

*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: N.K.

Date of Birth: [redacted]

Dates of Hearing: November 30, 2010, January 7, 2011

CLOSED HEARING

ODR No. **01679-1011-AS**

Parties to the Hearing:

Parent[s]

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Date Record Closed:

January 31, 2011

Date of Decision:

February 14, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student<sup>1</sup> is a preteen-aged resident of the West Chester Area School District (hereafter District) who is eligible for special education and related services on the basis of autism and a speech/language impairment. On September 27, 2010, Student's Parents filed a due process complaint under both the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and Section 504 of the Rehabilitation Act of 1973 (Section 504),<sup>3</sup> challenging the educational program offered to Student by the District, and sought tuition reimbursement for the 2009-10 and 2010-11 school years, as well as reimbursement for an independent educational evaluation (IEE).

The hearing convened over two sessions at which the parties presented evidence in support of their respective positions. For the reasons which follow, I find in favor of the Parents in part and in favor of the District in part.

### **ISSUES**

Whether the District offered a free, appropriate public education to Student for the 2009-10 and 2010-11 school years and, if not, are the Parents entitled to tuition reimbursement; and

Whether the Parents are entitled to reimbursement for an Independent Educational Evaluation obtained in 2010.

### **FINDINGS OF FACT**

1. Student is an preteen-aged eligible student who resides within the District with Student's Parents.<sup>4</sup> Student is eligible for special education by reason of Autism Spectrum Disorder (ASD), Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS), and a speech and language impairment. (Notes of Testimony (N.T.) 18-21)
2. Student began to exhibit compulsive behaviors at the age of approximately three and one half and was evaluated by the local Intermediate Unit (IU), after which Student began receiving early intervention services. Student was also evaluated in 2004 by a psychiatrist who made the diagnoses of anxiety (particularly with respect to separation and new, unfamiliar situations) and PDD-NOS. (N.T. 129-30, 142-43, 150-51)
3. In March of 2006, an Individualized Education Program (IEP) was developed for the 2006-07 school year when Student would enter Kindergarten. The IEP included information from a very recent Evaluation Report (ER) which reported Student's average to low average cognitive ability. After a comparison of Student's cognitive ability with

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<sup>1</sup> Student's name and gender are not used in this decision to protect Student's privacy.

<sup>2</sup> 20 U.S.C. §§ 1401 *et seq.*

<sup>3</sup> 29 U.S.C. § 754.

<sup>4</sup> Reference is made throughout this opinion to the "Parents" in the plural where it appears both parents were acting together or one was acting on behalf of both.

the results of the Kaufman Survey of Early Academic and Language Skills, it was recommended that Student's learning differences be monitored for discrepancies between ability and academic performance (readiness skills). Student's adaptive functioning was also noted to be more delayed than Student's cognitive functioning. (N.T. 152-53; Parent Exhibit (P) 1)

4. Student's IEP also included speech/language, occupational therapy, and physical therapy assessments which reflected needs in all of those areas, particularly with respect to expressive language and articulation and processing sensory information. Additionally, a Central Auditory Processing Disorder (CAPD) was also noted. (P 1)
5. Student's Kindergarten IEP contained goals and short term objectives for improving learning strategies and skills; improving play and socialization skills; improving academic readiness skills (recognizing letters of the alphabet and counting); and demonstrating expressive language skills. There were also goals and short term objectives in gross and fine motor skills, visual motor tasks, motor planning, speech/language skills, and social skills. The IEP included program modifications and specially designed instruction and provided for part-time autistic support. (N.T. 151-52; P 1)
6. Student attended a full-day Kindergarten program in a District elementary school at the beginning of the 2006-07 school year and continued to demonstrate anxiety and behavioral challenges. Student was very anxious about attending the elementary school and typically was crying as Student left for school and returned home. Student also suffered a fractured arm at school sometime in the fall of 2006, and thereafter began attending Kindergarten for only half days at the suggestion of the District and agreement of the Parents due to Student's injury and severe anxiety. Student's psychiatrist increased Student's medication for anxiety over the course of that school year. Student was also evaluated for gastrointestinal symptoms during that school year, and the physician opined that Student's symptoms may have been related to anxiety. (N.T. 20, 131-32, 134, 151, 153-54, 167-69, 296-97; P 1; P 2)
7. The Parents and District executed a settlement agreement over the summer of 2008 which provided for the District's funding of Student's placement in a private school for the 2007-08 and 2008-09 school years as well as for extended school year (ESY) programming for the summer of 2009. (N.T. 19, 291-92; P 4, P 16; School District Exhibit (S) 15)
8. Student attended the private school for ESY programming during the summer of 2008. (N.T. 155; P 3)
9. Even after Student stopped attending the District elementary school, Student continued to get upset when seeing the building or talking about the school. (N.T. 40-41, 172)
10. In December 2008, the private school developed an IEP for Student. (N.T. 155-57; P 7)
11. In the spring of 2009, the District conducted a re-evaluation of Student and issued a Re-Evaluation Report (RR). The Parents had consented to the RR as part of the 2008

