S 22.)

#### DISTRICT'S FINAL OFFER

25. On October 20, 2016, the District issued a final re-evaluation report for Student. The report recommended that the IEP team consider placement in life skills support to provide Student with needed functional academic and adaptive skills. (S 12.)
26. On November 9, 2016, the District offered an IEP placing Student in supplemental life skills support, to be provided in the life skills classroom located at a different school at greater distance from Student's current school. (NT 377-378; S 14.)
27. The District recommended a life skills support program because the curriculum would be different in that program and would emphasize skills that Student would need to become more independent, even though Student is expected to always be dependent on others. The District concluded that such skills could not be taught in the regular education classroom appropriately. (NT 89-98, 129-130, 215-218.)
28. During the November 9, 2016 IEP team meeting, the District's Director informed Parents that Student could not stay at Student's current school. The IEP team did not seriously consider the full range of options of co-teaching or implementing new or different supplementary aids and services that could be employed to more effectively meet Student's educational needs in the general education classroom. (NT 167-170, 192-193, 264-267, 377-379, 430-434; 459-464, 470, 476-478.)

29. The November 2016 IEP offered goals, modifications, and accommodations to address Student's toileting independence; nose wiping; putting on and taking off coat; cutting; attention to task for desk-work; formation and proper spacing of letters; segmenting words; word reading accuracy; writing sentences; reading a calendar; reading an analog clock; counting objects; addition and subtraction; and entering and walking in line with peers appropriately. (S 14.)
30. The November 2016 EP offered related services: 30 minutes per week of occupational therapy and transportation. The IEP did not offer a stated amount of speech and language therapy. (S 14.)
31. On November 9, 2016, the District offered a Notice of Recommended Educational Placement (NOREP) that asserted that Student's program in the regular education setting was not a FAPE. (S 15.)
32. Parents rejected the NOREP and requested mediation. (S 16.)

#### STUDENT'S PROGRESS

33. From September 2016 to January 2017, Student demonstrated kindergarten to first grade level skills in reading. Student showed mastery of letters and sounds, as well as blending phonemes into words. Student's mastery of pre-primer sight words was less than 50 %. Student demonstrated minimal fluency with first-grade word reading. (S 18.)
34. From September 2016 to January 2017, Student demonstrated kindergarten to first grade level skills in mathematics. Student could count to 12 consistently; identify numbers from one to ten; and add and subtract with manipulatives. Student could orally state the names of months and days of the week; name coins inconsistently; and tell the hour inconsistently. Student was unable to demonstrate an understanding of the concepts of adding and subtracting, read the names of months and days; find the current date from a calendar; or tell time by the half hour. (S 18.)
35. From September 2016 to January 2017, Student demonstrated kindergarten to first grade level skills in writing. Student could form letters, but struggled to do so and to place them on a line. Student was unable to respond to instructional questions in writing, but could do so orally. (S 18.)
36. By January 2017, Student demonstrated the ability to follow one- or two- step directions. Due to expressive language difficulties, Student was unable to demonstrate listening comprehension of stories. (S 18.)
37. From September 2016 to January 2017, Student attained a grade of 91% in science. (S 18.)

38. From September 2016 to January 2017, Student required short breaks every 15 minutes; verbal cues to initiate activities; sensory breaks; step-by-step instructions for toileting on a toileting schedule in which an adult was required to prompt Student to use the bathroom; and assistance with putting on and taking off a coat. Student demonstrated behaviors including refusal, lying on the floor, difficulty keeping hands to self, pushing and social skills deficits. (S 18, 24.)
39. From September 2016 to January 2017, Student demonstrated some progress in Basic classroom skills such as following a schedule and instructions; social skills; word reading at a pre-primer level; and first grade numbers and operations. Student made progress learning to use a zipper and put Student's coat on and off, and on toileting skills. Student made little progress in expressive language, similarities and differences and naming pictures of objects. (NT 89-99, 186, 212, 256-262, 313-316, 367-377, 381-382; S 22, 23, 24.)

