

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. 00185-0910AS; 00287-0910AS¹

Child's Name: DS

Date of Birth: xx/xx/xxxx

Dates of Hearing: 12/18/09, 2/17/10, 3/22/10

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney:

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School District

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Date Record Closed:

April 5, 2010

¹ After Parents decided to send Student to a private school for kindergarten, they submitted a second complaint to seek tuition reimbursement for the current school year. The relief sought in the original case, 00185-0910AS, was superseded by the second complaint, 00287-0910AS, but the issues in the original complaint remained viable as the basis for Parents' contention that the Wilson School District failed to offer an appropriate program and placement for the 2009/2010 school year. Since the issues asserted in both cases became facets of the same claim, (N.T. pp.253, 278) with the same evidence and legal argument completely applicable to both cases, the cases were fully consolidated for disposition as well as for hearing, and there is no reason or basis for separate decisions.

Date of Decision: April 20, 2010

Hearing Officer: Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student, age 6, is completing his kindergarten year at the same private school he attended for preschool early intervention services. Responsibility for Student's program and placement transferred from the Berks County Intermediate Unit EI program to his school district of residence, Wilson, at start of the 2009/2010 school year, since Parents had elected to have Student remain in early intervention for the 2008/2009 transitional school year.

Parents contend that the only appropriate setting in which the District should provide all special education and related services to Student is a regular kindergarten class, with typical peers. Parents further contend that the District improperly instructs all students with autistic spectrum disorders, such as Student, with the Verbal Behavior Program. Since Parents and the District could not resolve their program and placement differences prior to the beginning of the 2009/2010 school year, Parents filed a due process complaint in August 2009. Parents subsequently amended that complaint to request an independent educational evaluation (IEE).

In September 2009, contending that the District was still not prepared to meet Student's needs appropriately, Parents filed a second complaint seeking tuition reimbursement for the private kindergarten he is presently attending. The hearing was delayed due to a change of hearing officer in October 2009 and the parties' continuing efforts to resolve their dispute. The hearing was ultimately held over three sessions from December 18, 2009 through March 22, 2010. For the reasons that follow, Parents' claims for tuition

reimbursement for the 2009/2010 school year, for an Independent Educational Evaluation (IEE) at public expense and for related services to be provided at the private school are denied.

ISSUES

1. Did the District offer Student an appropriate special education program and placement for the 2009/2010 school year?
2. If not, have Student's Parents established that the unilateral private school placement they selected is appropriate for Student and that there is no equitable basis for reducing or denying tuition reimbursement?
3. Is the District required to provide an IEE for Student and/or related services at the private school he is attending?

FINDINGS OF FACT

1. Student is a 6 year old child, born [Redacted]. He is a resident of the District and is eligible for special education services. (Stipulation, N.T. pp. 15, 16)
2. Student has a current diagnosis of autism spectrum disorder in accordance with Federal and State Standards. 20 U.S.C. §1401(3), 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 16)
3. For the 2009/2010 school year, Student is attending kindergarten at a private school unilaterally selected by his Parents. (Stipulation, N.T. pp. 16, 17)
4. By agreement of the parties, had Student attended a District kindergarten during the 2009/2010 school year, it would have been at a District elementary school building other than his neighborhood school, due, in part, to Parents' desire that Student and siblings in elementary school, including a sister enrolled in kindergarten, not be educated in the same school building. (N.T. pp. 17, 218; P-12)
5. Parent also visited various autistic support classes offered by the District during the spring of 2009, and concluded that a teacher with a class in a building other than Student's home school appeared to be a particularly good fit for Student. (N.T. pp. 216, 312)
6. Student began receiving early intervention services in July 2005, just before he turned 2. In August 2006, Berks County Intermediate Unit 14 (BCIU 14) began providing 10 hrs/week of early intervention (EI) educational services in an EI classroom that Student attended for half of each day and monthly consultant services at the private pre-school program Student attended for the other half of each school day. During