settlement agreement with the District, and also consented at the time the evaluation was conducted. The RR included information from prior evaluations including one by the private school in December 2008 as well as input from the Parents. Student's academic performance at the private school was also summarized (N.T. 161-63, 237, 240-44, 292; P 11; S 2)

12. The District's school psychologist observed Student at the private school for one thirty-minute period and administered portions of the Kaufman Test of Educational Achievement – Second Edition (KTEA-II). She also obtained Parent and Teacher Rating Scales of the Behavior Assessment System for Children – Second Edition (BASC-2) from one of Student's Parents and one of Student's private school teachers. (N.T. 230-35, 244-49; P 11; S 2)
13. On the BASC-2, the Parent Rating Scales reflected At Risk or Clinically Significant scores in a number of areas: Anxiety, Atypicality, Social Skills, and Leadership. The Teacher Rating Scales revealed At Risk or Clinically Significant scores in the areas of Anxiety, Depression, Withdrawal, Attention Problems, Adaptability, Social Skills, Leadership, Functional Communication, and Adaptive Skills; the teacher did not respond to the items in the Somatization and Internalization areas to permit scoring. (P 11; S 2)
14. The RR also included speech/language, physical therapy, and occupational therapy assessments conducted in the spring of 2009, which reflected continued needs in all of those areas. Other areas of need included improvement in social skills, academic skills, and task completion. (P 11; S 2)
15. Student was determined to be eligible for special education based on Autism (PDD-NOS) and a speech/language impairment. The RR recommended a highly structured, small group educational environment, speech/language support, and physical and occupational therapy. Further, the RR noted that Student continued to demonstrate difficulty tolerating changes and novel experiences, and recommended counseling to address anxiety and social skills. (N.T. 249-50, 263, 270-71; P 11; S 2)
16. Student's Parents understood at the time of the RR that the District planned to consider returning Student to a District placement for the fall of 2008, but they did not believe that the RR adequately addressed Student's anxiety or sufficiently consider Student's need for a gradual transition back to a District program. They did not, however, express disagreement with the RR to the District. (N.T. 161-65, 205-07, 237-39)
17. The RR was discussed at the beginning of an IEP meeting in June 2009. Student's mother participated in the IEP meeting and was accompanied by a special education attorney/consultant and two representatives of the private school. (N.T. 165-66, 195-97, 238, 299-301; P 14; S 3)
18. The IEP developed in June 2009 included information on Student's present levels of academic achievement and functional performance utilizing information from the RR and other previous reports. Student's significant anxiety, particularly with new people or other changes, was noted. (N.T. 252-53, 341-43; P 14; S 3)

19. Academically, annual goals and short term objectives addressed handwriting, reading/language arts, and mathematics skills. Student's IEP also contained goals and objectives for attending to tasks, using coping strategies for anxiety and frustration, and developing social skills, as well as speech/language, physical, and occupational therapy. Counseling support to address Student's social skills needs and anxiety, as recommended in the RR, was not specifically provided for in this IEP. (N.T. 254-58, 275-77, 306-07, 308-09, 344-46, 348-50; P 14; S 3)

20. As part of the program modifications and specially designed instruction, Student's IEP included a plan for transition back to the District elementary school where Student had attended Kindergarten. That plan, in its entirety, was:

Prior to the start of the school as decided upon mutually agreeable times between school district and parents [Student] will have the opportunity to have at least three visits to the school and classroom that [Student] will be attending in the fall of the 2009-10 school year. [Student] will meet the principal, teacher, PCA [Personal Care Assistant] and therapists. [Student] will have the chance to tour the building facilities.

[Student] will be provided a social story about [Student's] new school to include pictures of teachers, therapists, principal and anyone else [Student] would encounter during [Student's] school day.