#### FURTHER EDUCATIONAL PROGRAM PLANNING AND SERVICES DELIVERED

40. On January 6, 2017, the parties engaged in mediation. At that time, the District agreed to engage in a state-sponsored fact-gathering process designed to address the District's obligation to provide appropriate education in the least restrictive environment, entitled "Include Me From the Start" (Include Me). The District made it clear that its agreement to participate did not reflect a change in its insistence that the Student's current placement was not appropriate for Student and that Student needed placement in a supplemental life skills program. (NT 379; S 18.)
41. At the same time, the District made revisions to some of the goals in the offered IEP to include sensory and fine motor skills goals recommended in a November 2016 occupational therapy report. (S 18.)
42. The Include Me program includes a planning process called a "Supplementary Aids and Services Toolkit" (SAS Toolkit). The Toolkit is expressly designed to identify the services and supports that an individual child needs in order to access the curriculum appropriately in the general education classroom. (S 21.)
43. The District IEP team, school psychologist and Director of Special Education attended a planning meeting led by a trained inclusion advocate. Team members participated in a brainstorming exercise to list ways in which the curriculum and teaching methods could be modified to meet Student's needs. The meeting did not influence the District's recommendation that a life skills program would be best for Student. (NT 125-130, 136-138, 432-434; S 21, 22.)
44. The educators assigned to Student attempted to utilize the results of the planning method, without any additional training or coaching, and concluded that Student's disabilities were so profound and the pace of regular education so preclusive for

Student that a life skills setting would be more appropriate for Student. (NT 127-128, 194-197; S 24.)

45. One technique that can be considered to address Student's distractibility in the general education classroom is modifying the regular education teacher's instruction to include Student in the same activities that the rest of the class are performing. (NT 203-204,551-552; P 3 pp. 8, 10-11.)
46. Student does not have a sensory diet. (NT 326.)
47. Student does not receive the number of hours of speech and language intervention that Student needs in order to make appropriate progress in learning language and in the curriculum. (NT 164-167, 224-225.)
48. Student's special education teacher does not have enough time with Student to address all of Student's educational needs. (NT 148-150, 187-188, 202-204.)
49. The District did not perform a Functional Behavioral Assessment to address Student's behaviors such as lying on the floor, refusing to work and engaging in melt-down behaviors, which became less frequent from September 2016 to March 2017. (NT 212, 317, 324-325; S 24.)

## **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.<sup>3</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of

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<sup>3</sup> 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).

evidence<sup>4</sup> that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)(applied to least restrictiveness analysis).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents to show that the District has not performed its obligation to offer a free appropriate public education in the least restrictive environment. L.E. v. Ramsey Board of Education, 435 F.3d above at 392. If Parents fail to produce a preponderance of the evidence in support of their claim, or if the evidence is in “equipoise”, then Parents cannot prevail under the IDEA.

## CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this matter, I have weighed the evidence with attention to the reliability of the testimony.

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<sup>4</sup> 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. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

I find that all witnesses were credible. I gave great weight to the testimony of the District's teachers and para-professional, but I gave reduced weight to their opinions as to the appropriateness of Student remaining in the current placement, because their opinions were not informed by appropriate training in the current state of the art in teaching children with disabilities in the regular education classroom, nor were their experiences with Student based upon appropriate practices for that purpose. I also accorded reduced weight to the opinions of Parents' expert, because that expert did not have sufficient knowledge of Student's needs or the District's programming. Nevertheless, I credited the expert with knowledge of the full array of supplementary aids and services that can be considered in Student's case, and of what is possible in educating children with typically developing peers.

#### LEAST RESTRICTIVE ENVIRONMENT

The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled, "to the maximum extent appropriate ... ." 20 U.S.C. §1412(a)(5)(A). Separate schooling, or other removal of children with disabilities from the regular education environment is permissible only if education in regular classes "cannot be achieved satisfactorily" through the use of supplementary aids and services. 34 C.F.R. §300.114(a)(2)(ii). Removal is not permitted if the sole reason is "needed modifications in the general education curriculum." 34 C.F.R. §300.116(e). United States Supreme Court has interpreted this mandate to require districts to educate children with disabilities with non-disabled students "whenever possible." Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 3049, 73 L.Ed.2d 690 (1982).

The United States Court of Appeals for the Third Circuit has construed the statutory language to set forth a “strong Congressional preference” for integrating children with disabilities in regular classrooms. Oberti v. Board of Ed. Of Bor. Of Clementon Sch. Dist., 995 F.2d 1204, 1213-1214 (3d Cir. 1993). The Court characterized this preference as creating a “presumption” in favor of educating children with disabilities in the general education environment, id. at 1214, at least for “a significant portion” of the school day. Id. at 1215 n.21.