- the 2008/2009 school year, Student was enrolled in a [Redacted] pre-school program located in the same school Student is currently attending for kindergarten. Student was also receiving 15 hours/week of mobile therapy services, provided by a county agency, Service Access Management (SAM) in Student's various natural settings. (N.T. pp. 198—202, 281; S-1)
7. In addition to special education, BCIU 14 provided related services consisting of individual and integrated speech/language services, integrated physical and occupational therapy (P-1, S-4)
 8. In the spring of 2008, Parents notified the District that they had elected to have Student continue receiving EI services between ages 5 and 6, but wanted to begin planning for Student's transition to the District for kindergarten in the 2009/2010 school year. (N.T. pp. 270, 284; S-15)
 9. Late in the winter of 2009, Parents and the District began formal planning for Student's transition into the District's kindergarten program. (N.T. pp. 205, 206)
 10. The District first issued a permission to reevaluate (PTRE) on February 10, 2009 in response to Parents' request, proposing a speech/language/communication and occupational therapy evaluation. A week later, the District issued a second PTRE, adding assessments of perceptual and behavioral functioning. Parents consented to both evaluation requests at the time they were issued, but later requested that only the OT and S/L evaluations be reported in Student's IEP. (N.T. pp. 356; S-2, S-3, S-4).
 11. Parents' input form submitted for the spring 2009 evaluations identified significant needs for Student in the areas of behavior, communication and social skills. (N.T. p. 358; S-7)
 12. Student's EI team met to develop an IEP in March 2009, with the participation of School District representatives. At that time, Student was demonstrating significant problem behaviors, including elopement, tantrums and occasional aggressive actions toward peers when interrupted at a task. Student also engaged in various self-stimulating (stimming) behaviors. (N.T. pp. 207, 217, 311, 350, 358, 359, 377; P-1, pp. 6, 9, S-4)
 13. With adult verbal and gestural prompting, Student was able to follow and engage in classroom routines at the [Redacted] school, as well as engage in peer social interactions with adult facilitation. Student required the prompts from an adult in close proximity, as well as sensory breaks, to maintain focus and attention and to succeed generally in the classroom. (N.T. pp.350—352, 412, 413; P-1, pp. 4, 5, S-4)
 14. The [Redacted] program focuses on students working individually to complete "jobs" (structured tasks). Student, therefore, spent most to the school day working alone on individual tasks with the assistance of his personal care assistant (PCA). (N.T. pp.80, 81; P-1, p. 6, S-4)

15. The March 31, 2009 IEP identified goals in the areas of: 1) independently participating in classroom activities; 2) increasing effective communication, including requesting desired items, commenting, answering “wh” questions, labeling of pictures related to thematic vocabulary, and generalizing language skills across settings; 3) increasing his ability to participate effectively in age-appropriate pre-school activities, including developing listening skills and the ability to follow multi-step directions; 4) developing task persistence; 5) exploring cause and effect. (N.T. pp. 207; P-1, pp. 12—18, S-1)
16. In June 2009, Student’s EI IEP team concluded that Student needed to continue working toward all five goals identified in the March 31 IEP. (N.T. pp; P-8, pp. 3, 5, 6, 8, 9)
17. After the March 2009 IEP meeting, at which Parents notified the District that only the OT and S/L evaluations should be included in Student’s IEP, and that it did not appear to them that a comprehensive reevaluation was necessary at that time, the District issued a new PTRE on April 1, 2009, specifying the same type of assessments included in the February 10 PTRE. (N.T. pp. 288, 289; P-2, S-5, S-17, p. 2)
18. Parent requested an additional evaluation to be certain that the District had sufficient information to develop an appropriate IEP. The District issued a fourth PTRE on May 11, 2009, adding a physical therapy (PT) evaluation Parents’ request. Parent requested that only the OT, PT and communication evaluation results be included in Student’s IEP. (N.T. pp. 208, 209; P-4, S-8)
19. Parents did not want the District to perform any IQ testing, fearing that Student’s autism disability would depress his scores on tests of cognitive potential and adversely affect expectations concerning Student’s academic achievement. (N.T. pp. 209—212, 310, 311; S-17, p. 2)
20. The needs identified at the March 2009 IEP meeting were confirmed in the District’s April 2009 OT evaluation and May 2009 speech/language evaluation (P-1, P-3, P-5, S-4, S-9, S-13)
21. The first IEP meeting for the 2009/2010 school year was held at the end of May 2009. The parties also met in July and September to revise the proposed IEP. (N.T. pp. 222, 223; P-6, P-10, S-13)
22. In light of Student’s significant needs identified in the spring of 2009, the District’s initial IEP draft proposed that Student would receive all academic instruction in an autistic support classroom in order to provide intensive instruction to meet Student’s significant behavior and communication needs and facilitate transfer of skills into a regular education environment. Beginning with the first IEP meeting, the District emphasized the need to collect baseline data on Student’s functioning during the early part of the school year in order to determine the appropriate level of inclusion in the regular kindergarten program. (N.T. pp. 360—362, 373, 515; P-10, p. 26)