(P 14 at 18; S 3 at 18) The members of the IEP team recognized that a plan of transition to the District placement was a matter of importance in Student's IEP. (N.T. 280, 330, 347, 354-55, 370-71)

21. The parents and their attorney suggested that the plan to transition Student to the District elementary school was inadequate and not of sufficient duration. The IEP team also discussed Student's anxiety with respect to the District elementary school where Student had attended Kindergarten, of which the District representatives were already aware. (N.T. 180-81, 196-98, 277-79)

22. Other items of program modifications and specially designed instruction included, among other things, a highly structured, predictable routine; a small group environment with a low teacher-student ratio to develop cognitive and academic skills; reminders of changes prior to transitions; a visual schedule and daily preview of activities; social skills instruction; sensory breaks; clear behavioral expectations; and strategies for coping with stressful situations. A functional behavioral assessment would be conducted within 45 days of initial implementation of the IEP at the beginning of the school year. (N.T. 339-41, 367, 374-75; P 14; S 3) The PCA was to gradually be faded to elimination as Student would "become[] comfortable, experience success and become[] more independent in the school environment." (P 14 at 18; S 3 at 18)

23. This June 2009 IEP provided for full time autistic support with participation with typically-developing peers whenever possible with support. The team expected that if Student demonstrated difficulties with unstructured activities such as lunch and recess,

Student could be placed in a smaller group setting for those periods. (N.T. 356-58; P 14; S 3)

24. On July 16, 2009, the Parents disapproved the Notice of Recommended Educational Placement (NOREP) for Student's return to the District for the 2009-10 school year to the same elementary school where Student had attended Kindergarten. The reasons stated for the disagreement were their specific concerns over the speech/language, physical, and occupational therapy services including their coordination, and the need for one-on-one support for guidance and direction to transition between activities throughout the day which Student could not do independently. The Parents also stated their belief that Student should remain in the private school program. (N.T. 157-60, 172, 310-13; P 8, P 15; S 12, S 13)
25. By letter of August 3, 2009, the District acknowledged the Parents' intention to continue Student's placement in the private school, and it provided the Parents with a copy of the Procedural Safeguards Notice. (N.T. 190, 316; S 14)
26. Also in the summer of 2009, the Parents contacted a private psychologist to arrange to have Student independently evaluated. This evaluator met with the Parents in the fall of 2009, but there was a several month delay before this psychologist was able to schedule actual observations and assessments. (N.T. 33, 164-65, 211-12; P 18)
27. The supervisor of special education, and the principal of the District's elementary school which was proposed for Student's placement in the July 16, 2009 NOREP, asked to meet with the Parents in late August 2009, and they agreed. A meeting convened on September 3, 2009 at which they discussed Student's anxiety related to that particular elementary school and whether any alternative District placements were possible for Student; however, no other specific placements were determined to be options at that time. By that date, the District had already started the school year and Student would begin again at the private school the following week. (N.T. 174-75, 313-15, 317, 321-24)
28. Student attended the private school for the 2009-10 school year and it developed a new IEP for Student in December 2009. (N.T. 176-77; P 17, P 19, P 20; S 4)
29. The private psychologist observed Student at the private school for several hours in February 2010. The observation included a reading class, snack time, and an activity period where the children worked on posters and engaged in play with a peer for a short time. (N.T. 32-33; P 18)
30. The private psychologist also reviewed Student's educational and medical records, interviewed the Parents, and conducted a number of assessments (cognitive, achievement, and visual-motor), in addition to obtaining emotional and behavioral information from Student's Parents and teachers. In direct assessment, Student was very anxious and cried several times during the evaluation. (N.T. 35-38; P 18)
31. This independent evaluator asked Student about returning to the District elementary school where Student attended Kindergarten, and Student became upset and stated that Student did not want to go back there. (N.T. 40, 100-01)