The IDEA prescribes procedural and substantive requirements for school districts’ selection of placements for children with disabilities. The placement decision must be made “by a group of persons, including the parents . . . .” 34 C.F.R. §300.116(a)(1). Potential harm to the child or to the quality of educational services must be considered. 34 C.F.R. §300.116(d). But the child may not be excluded from age-appropriate regular classrooms “solely because of needed modifications in the general education curriculum.” 34 C.F.R. §300.116(e).

The Court also recognized a “presumption” in favor of placing the child in the neighborhood school or the school closest to the child’s home. Oberti, 995 F.2d above at 1224 n. 31. The IDEA regulations provide that placement must be “as close as possible to the child’s home . . . .” 34 C.F.R. §300.116(b)(3). Unless otherwise required by the child’s Individualized Educational Program (IEP), the child must be educated “in the school that he or she would attend if nondisabled . . . .” 34 C.F.R. §300.116(c). Thus, although there is not an absolute right to services in the neighborhood school, it is presumptively required in the absence of an appropriate reason for excluding the child from the neighborhood school.

The Commonwealth of Pennsylvania has adopted and further articulated the IDEA requirements in its regulations implementing the IDEA. 22 Pa. Code §14.145. In addition to incorporating the language of the statute, the regulation adds the requirement that a district

may not remove a child from the regular education classroom, or determine a child to be ineligible for such placement, solely because of the nature and severity of the child's disability, or because of considerations of cost or administrative convenience. 22 Pa. Code §14.145(4).

The Court in Oberti emphasized that the central consideration in determining whether or not a district has provided a FAPE in the least restrictive environment is the "proper use of supplementary aids and services." Oberti, 995 F.2d above at 1214. The Court pointed out that each district must make available the "continuum of alternative placements", including special classes and special schools, 34 C.F.R. §300.115(a). Districts must also provide "supplementary services ... in conjunction with regular class placement." 34 C.F.R. §300.115(b)(2); Oberti v. Board of Ed. Of Bor. Of Clementon Sch. Dist., 995 F.2d above at 1216.

The Court in Oberti set forth a two part analysis for determining whether or not a local educational agency has complied with the least restrictive environment requirement. First, the court (or in this case the hearing officer) must determine whether or not the child can be educated satisfactorily in the regular education setting with supplementary aids and services. Second, the court must determine whether or not the agency has provided education in the general education setting to the extent feasible, such as inclusion in part of the general education classes and extracurricular and other school activities. Oberti, 995 F.2d above at 1215.

The present matter turns on the first level of the Oberti analysis. Can Student be educated in the regular education classroom with supplementary aids and services? If so, the District is compelled by law to provide the aids and services that are needed to educate Student in the least restrictive environment. Only if Student cannot reasonably be expected to receive

a free appropriate public education in the regular education setting is the District authorized to place Student in a more distant school that offers a special class for Student.

The Court set out three considerations that must be examined in order to make a determination of whether or not Student can be educated in the regular classroom: First, has the agency given “serious consideration” to utilizing the full continuum of placements and supplementary aids and services? Id. at 1216. Second, what are the comparative educational benefits that the child can receive in the regular education and segregated settings, particularly considering the benefits of learning social and communication skills in the general education context. Ibid. Third, is the child’s behavior in the regular education setting so disruptive that the child is not benefitting and that the behavior is interfering with the education of the other children in the general education setting? Id. at 1217. The Court emphasized that if supplementary aids and services would prevent these negative consequences, the determination of a negative effect on peers would not warrant removal from the regular education environment. Ibid.

Applying the Oberti analysis to this record, I conclude that the District has failed to meet its obligations under the IDEA and its regulations to provide a FAPE in the least restrictive environment. I conclude that it has not given serious consideration to the full range of supplementary aids and services available to enable children to learn in the least restrictive environment. I conclude that, for Student, the benefits of inclusion in the general education setting outweigh the detriments. I conclude that Student’s presence in the general education classroom does not cause an unacceptable degree of disruption or impede the learning of others. I conclude that there is not a sufficient reason to remove Student from Student’s

neighborhood school. Therefore, I conclude that the District must be ordered to comply with its obligations under federal law and state regulations.