23. In August 2009, the District proposed a 30 day diagnostic placement in which the District would conduct comprehensive assessments to determine Student's then current language and early learning skills. Language and math instruction, along with some gross motor and sensory activities, were to be provided in the autistic support class, with the remaining instruction in the regular kindergarten class during the diagnostic period. (N.T. pp. 241, 362—367, 369; P-11, P-13, S-13)
24. The most recent IEP offer in September 2009 proposed an increase in the amount of time Student would spend in the regular education environment during the diagnostic period. The District proposed to provide special education services at the supplemental level, *i.e.*, more than 20% but less than 80% of the school day. The District's latest IEP proposal would have placed Student in the regular education setting an average of 62% of each day, with a review of assessments taken during the diagnostic period by the IEP team in October 2009, leading to an IEP proposal for the remainder of the 2009/2010 school year. (N.T. pp. 299, 368—370, 594, 595, 602; S-11, S-12, S-13, S-14)
25. The final proposal for an interim IEP included 6 language goals, 2 OT and social skills goals and 1 behavior goal. Parents' school psychologist expert witness considered most of the goals flawed as written but not inappropriate as long as the staff understood how the goals were to be addressed. Parents' expert suggested improvements to the means and methods by which Student's progress should be monitored. Parents' expert agreed that Student's IEP goals and progress should be measured for a period of time early in the school year, with the IEP team to reconvene and review the program and placement at that time, but would begin with a full-time regular education placement. (N.T. pp. 106—113, 119—122, 405—408, 413, 519; S-13)
26. The services the District proposed to provide in the special education autistic support classroom were those that would be more difficult to implement in a regular education classroom. The time in the autistic support classroom was also expected to provide a better setting for the particular skills assessments the District wanted to conduct during the first month of the 2009/2010 school year. (N.T. pp. 363—365, 369, 370, 373; S-12)
27. The District intended to provide instruction in the autistic support classroom with the Verbal Behavior Program (VB), an intensive, data-driven instructional method that focuses on developing functional communication skills to build additional cognitive and academic skills. (N.T. pp. 375, 445; S-22)
28. Much of the ongoing research basis for VB is derived from data compiled via assessments of students instructed with VB techniques. VB is based upon principles used in Applied Behavior Analysis (ABA). Progress monitoring is based entirely on objective data and is used to determine the effects of particular interventions for each

student after baselines are established in various situations. (N.T. pp. 446, 449—452, 552; S-22)

29. Various types of communication (operants) are labeled by form and function, *e.g.*, mand = request; tact=label; intraverbal= reciprocally responding to questions, comments; echoic= verbal repetition; imitation = motor repetition; listener responding/receptive = following directions, responding to requests. Not all students are expected to work on or master all five types of communication. Goals are driven by skill levels and needs as determined by baseline data, which in turn, is derived from specific assessments ranging from a “snapshot” to data collected over a significant period of time. (N.T. pp. 454—474; S-22, pp. 9, 12, 13, 14)
30. Generally, in a VB classroom, students work individually or in small groups at various stations set up around the room, with each student’s materials organized into individual carts. Each student works on his/her individualized, academic, language, social, behavioral goals. Not all students in the VB program are instructed in a separate classroom. (N.T. pp. 474—476)
31. VB instruction begins with building a strong teacher/student relationship (pairing) to establish the teacher as a positive source of reinforcement for the child. Positive reinforcement means providing (adding) a desired or preferred object or activity. Negative reinforcement means eliminating a situation, activity or object the child wishes to avoid, *i.e.*, subtracting something from the child’s environment. Both types of reinforcement are delivered on a variable and differential basis to increase the likelihood that a child will repeat a desired behavior. (N.T. pp. 477—491, 582—584; S-22, p. 15)
32. Intensive teaching and errorless teaching are important components of VB. Intensive teaching focuses on assuring that students acquire essential discrete skills. Errorless teaching supports success by mixing new concepts with familiar, mastered skills. (N.T. pp. 491—497)
33. Another essential component of VB is providing opportunities and methods for generalizing skills to the natural environment. (N.T. pp. 507, 508)
34. Because goals are individualized and data-driven, adjustments can be made quickly, to both goals and intensity of instruction with respect to skills that Student learns quickly and easily generalizes to the natural environment. Skills that Student mastered prior to beginning instruction would be checked regularly but would not be a focus of instruction. (N.T. pp. 509—515)
35. Parents agreed with the parts of Student’s proposed schedule to be provided in the regular education setting and disagreed with providing instruction in any setting other than a regular kindergarten class. Parents also disagreed with using VB for any part of Student’s instruction. (N.T. pp. 17 (Stipulation), 225, 244, 255, 256; S-12)