32. On the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), Student demonstrated verbal reasoning abilities (in the Average range) which were better developed than nonverbal reasoning abilities (in the Borderline range). Student’s Working Memory and Processing Speed scores were in the Low Average and Extremely Low ranges, respectively. This evaluator obtained a Full Scale IQ score in the Borderline range. (P 18)
33. The Wechsler Individual Achievement Test – Third Edition (WIAT-II) reflected below average reading skills and low math skills. Student’s standard scores in reading revealed educational progress although the evaluator did find discrepancies between Student’s ability and achievement in that area suggesting a nonverbal learning disability. She also determined that Student was making limited educational progress in math. (P 18)
34. Student’s visual-motor skills were also assessed to be weak and in need of intervention. (P 18)
35. In behavioral and emotional assessment, the private psychologist used the Pervasive Developmental Disorder Behavior Inventory (PDDBI) to obtain information from Student’s Parents and a teacher. Student’s scores were consistent with the PDD-NOS diagnosis with the most significant concerns reflected in the areas of spoken pragmatic language and the specific fears domain. On the Adaptive Behavior Assessment System – Second Edition (ABAS-II), Student’s Parents and the math teacher reported Extremely Low range scores on all composites, while the special education teacher reported Below Average adaptive behavior. The private psychologist opined that Student’s adaptive skills in the private school were improving with the exception of math class where Student has the most difficulty. (N.T. 36; P 18)
36. On the Achenbach System of Empirically Based Assessments (ASEBA), Student’s Parents completed the Child Behavior Checklist (CBCL) and both teachers completed the Teacher Report Form (TRF). Student’s Parents’ ratings on the CBCL reflected a Total Competence score in the clinical range, and a Total Problems score in the normal range with a clinical score noted on the Withdrawn/Depressed Syndrome Scale. On the DSM-Oriented Scales, Student’s Parents’ score on the Anxiety Problems Scale was in the clinical range. (N.T. 36-37; P 18)
37. Student’s special education teacher’s input into the ASEBA through the TRF reflected a Total Adaptive Functioning Score in the clinical range. The special education teacher’s scores were in the normal range on the Total Problems score although the Anxious/Depressed Syndrome Scale was in the clinical range. On the DSM-Oriented Scales, Student’s TRF scores by this teacher were in the normal range with the exception of the score on the Anxiety Problems Scale which was in the borderline critical range. Student’s math teacher provided ratings which were highly consistent with those of the special education teacher. (N.T. 36-38; P 18)
38. In her Independent Educational Evaluation (IEE) Report, the private evaluator opined that Student was flourishing in the private school environment where Student was gaining some independence. She noted that Student “continues to be easily overwhelmed by

transitions” (P 18 at 14) and opined that a return to Student’s former elementary school in the District would not be in Student’s best interest and would likely cause emotional and academic regression. (P 18)

39. The private evaluator made a number of recommendations in the IEE for Student’s educational program which focused primarily on Student’s weaknesses in math skills, visual-motor coordination and writing, reading, spelling, and social skills. (P 18)
40. By letter dated August 5, 2010, the Parents advised that they would continue Student’s placement in the private school and asked the District to support that placement. This was the first communication from the Parents to the District about the 2010-11 school year. (N.T. 183-84, 190-92; P 29; S 19)
41. The District invited the Parents to an IEP meeting in August 2010, and after some attempts at rescheduling the meeting to accommodate schedules, the Parents agreed to attend on August 31, 2010. (N.T. 177-78, 192-94, 381-82; P 24; S 5, S 6, S 20)
42. The IEP developed on August 31, 2010 contained information from the IEE as well as from the December 2009 private school IEP and the District’s spring 2009 RR. Annual goals and short term objectives addressed reading (fluency, decoding/encoding, and comprehension), math (computation and functional math skills), written expression, occupational therapy, physical therapy/adaptive physical education, speech/language therapy, as well as social and coping skills and compliance with teacher redirection. Counseling was not expressly provided in the IEP. (N.T. 385, 387-92, 402-03, 410; P 25; S 7)
43. A number of program modifications/specially designed instruction were also included relating to math computation and application, reading, use of a Total Communication approach during instructional time, and handwriting and spelling needs; in addition, this section of the IEP provided for social skills instruction, encouragement of independence, development of a sensory diet, and instruction in and opportunities for relaxation and calming strategies. Additional program modifications and specially designed instruction addressed direct instruction, small group instruction, modified/adapted instruction in science and social studies. (N.T. 391-96; P 25; S 7)
44. To further support Student, this IEP also included program modifications/specially designed instruction addressing advanced warning of transitions, visual and verbal cues and modeling for non-preferred tasks, additional wait time for verbal responses, monitoring of Student’s navigation throughout the building, and individual or very small group support during inclusion opportunities. Student would also be provided speech/language, occupational, and physical therapies, and adaptive physical education as related services. (N.T. 401-02, 406-07, 416; 425; S 7)
45. A functional behavior assessment (FBA) was planned within the first twenty school days, and the IEP team would also reconvene within two months to assess Student’s transition. The team did discuss a plan of transition but did not create such a plan at the meeting; however, the team would have reconvened to develop a transition plan should Student