Applying the Oberti analysis, I first inquire as to whether or not the District gave “serious consideration” to whether Student can be provided with a FAPE “satisfactorily” and “appropriately” while placed in the general education classroom with supplementary aids and services. Such consideration must be more than a perfunctory nod toward the option of full inclusion, as the word “serious” implies. See, Blount v. Lancaster-Lebanon Intermediate Unit, 2003 WL 22988892 (W.D. Pa. 2003). I conclude that the District has failed to give this question more than perfunctory consideration.

#### SERIOUS CONSIDERATION

The record is preponderant that the District did not give “serious consideration” to educating Student with typically developing peers, Oberti, 995 F.2d above at 1216. The District’s Director recommended the life skills placement in her first conversation with Parent, even before she had received complete information on Student. The Director’s reasons included Student’s IQ and adaptive delays, the previous school’s provision of supplementary supports and alternate curriculum, and the District’s available programs. The Director did not even mention the possibility of placement in general education with supplementary aids and services. After the District completed its re-evaluation of Student, at an IEP team meeting in November 2016, the Director flatly refused to consider any placement other than the life skills placement, informing Parents that Student could not stay in Student’s neighborhood school placement. After a mediation agreement to engage in the state-sponsored planning process for providing supplementary aids and services in the general education setting, the Director made

it clear that any result of that process would not alter the District's determination to place Student in the life skills program. Thus, throughout Student's third grade year, the District remained closed to the option of teaching Student in the neighborhood school's general education setting.

The District understandably argues that it gave the less restrictive placement a chance, by educating Student in the general education classroom for months and taking data on the results. I cannot accept this argument, because, while the District included Student in regular education during that time, it failed to provide staff with appropriate training or administrative leadership, and it failed to provide the resources that the Student needed to ensure that Student would receive appropriate benefit in that placement.

The District failed to provide appropriate support and training for the educators who were struggling to meet Student's needs in the regular education classroom. The District provided for insufficient planning time, which Student's regular education teacher, special education teacher and one-to-one paraprofessional needed to modify Student's third grade curriculum and differentiate classroom instruction. The District provided no training to these staff, even though their backgrounds in the techniques of least restrictive teaching were minimal and dated. The District failed to adjust the special education teacher's case-load to accommodate the fact that Student needed more of her time in the general education setting; the District failed to even consider providing for co-teaching in Student's classroom. The District failed to provide any direct supervision or coaching to these educators to help them provide Student with educational benefit in the general education classroom.

As a result, most of the curricular modification and delivery of differentiated teaching in the general education setting fell to the least educated and trained member of the team, the

paraprofessional<sup>5</sup>. The regular education teacher provided minimal differentiation of instruction; this service was provided by the paraprofessional alone in most cases. The special education teacher, when present in the classroom, had to allocate her time to other children, again leaving the paraprofessional on an island with Student, a classroom within the classroom. With inadequate time for pre-planning and coordination of this team, and with the staff expertise derived largely from looking things up on the state educational website, the pedagogical results and the degree of “inclusion” that Student received were less than ideal.

The District made no effort to reconfigure its related services for Student, even though Student demonstrated a need for more speech and language services. The record is preponderant that Student had profound deficits in both receptive and expressive language, a foundational skill needed to address all other areas of educational need. Yet the District provided Student with only 30 minutes per week of speech and language intervention. Although the paraprofessional attempted to reinforce any learning that Student may have acquired during that time, she did so alone and without adequate planning, coordination and support in the classroom. Thus, Student showed minimal progress in language skills and knowledge – even in skills that are acquired typically in pre-school and kindergarten.

In sum, Student’s experience in the general education third grade is not the equivalent of “serious consideration”, Oberti, 995 F.2d above at 1216, of providing education in the general education setting with supplementary aids and services. Staff made admirable efforts

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<sup>5</sup> By this observation, I certainly do not intend to diminish the excellent services that this paraprofessional provided to Student. This educator’s testimony, well supported by her extensive daily notes, demonstrated that she achieved commendable results for Student. This paraprofessional single-handedly modified Student’s curriculum and differentiated Student’s instruction, often without prior planning and “on-the-fly”. Very often her modifications appeared to be sensible and facially appropriate. She also dealt deftly with Student’s difficult first-time-in-school behaviors during the first six weeks of school, including melt-downs and refusals, and the record shows preponderantly that these behaviors dissipated over time. The paraprofessional enabled Student to derive significant benefit from Student’s placement in general education, despite the glaring lack of resources available to her. Her devotion and skill cannot be overstated.

without a doubt, but they were hamstrung by a lack of appropriate support, training and resources. At no time was there a serious effort to marshal the full range of supplementary aids and services, nor did the staff have the requisite knowledge and time to do so. When state-sponsored support was offered by Parents, the offer was spurned. In short, the District's placement of Student in the neighborhood school for third grade did not fairly test the option of education with typically developing peers, nor does Student's third grade experience overcome the presumption that the District can with appropriate supports educate Student appropriately in the general education setting.