36. Parents' expert school psychologist acknowledged that the District's final proposal for an interim diagnostic IEP provided for much inclusion, but would have advised the District to accede to Parents' request for full inclusion to engage Parents and avoid a due process hearing. During his mid-September observation, he saw nothing in Student's functioning that would have precluded full inclusion in a regular kindergarten class, at least on an experimental basis for the first several weeks of the school year. (N.T. pp. 124—129, 131, 132; S-13)
37. After Parents rejected the District's final IEP offer, the District requested Parents' permission to observe Student in his private placement. Parents refused permission for the observation in part because an independent psychologist has recently observed Student in the private school at Parents' request, but primarily because Parents did not trust the District to conduct an unbiased observation, because Parents were funding the private placement and because the District refused to provide transportation, speech and OT services for Student. (N.T. pp. 268, 269, 308, 334; S-10)
38. Parents' independent psychologist conducted an observation of Student in the private school placement on September 15, 2009 for approximately 2½ hours. Although the psychologist concluded that Student was functioning well in the full inclusion setting, albeit with the constant and intensive support of Student's TSS, he was troubled by several aspects of the private school program, particularly the lack of objective data to monitor Student's progress and any identification of skills that needed to be developed. (N.T. pp. 93, 100, 101, 143, 144 ; S-26)
39. The observation conducted by Parents' independent psychologist in mid-September 2009 confirmed that Student was still demonstrating the needs identified in the March and June 2009 BCIU 14 IEPs, and in the District's speech/language evaluation conducted in April 2009. (N.T. pp. 94, 95, 113, 114, 140, 141; P-1, P-6, P-8, P-26, S-4, S-9)
40. In December 2009, Parents obtained two other observations of Student in the [Redacted] kindergarten class. By that time, Student was no longer accompanied by a TSS and was following the classroom routines independently. On the day of the first observation, Student engaged in parallel play with peers rather than interacting with them and exhibited verbal stimming behaviors. The next day, Student was observed at recess engaging with peers for approximately half the time and playing by himself the rest of the time. (N.T. pp. 44—49, 55, 166—171)

DISCUSSION AND CONCLUSIONS OF LAW

I. Tuition Reimbursement

The primary dispute between the parties in this case centers on whether the District is required to fund the private school placement Parents unilaterally selected for kindergarten.

To determine whether Parents are entitled to reimbursement for the costs of the [Redacted] School Student is currently attending, the familiar three part test, based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993), must be applied. The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the District are the second and third steps considered, *i.e.*, whether the program selected by Parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. A decision against the parents at any step of that process results in a denial of reimbursement. *Id.*

II. School Districts Offer of FAPE

A. IEP Goals

The disagreement between the parties over the School District's offer of a kindergarten program and placement to Student for the current school year is fairly limited. Although Parents raised some issues concerning the goals and objectives included in the District's IEP offer (S-13), those issues were not the focus of the Parents' contention that the District failed to offer an appropriate program and placement. That was especially true after the testimony of Parents' expert school psychologist, whose review of the IEP goals elicited little disagreement with the District's IEP, other than noting that some of the goals could be more explicitly stated. (F.F. 25) Of the 11 goals listed in the proposed IEP, Parents' expert found only the behavior goal too vague to be acceptable. (N.T. p. 115) Moreover, Parents' expert noted that it would be important to re-visit the goals in light of how Student was

functioning after several weeks in school, which is precisely what the District planned. (F.F. 24, 25) In this case, the District's "final" proposed IEP was never meant to be implemented during the entire school year. Instead, the District maintained throughout that it was a temporary initial IEP, to be used only during a diagnostic period, defined as the month of September 2009, essentially the first four weeks of the school year. (F.F. 23, 24) Consequently, there is no evidentiary basis for concluding that the IEP is inappropriate based upon its indisputably temporary goals.

B. LRE General Legal Standards

In this case, the primary dispute over whether the District offered a FAPE to Student for the current school year is based on Parents' contention that the District's proposed IEP violated the IDEA's least restrictive environment (LRE) requirement, which provides that an eligible student should be educated with children who are not disabled to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2)(i).

In *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993), the United States Court of Appeals for the Third Circuit provided explicit guidance for applying the LRE requirement. In accordance with *Oberti*, evaluating a program and placement to determine whether it meets the LRE standard begins with considering whether the eligible student can be educated satisfactorily in the regular classroom with sufficient supplementary aids and services. *Greenwood v. Wissahickon School District*, 571 F.Supp.2d 654 (E.D. Pa. 2008). In making that assessment, 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. Finally, the district must determine 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.

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. 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. *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 390 (3rd Cir. 2006).