return to a District placement. (N.T. 198, 383-84, 397-99, 406, 429; P25; S 7) The transition plan itself stated: “As the school year begins and as part of [Student’s] initial transition back into the public school setting, [Student] should be given the opportunity to eat lunch outside of the regular cafeteria (i.e., special education classroom, therapy room, etc.)” (P 25 at 21; S 7 at 21) A smaller group setting for unstructured activities such as lunch and recess would be addressed based on Student’s individual sensory needs. (N.T. 400-01, 426-27)

46. Student’s proposed placement pursuant to the August 2010 IEP was full time autistic support, in a different elementary school than that Student had attended Kindergarten, with gradual introduction to opportunities to participate with typically-developing peers at lunch, recess, and during special subjects as determined by Student’s anxiety levels. The Parents did not approve the NOREP accompanying the August 31, 2010 IEP, believing that it did not adequately address Student’s needs for a gradual transition. Additionally, Student by that time had already started the school year in the private school, and the District’s school year had also already begun. (N.T. 179-80, 182, 384-85, 404-05, 407, 415; P 25, P 26, P 27; S 7, S 8, S 9, S 16, S 17)
47. The full time autistic support program proposed by the August 31, 2010 IEP and NOREP was a class of five full-time and two itinerant students. Student would have been the eighth student in the class when all students were present. At any given time, in addition to the special education teacher and classroom paraprofessional, there are generally two other adults in the classroom who are assigned to specific students. The class is highly structured with predictable routines. Students are met at the bus or the door to the building and escorted to the classroom to begin the school day. Students are provided direct instruction in small group; they also attend special classes, lunch, and recess outside of the classroom, in addition to related services. (N.T. 422-31, 435-37)
48. There is no question that the private school is an appropriate educational placement for Student. (N.T. 20)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);<sup>5</sup> *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where

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<sup>5</sup> The burden of production, “i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding,” *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and, while the recollections of some of the witnesses may have varied to some extent, the testimony as a whole was essentially consistent. The credibility of particular witnesses is discussed further in this decision as necessary.

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

In this case, the Parents seek tuition reimbursement for the private school placement for the 2009-10 and 2010-11 school years. Under the IDEA, parents who believe that a public school is not providing FAPE may unilaterally remove their child from that school and place him or her in a private school, and also seek tuition reimbursement for the cost of the alternate placement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); *Mary Courtney T.*, 575 F.3d at 242. Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). Consideration of equitable principles is also relevant in deciding whether reimbursement for tuition is warranted. *Id.* In considering the three prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not

controlling in evaluating parents' unilateral placements. *Ridgewood supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id*.

### The 2009-10 IEP

The first question is whether the District's proposed IEP for the 2009-10 was appropriate for Student. The Parents and their expert testified, quite credibly and candidly, that this IEP met the legal requirements for an IEP and, with limited exceptions, appropriately addressed Student's needs. (N.T. 41, 78 (by the expert); N.T. 188-89 (by the Parent)). The specific areas of the IEP which the Parents and their expert did not agree were appropriate were (1) the lack of counseling services to address Student's anxiety which the RR recommended (N.T. 42); (2) the inclusion of a PCA which was a support Student did not need at the private school (N.T. 43-44); (3) the absence of strategies to reduce Student's anxiety, particularly in unstructured settings (N.T. 42-43); and, most significantly, (4) the inadequacy of the plan to transition Student back to the District placement (N.T. 43).

This hearing officer does not find the first two of these asserted flaws to be necessarily fatal to the appropriateness of the IEP. While counseling services were not expressly included in the 2009-10 IEP (Finding of Fact (FF) 19), an IEP need not include each and every recommendation contained in an evaluation report and, further, the District presented credible testimony as to how Student's needs in the areas of social skills and coping with anxiety would be addressed. (N.T. 255-58). It is also noteworthy that the Parents' expert did not herself recommend counseling as a related service for Student. (P 18) With respect to the PCA, the Parents' expert did concede that Student likely would need an adult to facilitate peer interactions and assist with negotiating the hallways and participating in unstructured activities, and that the PCA could be faded as proposed in the IEP. (N.T. 70, 73, 97-98). This hearing officer concludes that the inclusion in the IEP of a PCA to support Student is both appropriate and reasonable given Student's needs.