#### RELATIVE BENEFITS OF PLACEMENT OPTIONS

The second Oberti consideration requires that I weigh the relative benefits of the available placement options. In this case, the parties are divided between two placements: regular education for the majority of Student's day in the neighborhood school, and life skills placement for the majority of Student's day in a school building that is farther away from Student's home. I conclude that the balance falls in favor of Parents' requested placement.

The principal benefit of placing Student in the general education classroom would be to provide Student with the opportunity to learn appropriate social skills and behavioral self-regulation. The general education setting would provide Student with opportunities to interact with typically developing same-age peers in a normal setting. The record is preponderant that Student can benefit from such opportunities. Student showed a propensity to emulate typically developing peers in following classroom routines. Student was the recipient of assistance and attention from those peers, and Student had the opportunity to learn to socialize with them. The record discloses instances in which Student recognized being part of a larger group, was

challenged to respond to greetings and inquiries; learned when Student's behaviors were inappropriate with same-age peers and the need to apologize for such behavior; exchanged valentines; accepted assistance and redirection from peers in attending to classroom activities; and attended a peer's birthday party. Student demonstrated motivation to engage in social interactions with peers.

A secondary benefit of placement with typically developing peers is the opportunity to learn appropriate school and classroom skills, including behavioral self-regulation, following instructions, and participating in classroom activities, including collaboration with peers in problem solving and exploration. Student showed a propensity to benefit from these opportunities during Student's third grade year.

A third benefit for Student is being able to attend Student's closest available school. As noted above, the IDEA recognizes a presumption in favor of such placement. Student's attention is typically short, and the evidence is preponderant that a shorter ride has allowed Student to arrive at school ready to learn. While the District points out that the difference in travel time for Student is about fifteen to twenty minutes, I do not accept the District's suggestion that such a difference for a severely disabled child in fourth grade should be discounted. Nothing in this record weighs so heavily in favor of the more distant school as to overcome the statutory presumption in favor of the nearest possible school for Student.

There was evidence indicating that Student is vulnerable to bullying and exploitation in the general education setting. Although this risk is of great concern, it does not justify depriving Student of the many opportunities for social skills development that the general education environment provides. Rather, it argues for heightened vigilance to protect Student, vigilance that the Student's paraprofessional provided, as the record shows. Moreover, the risk

of inappropriate behavior by peers also provides a reason for more explicit social skills instruction, a service that I will order in this matter.

The District's witnesses made it clear that their primary reason for recommending life skills placement is the different curriculum, which would emphasize language and practical skills, such as safety awareness and functional academics. The record showed that, while Student made some progress in academics, Student's progress was very slow and limited.<sup>6</sup> However, the District provided no support for the assumption that neither life skills nor academics could be provided in the general education environment with supplementary aids and services. On the contrary, the record is preponderant that Student is able to learn alternate eligible content and functional skills within the general education setting. Thus, the record is not preponderant that the life skills placement would be necessary in order to address Student's needs in these areas. In effect, the District is arguing that Student needs to be educated separately due to the nature and severity of Student's disabilities; this is an impermissible assumption. 22 Pa. Code §14.145(4).

There is one area in which the record clearly proves that the Student needs explicit teaching outside of regular education classroom. Student's need for speech and language intervention is acute, foundational and profound. Therefore, I will order the District to provide expanded speech and language intervention as part of a supplemental learning support placement.

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<sup>6</sup> The record suggests that Student actually regressed academically in the beginning of the school year, contrasted with where Student's skills seemed to be at the end of second grade in the cyber charter school. However, while this was Parents' conclusion, I do not find clear evidence of regression. There is little evidence to show where Student stood academically at the end of the previous school year; the only reliable information in the record is Parents' opinion and the general assertion that Student was functioning at a first grade level academically in an alternative curriculum with supplemental support. I cannot reach a conclusion on this point given that level of evidence.