An additional challenge in applying the LRE legal standards as explained in *Oberti* arises from determining how the burden of proof should be allocated. 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. In *L.E. v. Ramsey Board of Education*, 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. 435 F.3d at 392. It is, however, not entirely clear how imposing the burden of persuasion to parents works in practice with respect to an LRE violation, when both the IDEA regulations and controlling case law place

an affirmative duty on districts to assure that an eligible child is removed from the regular education environment only when, and to the extent, necessary.

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. Moreover, in *L.E. v. Ramsey Board of Education*, the administrative hearing and district court decisions were issued when school districts had the burden of proof, and those decisions were affirmed on that basis. In addition, the court analyzed and credited the evidence presented by the district with respect to the need for the student in that case to be educated outside of a regular classroom environment. It is likely, therefore, that the *L.E.* decision is not the last word on this issue.

In *Moore v. Kulicke & Soffa Industries, Inc.*, 318 F.3d 561 (3rd Cir. 2003), the court discussed the role of presumptions in a burden of proof analysis, concluding that when the party with the ultimate burden of proof successfully raises a presumption under the governing law, the burden of production shifts to the opposing party to come forward with some evidence to rebut the presumption. Failing that, the party with the burden of proof prevails on that issue. In the absence of specific guidance from the courts with respect to how the statutory/regulatory LRE standards as explained in *Oberti* should be analyzed and applied in light of *Schaffer* and *L.E. v. Ramsey Board of Education*, and noting that the Supreme Court specifically allocated only the burden of persuasion, which remains with parents, it makes sense to adopt and apply the *Moore* analysis with respect to the LRE issue in this case.

C. LRE Legal/Factual Issues Specific to Student

Parents' primary disagreement with the District centers on whether the District's proposal to place Student in an autistic support class for part of each school day from the beginning of the 2009/2010 school year through at least the end of September 2009 fulfills the District's LRE obligations. Although Parents did not foreclose the possibility that Student might need some instruction outside of the regular classroom at some point, they contend that such determination can appropriately be made only after Student is placed in a regular classroom for the entire school day and assessments indicate that full inclusion is unsuccessful. *See* N.T. pp. 225, 226, 299.

The essence of the LRE dispute on this case, therefore, is timing. The District proposed to provide special education and related services in an autistic support classroom for approximately 38% of the Student's school day from the beginning of the 2009/2010 school year until the IEP team re-convened in October 2009 (F.F. 23, 24). During that diagnostic period, the District proposed to assess Student's educational and related service needs, as well as his functioning in the regular education classroom, compiling data for the IEP team to consider in determining whether to maintain the initial level of part-time services in the autistic support classroom, place Student entirely in the regular classroom setting or move to some other combination of regular and special education settings. The District never proposed maintaining the initial 62/38% ratio of regular classroom and pull-out services for the entire 2009/2010 school year. (F.F. 23—26)

Nevertheless, Parents declined to enroll Student in a District kindergarten, contending that the District's proposed interim placement does not meet the LRE legal standard. At the time it was offered, the District's proposed IEP provided for approximately one month of less than full inclusion, to be followed by an IEP team review. It is impossible to determine, of

course, whether the parties would have agreed upon the LRE issue when the IEP team reconvened in October, since there is no way of knowing how Student would have adjusted to the public school program, notwithstanding Student's apparently good progress in the private placement. It is even impossible to determine whether the initial period would have been long enough to ascertain whether to maintain, increase or even decrease the amount of time spent in the regular education environment based upon an assessment of Student's social and academic progress in all areas of the curriculum.

The LRE issue in this case, therefore, comes down, first, to a legal determination whether proposing to begin the school year with a less than full inclusion placement for a child never before enrolled in a public school is a *per se* violation of the federal mandate for educating an eligible child with non-disable peers to the greatest extent appropriate. There is also a factual determination whether, in this case, proposing a placement that provided for less than full inclusion in a regular education setting for an evaluation period was inappropriate based upon what the District knew about this Student's needs and functioning at and prior to the beginning of the 2009/2010 school year. It is important to note that both the legal and factual standards are objective. Parents' preferences are not determinative.

Legally, the appropriateness of the District's program/placement offer must be based upon what the law actually requires, not Parents' opinions or preferences concerning the desirability of full inclusion from the beginning of the school year rather than waiting to determine whether experience suggested that a more restrictive setting might be the best option for their child. Similarly, whether the District's offer was appropriate as a matter of fact must be based upon the evidence in terms of the information available to the District and whether that information was appropriately assessed and considered by the District, not

Parents' opinions or preferences concerning either their child's best interests or their philosophy with respect to whether it is better to begin a child's enrollment with full inclusion or in a more restrictive setting.