The other two areas of concern are exceedingly intertwined and not so easily dismissed. Student's high level of anxiety, particularly with new and different situations, was well known to the IEP team which concluded that a plan of transition was a significant need for Student. (N.T. 263-64; FF 13, 15, 18, 19, 20, 21, 22) The plan of transition did nothing to address Student's anxiety over the school building itself (FF 20) and was very limited in scope to prepare Student for this major change. Furthermore, even if some members of this IEP team were not aware of the extent of Student's anxiety with respect to the elementary school where Student attended Kindergarten (N.T. 320-21, 365), the team as a whole was certainly sufficiently informed of this circumstance, including Student's inability to attend that school for full days during the 2006-07 school year, to warrant serious consideration of whether Student would be able to successfully transition back to that placement. (FF 6, 20, 21) The District, however, did not discuss the possibility of other placements with the Parents until after the 2009-10 school year had started (FF 20, 27) and, by then, exploration of alternative placements was clearly not viable for a child who had already returned to the private program and for whom transitions were difficult.

The Parents' expert testified, credibly and knowledgeably based upon her familiarity with Student, that, in her opinion, she did not believe that Student could successfully transition back to the school building where Student had attended Kindergarten.<sup>6</sup> (N.T. 60-61, 104-05) However well constructed the 2009-10 IEP was, Student could not derive meaningful educational benefit from its implementation if Student was not able to successfully make the transition to the placement it proposed. Moreover, the fact that the Parents, at that time, may not have explicitly expressed in the NOREP their concerns over the IEP's minimal transition plan and failure to address Student's anxiety (N.T. 317, 327, 330), they did provide several reasons for their disagreement with that IEP which were directly related to these particular flaws. (FF 21, 24) In any event, "a child's entitlement to special education should not depend upon the vigilance of the parents[.]" *M.C. on Behalf of J.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996).

In sum, this hearing officer concludes that Parents have met their burden of establishing that the 2009-10 IEP, which proposed returning Student to the elementary school where Student had attended Kindergarten with a minimal plan of transition, was not reasonably calculated to provide Student with meaningful educational benefit and, thus, was not appropriate. For purposes of tuition reimbursement, the next consideration, the appropriateness of the private placement, is not in question. (FF 48) That leaves the third step, consideration of the equities. On balance, I find that the conduct of the parties was not unreasonable or improper on either side. The Parents provided timely notice to the District, via the July 16, 2009 NOREP, that they intended to keep Student in the private school (FF 24), and there is no suggestion or evidence that the Parents were not acting in good faith in developing the IEP for the 2009-10 school year. Although I also find no basis on which to conclude that the District was acting in anything other than good faith, the record as a whole supports the determination that the tuition reimbursement award for the 2009-10 school year should not be reduced under this third step. *See Forest Grove School District v. T.A.*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2484 (2009) (explaining that tuition reimbursement award may be reduced where equities warrant, such as where parents failed to provide notice).

### The 2010-11 IEP

The Parents' contention that the 2010-11 IEP failed to provide FAPE to Student is premised upon (1) the lack of counseling (N.T. 52, 80-82); (2) the inclusion of Total Communication and the Picture Exchange Communication System (PECS) as items of specially designed instruction (N.T. 58-59); (3) the failure to address Student's nonverbal learning disability; and (4) the absence of a transition plan (N.T. 52-56). Their expert did not observe the proposed placement at the second elementary school (N.T. 53) and, thus, this witness' testimony on the flaws in the 2010-11 IEP were limited to the face of the document.

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<sup>6</sup> This hearing officer accorded little weight to this expert's testimony that suggested that there had to be justification for removing Student from the private school where Student was flourishing (N.T. 60-61). While an understandable perspective, the standard for evaluating a school district's special education program does not include this element.