The District also argues that Student's distractibility is exacerbated by placement in the general education setting, which is much busier and distracting than would be the case in the life skills setting. While the record supports the assertion that the regular education environment is busy and distracting to Student, I do not conclude that this alone compels a balancing of benefits in favor of the life skills placement. There is a paucity of evidence as to the nature of the life skills environment and whether or not it would be distracting to Student. Moreover, the paraprofessional provided most of the curriculum modification, differentiated delivery of curriculum, and modification of environment, so that Student was not participating with the rest of the class, and two different things were going on at the same time for much of the school day. As discussed above, Student's experience in this setting, essentially without needed supplementary aids and services, does not preponderantly balance the competing benefits in favor of the life skills placement.

The record shows that the District failed to provide additional speech and language services and additional in-classroom teaching by the special education teacher because of the respective caseloads of the assigned staff. In effect, it failed to provide appropriate services solely due to administrative convenience and cost. This is not a permissible objection to providing such services appropriate to Student's needs at Student's neighborhood school. 22 Pa. Code §14.145(4).

#### IMPEDING THE LEARNING OF OTHERS

The third area of concern set forth in Oberti is the effect upon the learning of others in the general education setting. This record does not show any such effect. Therefore, this third consideration does not weigh against Student's placement in general education.

In sum, I conclude that the District has failed to perform its obligation to provide Student with education in the least restrictive setting. It failed to consider appropriately the option of educating Student in the general education setting with supplementary aids and services. It failed to consider that the benefits of such a placement would outweigh the benefits of the life skills setting for this Student, who demonstrated in third grade that Student was able to benefit from appropriate educational services in a general education setting without impeding the education of others. It based its conclusions upon the nature and severity of Student's disabilities and upon cost and administrative convenience, contrary to Pennsylvania regulations implementing the IDEA's least restrictive environment mandate. Therefore, I will order that it provide appropriate services in the general education setting for Student's fourth grade year.

#### PROVISION OF FAPE

Having addressed the first two issues in this matter, concerning least restrictiveness, I now address the third and fourth issues, concerning whether or not the current and proposed setting provided or offered a FAPE for Student's third and fourth grade years respectively. I conclude that the District provided Student with a FAPE for third grade. As to the program offered for Student's fourth grade year, Parents have failed to introduce preponderant evidence that the offer is inappropriate.

#### LEGAL STANDARD

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). FAPE is "special education and related services", at public expense, that meet state

standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be “reasonably calculated” to enable the child to receive appropriate services in light of the child’s individual circumstances. Andrew F. v. Douglas County Sch. Dist., RE-1, \_\_\_ U.S. \_\_\_, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017). The Court of Appeals for the Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “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 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009). In appropriate circumstances, a District that meets this Third Circuit standard also can satisfy the Andrew F. “appropriate in light of the child’s individual circumstances” standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

In order to provide a 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).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Andrew F., 137 S. Ct. above at 999 (requiring

what is reasonable, not what is ideal); Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid.

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Andrew F., 137 S. Ct. above at 999; 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.) The program's appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Applying these standards to the above findings and the record as a whole, I conclude that the District has provided Student with an educational program for third grade that was appropriate in view of Student's circumstances during the relevant period, and that could be expected to and did confer meaningful educational benefit upon Student, in view of Student's unique learning style and needs.

During the relevant period, Student presented as a child with complex learning needs, low cognitive ability according to standardized tests, and significant delays in development, including in pre-academic, functional, adaptive, social, communication, fine motor, gross motor and behavioral regulation skills. For this child, passing grades and advancement grade-to-grade were not a reasonable measure of progress. Rather, Student's circumstances dictate that Student's progress – both reasonably anticipated and actual - must be measured by

“dramatically” different measures. Andrew F. v. Douglas County Sch. Dist., RE-1, \_\_\_ U.S. \_\_\_, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017).