Although the IDEA statute and both the federal and state regulations concerning placement express an undeniable preference for fully inclusive placements, the limiting language "to the maximum extent appropriate" as well as the continuum of placements provided in IDEA contemplates that for some eligible students, full inclusion in a regular education setting may not appropriately meet the child's needs. In light of that recognition, it would place an unwarranted constraint on school districts to conclude, that as a matter of law, all students entering a school district must first be assigned entirely to regular education classes. Even more important than the LRE mandate is the IDEA requirement that a program and placement must be individualized to meet the unique needs of an eligible student. A *per se* requirement that full inclusion must be the initial placement offered to every child identified as IDEA eligible prior to entering a school district for the first time would inappropriately circumscribe the ability of school districts to consider the unique needs of each child. It is not unreasonable to permit a district to propose a less than fully inclusive interim placement in order to gather additional data when the district believes that it has insufficient information concerning the appropriate placement for an eligible child entering a public school placement for the first time. Rather than impose a *per se* rule with respect to full inclusion, each situation must be assessed in terms of the information available to the district about the child and whether it is reasonable, under the specific circumstances, to offer a placement that provides for less than full inclusion.

Here, the District proposed both a limited initial assessment period and provided that Student would spend most of each school day in the regular education setting during the initial assessment period, which is a reasonable proposal on its face. The question whether the District's proposed program and placement for Student was appropriate at the time it was offered turns on whether the information available to the District in July and September 2009 justified assigning Student to an autistic support class for part of the school day for approximately the first month of the school year, pending collection of data and reconvening the IEP team to consider adjusting Student's placement.

The evidence established that the District's proposal was based upon an assessment of the child's needs at the end of the EI period, the need to determine how, if at all Student's needs changed by the time the 2009/2010 school year began, and how Student would adjust to the public school kindergarten setting. *See* F.F. 11, 12, 13, 15, 16 As described in some detail in the foregoing findings of fact, both the formal language and OT assessments conducted during the spring of 2009 and descriptions of Student's school functioning at that time, based upon the observations of his teachers and other service providers, identified significant language, behavioral and sensory needs that supported the District's conclusion that an assessment period at the beginning of the 2009/2010 school year was appropriate. Indeed, in her testimony at the due process hearing, Student's Mother noted that "[S]ocially, there's really no comparison to the child he was last summer and the child he is today [February 2010]." (N.T. p. 235) In proposing an IEP for the beginning of the 2009/2010 school year, the only information about Student available to the District was the vastly different "child he was last summer."

The evidence also established that the necessary assessments of Students' functioning in the public school kindergarten setting could best be undertaken in an autistic support class, at least during the early part of the school year, until Student's IEP team could observe Student in the regular kindergarten class and obtain updated information about the extent of Student's sensory and behavioral needs in that setting. (F.F. 26) The District's proposal for obtaining updated information and providing some services in a part-time autistic support classroom during the early part of the 2009/2010 school year was reasonable and, therefore, appropriate, since Student was never before educated in an inclusive public school setting. Whether it would have been appropriate for Student's IEP team to increase the amount of time Student was placed in a regular education setting after the assessment period, including providing all special education supports and related services in the regular classroom is impossible to determine, since Parents did not give the District the opportunity to implement its proposal. Consequently, the only available evidence supports the appropriateness of the District's placement proposal for a limited period at beginning of the 2009/2010 school year.

Parents presented considerable testimony concerning Student's significant progress in the full inclusion setting of the [Redacted] kindergarten program during the current school year. For a number of reasons, however, such evidence does not support Parents' position that the District's proposed placement was inappropriate. First, the District's proposal must be evaluated as of the time it was presented to Parents, not in light of later events. *Susan N.*

v. Wilson School District, 70 F. 3d 751 (3rd Cir. 1995).

Under the circumstances of this case, it would be manifestly unfair to evaluate the District's placement proposal in September 2009 in light of Student's ability to function well in a full inclusion, private school setting by mid-December, when two of Parents' witnesses

testified with respect to their brief observations of Student, or by mid-February 2010, when Parent testified. Since Parents and two of the other witnesses they produced described progress that occurred well after the District's proposal was presented to Parents, and even well after the initial assessment period the District proposed, their testimony does not call into question the information the District used to develop its proposal.