The Parents' expert conceded that the 2010-11 IEP contained a number of items of specially designed instruction to address Student's anxiety needs (N.T. 52), but she first faulted the program for its absence of counseling services. As noted above, however, this expert did not make any recommendation in her IEE that Student receive counseling services (P 18) and, thus, it does not follow that the failure to include same would render the IEP inappropriate. The Parents' expert next opined that the inclusion of Total Communication and PECS as items of specially designed instruction were not appropriate because Student is verbal and should not have a need for these types of communication strategies. (N.T. 58-59) However, the District's Special Education Liaison provided a credible and, in this hearing officer's estimation, an educationally sound, explanation for including these strategies in Student's IEP in the event that Student, who has PDD-NOS, would not successfully and immediately use verbal communication skills in a new setting. (N.T. 393-94) There is certainly no reason why the District could not delete these items of specially designed instruction should the IEP team determine that they were not necessary while at the same time being prepared to implement them if they were. Next, with respect to Student's nonverbal learning disability, the Parents' expert candidly conceded that including this disability in the IEP would not have substantially changed its content in addressing Student's needs. (N.T. 59-60, 95-96) For these reasons, I cannot conclude that the 2010-11 IEP was inappropriate on these bases.

With respect to the absence of a transition plan and the Parents' expert's concern with the date of the 2010-11 IEP (N.T. 52-56), this hearing officer concludes that the District cannot be faulted. There was substantial testimony that the IEP team discussed Student's transition and was prepared to develop a plan for Student to become accustomed to a new placement in the District in the event that would occur. (FF 45, 46, 47) Importantly, and as the District correctly asserts, its obligation to develop an IEP for Student for the 2010-11 school year was only triggered when the Parents provided notice to it that they were seeking its support of the private school for another year.<sup>7</sup> The August 5, 2010 notice to the District of the Parents' intention (FF 40) left little opportunity for it to ensure that a fully developed IEP, with a plan of gradual transition, was prepared prior to the start of the 2010-11 school year. Even more critically, the 2010-11 IEP proposed Student's placement at a different elementary school (FF 46), one with which Student had not associated any anxiety or negative reactions. Accordingly, Student's transition to this placement would necessarily have entailed considerations quite different from those for the placement proposed by the 2009-10 IEP and NOREP. It is, therefore, quite reasonable that the District determined the transition plan could and would be developed, with parental input, in the event that Student actually was planning to return to a District placement.

Even if the 2010-11 IEP should be considered inappropriate and a denial of FAPE on the basis that it lacked a specific transition plan, and recognizing again that there is no question that the private school is appropriate, the equities would favor the District due to the timing of the notice of the Parents' intentions in August 2010. The District responded promptly to that notice, convening an IEP team as quickly as possible and accommodating the Parents' scheduling requests. (FF 40, 41, 42) Given the Parents' continued, and wholly reasonable, belief that a period of gradual transition was necessary for Student, the District was at a distinct disadvantage

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<sup>7</sup> See, e.g., 34 C.F.R. §§ 300.137, 300.148, 300.323(a); see also Letter to Goldman, 53 IDELR 97 (2009). The Parents do not suggest that the District had an obligation to develop an IEP for Student before their August 5, 2010 letter to the District.

at the beginning of August 2010 to ensure that this need was appropriately addressed for the proposed new setting before the school year began. Additionally, it may also be reasonably inferred that the Parents, however understandably and well-intentioned, had already determined by the time of the August 2010 IEP meeting that Student would be returning to the private school for the 2010-11 school year, and that no transition plan would be necessary. For all of these reasons, if the 2010-11 IEP were deemed inappropriate, this hearing officer would conclude that the equities warrant denial of tuition reimbursement for the 2010-11 school year. *See, e.g., In re Educational Assignment of C.S.*, Spec. Ed. Op. No. 1658 (2005) (finding that the equities favored the school district where the parents intended to send the child to their chosen placement irrespective of whether the district's proposed placement was appropriate, warranting denial of tuition reimbursement).

### IEE

The last claim is whether the Parents are entitled to reimbursement for the IEE based on the adequacy of the District's RR. In conducting an evaluation, a local education agency must ensure that it uses procedures to determine whether the child has a disability and to determine the child's educational needs. 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c)(2). Re-evaluations are also subject to specific requirements and limitations. 20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303.

The child must be assessed "in all areas of suspected disability." 20 U.S.C. § 1414(b)(3)(B); *see also* 34 C.F.R. § 300.304(c)(4). The IDEA regulations provide further guidance for conducting the evaluation or re-evaluation.

(b) *Conduct of evaluation.* In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the Parent, that may assist in determining—

(i) Whether the child is a child with a disability under § 300.8; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. § 304(b); *see also* 20 U.S.C. § 1414(b)(2). The evaluation must assess the child "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status,

and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Assessments must be administered in a manner which is nondiscriminatory, in a form designed to yield accurate information, and for the purpose for which the assessments were designed, by a trained professional, and in accordance with the test maker’s instructions. 20 U.S.C. § 1414(b)(3); 34 C.F.R. § 300.304(c)(1). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Further, the team must ensure that it considers existing information about the child through the following.