I conclude that the District made reasonable efforts to design a program for Student that was reasonably calculated to provide Student with a FAPE. Student had transitioned from a cyber charter program in second grade, and Student had not yet experienced the environment of a brick and mortar school. The previous school had provided evaluation reports and IEPs, and the District attempted to place Student in programming analogous to what the charter had provided. When Parents objected to the proposed life skills placement, the District provided placement in regular education in the neighborhood school, contrary to its advice to Parents. It added related services in the form of a paraprofessional assigned to Student on a one-to-one basis for the entire school day. It provided speech and language support on a pull-out basis and occupational therapy. In November, after it completed its own evaluation, it offered slightly expanded hours of speech and language therapy and added goals and modifications to address all of Student’s needs.

While Student’s academic progress was less than Student’s team would have wanted, Student made some progress. Student clearly improved school/classroom behavioral skills. Student improved social skills. Student made limited progress in word reading, numbers and operations, fine motor and adaptive skills. I conclude that this level of progress was appropriate in view of Student’s circumstances and was meaningful to Student – especially with regard to social skills.

The circumstances that I consider include Student’s very low cognitive ability, complex disability with intellectual disability and autism, profound speech and language delays, and fine motor challenges. I also consider the circumstances of Student’s entry into school:

Student's lack of brick and mortar school experience, the fact that Parents insisted that the District provide Student with education in the general education classroom, and the fact that the classroom was likely to and did interfere with learning because of the distractions and unwanted sensory stimulation that it presented to Student. Given all of these circumstances, the District's offer was appropriate, and it delivered on its offer appropriately from the standpoint of provision of a FAPE.

Although Parents have shown preponderantly that the District's offer of life skills placement was not an offer in the least restrictive setting, they have not presented a preponderance of evidence that the District's offer of that setting was not an offer of FAPE. On the contrary, it was reasonable for the District to expect that the life skills setting would meet Student's needs appropriately, even though it would not be least restrictive. Thus, I do not conclude that it was inappropriate or a failure to offer a FAPE.

#### ACCESS TO THE GENERAL EDUCATION CURRICULUM

Parents assert that Student had a separate right under the IDEA to be involved in and make appropriate progress in the general education curriculum. 20 U.S.C. §§ 1414(d)(1)(A)(i)(IV)(bb). IDEA also requires that evaluations must assist in determining "the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum." 20 U.S.C. § 1414(b)(2)(A)(ii). Both of the cited sections address the contents of the child's evaluation and IEP, and as such, I conclude that they are procedural in nature. In view of my above findings regarding the District's failure to provide a placement in the least restrictive environment, I conclude that these procedural requirements were violated.

## CONCLUSION

I conclude that the District failed in its obligation to provide Student with education in the least restrictive environment. I also find a procedural violation in that the District offered an IEP that did not provide for supports to enable Student to be involved in and make progress in the general education curriculum. Notwithstanding this finding, I also conclude that the District must provide Student with more speech and language intervention in an individual or small group setting. Therefore, I conclude that equitable relief is required through the order set forth below.

## ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District shall place Student in a supplemental level of support, to be provided to Student at Student's neighborhood school, for Student's fourth grade school year.
2. Within 30 days of this decision, the District shall convene an IEP team meeting to revise Student's IEP in accordance with this order. The team shall permit attendance by one advocate and one additional consultant of Parents' choice, either in person or by telephone or video meeting technology.
3. The IEP team shall consider thoroughly and seriously any and all supplementary aids and services that may assist in providing Student with a FAPE in the general education classroom at Student's neighborhood school.
4. The District shall provide Student with one hour per day of direct instruction in reading.
5. The District shall provide Student with speech and language therapy services on a one-to-one or small group basis, at least three times per week for thirty minutes per session; services shall include explicit instruction in social skills.

6. The District shall provide Student with such safety and other life skills, as well as functional academics, as the IEP team deems appropriate, in the general education setting at Student's neighborhood school.
7. The District shall provide occupational therapy in an amount deemed appropriate by the IEP team.
8. The District shall provide any other related services, including transportation, deemed appropriate by the IEP team.
9. Beginning on the first day of school, the District shall provide coaching to the educational staff, including the regular education teacher, special education teacher, and any paraprofessional assigned to Student. Coaching shall be provided by an educator selected by the District who is qualified by training and experience to provide such services. Coaching services shall be provided in the amount of at least one hour of consultation per week until the District's winter break; thereafter, services shall be provided in an amount deemed appropriate by the IEP team.

It is **FURTHER ORDERED** that nothing in this decision and order shall preclude the parties from reaching an agreement to alter the terms hereof.

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

*William F. Culleton, Jr. Esq.*

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

July 10, 2017