The testimony of Parents' third additional witness, an independent psychologist who observed Student in mid-September 2009, supported the factual underpinnings of the District's proposal for the beginning of the 2009/2010 school year, noting that Student needed direction from his TSS to initiate every classroom activity and to interrupt stimming behaviors. (F.F. 36, 38; P-26, pp. 1—4) The psychologist noted only one peer-initiated interaction, to which Student did not respond. (P-26, p. 3) Moreover, the psychologist made some recommendations concerning methods for decreasing TSS support and increasing peer interactions which may have led to greater classroom success as the school year progressed. There is no reason to believe that similar strategies would not have been used by the District, or that Student would not have been fully included in the regular District kindergarten classroom by mid-December 2009.

Second, even assuming that the independent school psychologist's observation suggests that full inclusion was appropriate for Student in September 2009, both the relevance and weight of such conclusion are limited by the circumstances, *i.e.*, that Student was observed in the familiar environment of the [Redacted] private school where he had also attended pre-school, and was accompanied by a TSS for behavioral and sensory support. Moreover, two of Parents' witnesses specifically noted that the [Redacted] program was particularly well-suited to Student. *See*, N.T. pp., 80, 81, 97 Absent testimony comparing

the [Redacted] program with the District's proposed program, expanding and generalizing the psychologist's one day "snapshot" observations into a conclusion that Student would have functioned well in a full inclusion public school kindergarten at the time the 2009/2010 school year began is unwarranted. In fact, the observation by the independent psychologist suggests that Student would not have been successful even in the [Redacted] classroom in mid-September 2009 without constant TSS support to move Student through the classroom routines, and that Student would have benefited from systematic social skills training and facilitated peer interactions. (F.F. 36, 38; P-26)

Finally, there is insufficient objective evidence concerning the extent of Student's overall and current progress in the private [Redacted] program. As the District pointed out, no one from the [Redacted] school testified concerning how Student is currently functioning and progressing in the private school setting, and more important, how Student fared on a daily basis from the beginning of the school year through October 2009. In addition, Parent presented no documentary evidence of Student's progress, indicating either that the school does not provide periodic written progress reports or that such documents exist but would not have supported Parents' position, at least as strongly as they would have liked. Moreover, Parents refused permission for a District observation of Student in the private kindergarten. Parents' reasoning that they felt no obligation to permit a District observation because they paid the tuition themselves does not justify that position, since they requested that the District pay the tuition and pursued a due process hearing to obtain tuition reimbursement from the District.

Parents made no attempt to explain the absence of any evidence from the private school placement concerning this school year. Consequently, even if Parents had succeeded

in establishing that the District's program/placement proposal was inappropriate at the time it was offered, based upon LRE considerations, Parents' limited observational and anecdotal evidence concerning Student's progress provided insufficient objective evidence that the [Redacted] private school placement is appropriate for Student. Parents, therefore could not have established the second prong of the tuition reimbursement analysis based on the evidence produced at the due process hearing. Parents cannot expect to prevail on the aspect of a tuition reimbursement claim requiring an assessment of the appropriateness of the private school placement by limiting the record evidence concerning the private school placement.

In addition, Parents' refusal to permit a District observation of Student in the private school during this school year would have supported at least a reduction in tuition reimbursement on equitable grounds, even if Parents had succeeded in establishing that the District's IEP proposal was inappropriate and that the [Redacted] private placement is appropriate, since such refusal deprived the District of the opportunity to revise its proposal for Student had it been found inappropriate. In *Seladoki v. Bellaire*, 2009 WL 312775 (S.D. Ohio Sept. 28, 2009), the court noted that the right to tuition reimbursement also depends on parents' good faith in working with their school district to develop an appropriate IEP. Just as school districts have a continuing obligation to offer a FAPE to an eligible student, parents have a corresponding continuing obligation to work with the district toward developing an appropriate public placement. Parents did not meet that standard in this case

D. Verbal Behavior Project

Parents also disagreed with the District's proposal to instruct Student in accordance with the methods and principles of the Verbal Behavior Project. Parents, however, relied

primarily on their own subjective opinions that those instructional methods would be inappropriate for Student. Their main objection appears to be based on their philosophical disagreement with the theoretical underpinnings of VB, which is derived from B.F. Skinner's work.

The District provided ample evidence concerning VB which belies Parents' objections that VB is too heavily based on rote learning and lacks individualization or a sufficient research basis. *See* F.F. 29—34

In the absence of objective factual evidence that VB methods would be inappropriate for Student, based on his needs, Parents' contention that the District's proposal to use VB instructional methods rendered the proposed IEP inappropriate must fail.