(a) *Review of existing evaluation data.*

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must—

(1) Review existing evaluation data on the child, including—

- (i) Evaluations and information provided by the Parents of the child;
- (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
- (iii) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the child’s Parents, identify what additional data, if any, are needed to determine—

(i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or

(B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;

(ii) The present levels of academic achievement and related developmental needs of the child;

(iii)(A) Whether the child needs special education and related services; or

(B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

34 C.F.R. § 305(a); *see also* 20 U.S.C. § 1414(c)(1). When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 34 C.F.R. § 300.502(b); *see also* 20 U.S.C. § 1415(b)(1). Stated another way, one critical consideration for reimbursement for an IEE is that the parents must disagree with an evaluation of the District. *See, e.g., P.P. v. West Chester Area School District*, 585 F.3d 727, 740 (3d Cir. 2009).

In this case, the Parents did not express their disagreement with the District's RR. (FF 16) While there is no explicit requirement that parents make their disagreement known at the time of an evaluation, the very short delay between the RR and the Parents' first contact with the private evaluator (FF 25) strongly suggests that they did not agree with the District's evaluation. Nevertheless, the claim for reimbursement fails on a more fundamental basis.

After careful review, this hearing officer concludes that the District's educational evaluation of Student in the spring of 2009 was appropriate according to the applicable law. The evaluation included functional, developmental, and academic information from a variety of sources about Student. Specifically, the evaluation included a review of prior records and evaluations, as well as information from the Parents and the private school. (FF 11, 12, 13, 14) The school psychologist observed Student at the private school. (FF 12) She also administered an achievement test using an appropriate norm-referenced, technically sound instrument. (FF 12) To obtain information about Student's behavioral and emotional functioning, the District utilized the BASC-2 Rating Scales from the Parents and Student's teachers. (FF 13) Also included in the RR were recent speech/language, physical, and occupational therapy assessments. (FF 14). Taken together, all of this information, existing and newly obtained, provided a sufficient basis for the District to assess Student in all areas of suspected disability and to identify Student's needs for special education and related services.

The Parents contend specifically that the District's RR did not seek behavioral/emotional information beyond the BASC-2; did not include cognitive testing, projective testing, psychiatric evaluation, or assessments of Student's adaptive functioning, written expression, or auditory processing skills; and lacked curriculum based assessments. (Parents' closing argument at 12-13) While the independent evaluator did administer the PDDBI, ABAS-II, and ASEBA, which went beyond the information derived from the BASC-2, those measures did not produce social/behavioral information which was significantly different from that obtained by the District in the RR and which was critical to development of an appropriate educational program for Student.<sup>8</sup> All of the other testing which the Parents claim was lacking was included, in one form or another, by incorporation of various other evaluations of Student. Specifically with respect to these asserted flaws, the RR contained information on Student's adaptive functioning; cognitive assessments from prior evaluations; classroom-based assessments in Reading, Math, and Language Arts; a classroom observation and information from Student's private school teachers; and results of a prior auditory processing evaluation. (P 11; S 2) The record as a whole does not support the conclusion that the District's evaluation was lacking in any significant respect such that it should be considered inappropriate in assessing Student's abilities, strengths, and needs in the spring of 2009 in order to develop an appropriate educational program. Accordingly, there is no basis on which to order reimbursement for the IEE.

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<sup>8</sup> As noted above, the specific portions of Student's IEPs which were challenged in this hearing were very limited in scope.

## Section 504 Claims

The obligation to provide a “free appropriate public education” is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm. 2005). Because all of the Parents’ claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

## CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that the District did deny FAPE to Student for the 2009-10 school year and that the Parents are entitled to tuition reimbursement for that school year; that the District did not deny FAPE to Student for the 2010-11 school year; and that the Parents are not entitled to reimbursement for the IEE.

## ORDER

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

1. The District did not offer FAPE to Student for the 2009-10 school year, and the Parents are accordingly entitled to tuition reimbursement at the private school for the 2009-10 school year.
2. The District did not fail to offer FAPE to Student for the 2010-11 school year and no remedy is warranted.
3. The Parents are not entitled to reimbursement for the IEE.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

February 14, 2011  
01679-1011AS