In general, the IDEA statute accords substantial deference to the instructional choices of school districts, which are vested with the primary responsibility for selecting appropriate teaching methods. *Lessard v. Wilton-Lyndeborough Coop. School Dist.*, 592 F.3d 267 (1st Cir. 2010). Moreover, since parents' right to participate in developing an appropriate program and placement for an eligible student does not extend to compelling a school district to provide a specific program or method, it follows that Parents likewise have no right to preclude a specific methodology simply because they disagree with it. *See, J.P. v. West Clark Community School*, 230 F.Supp. 2d 910, 919 (S.D. Ind. 2002).

III. IEE

After submitting their initial due process complaint in mid-August 2009 requesting a full inclusion kindergarten program, Parents amended the complaint two days later to add a request for an IEE by a certified school psychologist of their choice. (P-12, P-14)

Parents' claim appears to be based upon the contention that the District failed to propose a comprehensive reevaluation of Student. There is no suggestion that Parents disagree with the speech/language, OT and PT evaluations conducted by the District in the spring of 2009, as required by 34 C.F.R. §502(b)(1) in order to obtain a publicly funded independent evaluation. Parents testified only that they disagreed with the District's proposal to conduct an evaluation that included IQ testing, although the District had not issued a PTRE that included an IQ test. (F.F. 19; NT. pp. 211, 212) The District did, however, issue a PTRE in February 2009 that proposed assessments of behavioral and perceptual functioning. Although Parents consented to the evaluation, they later informed the District that they only wanted the speech/language, OT and PT evaluations included in the IEP to be developed for the Student by the District IEP team. (F.F. 17, 18)

In the absence of a District evaluation with which Parents disagree, there is no basis for an IEE at public expense. Presumably, Parents now believe there is a need for a comprehensive evaluation, although they did not see the need for such an evaluation in the spring of 2009. (F.F. 17) Parents provided no justification for an IEE, other than noting that the District has not conducted a comprehensive educational evaluation of Student. It may be that Parents want to control the assessments that will be used by selecting their own evaluator, in light of their objection to cognitive testing. Parents are certainly free to obtain such an IEE at their own expense, and the District is obligated to consider any such evaluation obtained by Parents. 34 C.F.R. §502(a), (c)

Since there is no legal or factual basis for requiring the District to fund an IEE, Parents must either obtain an IEE at their own expense or request a comprehensive psycho-educational evaluation to be conducted by the District

IV. Request for Additional Services from the District

In a letter dated August 24, 2009, Parents requested that the District provide transportation to the private school, as well as supports and services, which Student's Mother described in her testimony as OT and speech/language services. (N.T. p. 235; P-15) Neither Parents nor the District fully addressed this aspect of the Parents' claim in either testimony or their closing arguments. Parents elicited no testimony from District witnesses concerning this claim and Parents' testimony was limited primarily to stating their belief that the District's refusal to provide such services and transportation justified Parents' refusal to permit a District observation of Student in the private kindergarten he is attending. *See, e.g.*, N.T. pp. 321, 323.

Consequently, it is not entirely clear that Parents still consider the August 24, 2009 request for services and transportation an aspect of their claim, and Parents provided no legal authority for the statement that Student "should be receiving related services and progress monitoring at the [Redacted] School" and that the District "should either pay for these services or provide them itself." Parents' Closing Argument at 1. It is uncertain, therefore whether Parents are relying upon a federal or Pennsylvania regulation, intended to assert an equitable claim, or whether such claim is based upon the assumption that they would prevail on the tuition reimbursement claim. There is certainly no evidence in the record of this case that the District offers or provides the services Parents requested to any of its resident students who are enrolled in a private school funded by their parents.

It must be noted, however, that even in the midst of a dispute between the parties with respect to whether the District offered FAPE, and whether Parents are entitled to private school tuition reimbursement, Parents retain the right to enroll their child in private school at

their own expense. If the District does provide services, either directly or through the intermediate unit, to students residing in the District generally, and to eligible students in particular, who are enrolled by their parents in private school, at their own expense, Parents in this case can certainly expect the same, notwithstanding the controversy over tuition reimbursement.

In the absence of any evidence concerning whether regular public school transportation is provided to other District resident students enrolled in the same private school Student is attending, and/or whether/how the District provides supportive services to IDEA eligible or §504 protected handicapped students enrolled in private school, there is no basis for an order requiring the District to provide such services to Student. It should be noted, however, that notwithstanding the District's offer of FAPE, which precludes tuition reimbursement for Student's private school, there is no reason that Student should not be provided the same transportation and other services, if any, generally offered to students enrolled in private schools whose education is funded by their parents, subject, of course, to the same terms and conditions applicable to such students.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that District is not required to take any action with respect to the claims raised in the complaints and amendments submitted in this matter.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

April 20, 2010

