

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

DUE PROCESS HEARING

Name of Child: I.T.
ODR #02004/10-11 KE

Date of Birth:
[redacted]

Dates of Hearing:
March 22, 2011
March 29, 2011

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Perkiomen Valley School District
3 Iron Bridge Drive
Coatsville, PA 19426

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Frederick Stanczak, Esquire
179 North Broad Street 2nd Floor
Doylestown, PA 18901

Timothy Gilsbach, Esquire
Fox Rothschild
10 Sentry Parkway Suite 200
PO Box 3001
Blue Bell, PA 19422

April 13, 2011

April 14, 2011

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is an eligible kindergarten student on the autistic spectrum residing in the Perkiomen Valley School District (District). The Parents requested this hearing given their disapproval of the placements and programs offered to Student, specifically objecting to the initial proposal to place Student in the autistic support classroom for half the school day in addition to a half-day in the regular education kindergarten, and to the District's refusal to provide home-based ABA services as part of Student's program. They are seeking reimbursement for the ABA they provided privately and desire continuation of ABA at the level currently being provided. The District maintains that it offered Student appropriate placements and programs.

An ancillary issue is the Parents' position that the ABA program provided in the home is a pendent service and therefore they should be reimbursed from the point the District became responsible for Student's education to the conclusion of these proceedings. The District maintains that pendency does not apply.

Issues

The Issues to be addressed in this decision, as articulated on the record by the hearing officer and endorsed on the record by counsel for both parties, are as follows:

1. Was the IEP offered to Student in August 2010 inappropriate? Specifically, was the proposed placement in the autistic support classroom for half the day and a regular education kindergarten classroom for half the day inappropriate, and was the refusal to provide a home-based ABA program inappropriate?
2. Was the IEP offered to Student in October 2010 inappropriate? Specifically, was the proposed placement in regular education kindergarten for half the day with speech/language therapy, occupational therapy, social skills groups and autistic support but without provision of a home-based ABA program inappropriate?
3. In order for Student to receive FAPE does Student require ten hours per week of ABA programming including supervision and staff meetings?
4. If Student does require the ABA program should the Parents be reimbursed for their payments for this service from the beginning of the school year until the present?
5. Was the ABA program being funded by the Parents a pendent placement?

¹ The decision is written without further reference to the Student's name or gender to provide privacy.

Findings of Fact

1. The Student resides in the District and is eligible for special education services under the classification of autism. The Student is high functioning. [NT 31, 42]
2. The Student has a slightly older sibling, also on the autistic spectrum, who is severely impaired, only began to speak about six months ago, and is significantly cognitively challenged. [NT 42, 47-49]
3. When the Student was in preschool the [local] Intermediate Unit (IU) funded 12 hours per week of home-based ABA. [NT 33-34]
4. Student's preschool Early Intervention IEP also provided for the delivery of speech therapy once a week for 30 minutes. [NT NT 91; P-10]
5. Pursuant to a January 2009 Reevaluation Report, the Parents and the District agreed that the Student should defer kindergarten entrance for one year. [NT 34-35; S-16²]
6. The Student attended a private regular education preschool four days a week and seemed to enjoy playing there. [NT 42]
7. The District reevaluated the Student in March 2010 prior to entrance into kindergarten. [NT 36-37; S-28]
8. On March 31, 2010 the District proposed an IEP for the Student that provided for a half day in a regular education kindergarten classroom and a half day in the autistic support classroom. [NT 44-45, 51-52; S-30]
9. The Parents disagreed with this proposal because they believed the autistic support classroom would serve children who were not at the Student's level of functioning, particularly in the verbal sphere. [NT 46-47]
10. The Parents' belief about the autistic support classroom was based upon their older child's having been placed in that classroom the previous year. [NT 46, 104, 133; P-17]
11. In the previous year, Student's sibling and another child were on the lower end of functioning. The other children in the classroom were all high functioning and those children are currently fully included in regular education first grade with supports and are not in an autistic support class. [NT 409-410]

² School District exhibits are designated as "S" and Parents' exhibits are marked as "P". When exhibits were duplicative, either the District or the Parent exhibit was removed. See Transcript Volume II pages 432-440. See also the "Cross List of Exhibits" that is included with the record.

12. On August 8, 2010 the Parents expressed their disagreement in a letter from their attorney to the District's attorney. [NT 53, 104; S-35]
13. At the end of August 2010 and/or the beginning of September 2010 the District issued a slightly revised IEP and another NOREP. A letter from the District's attorney to the Parents' attorney noted the revisions in the IEP. The Parents rejected the NOREP. [NT 56-58; S-30, S-36, S-38, S-40]
14. The Parents continued to believe that the offered autistic support classroom would serve children who were lower functioning than the Student and feared the Student would take on their behaviors. [NT 58-59]
15. The Parents did not visit the autistic support classroom that the District was proposing for the Student at any time during the current school year. [NT 49, 97, 365]
16. The Parents do not know if the autistic support classroom offers ABA and/or Verbal-Behavior. [NT 130]
17. The Parents rejected the NOREP, but did allow the Student to attend the regular education classroom for half the day. [NT 52, 78, 96 375; S-34]
18. On October 27, 2010 the IEP team met and revised the IEP to accommodate the Parents' wishes for placement in the half-day regular education kindergarten only. However, the District continued to believe the autistic support classroom for the other half of the day was appropriate. [NT 422; S-53]
19. Although the Parents wanted the District to provide a home program for the Student which encompassed ABA/Verbal-Behavior, the IEP team did not recommend a home program because it determined that Student's needs did not warrant that level of service. The Parents also believed that the Student required more speech therapy per cycle. The Parents did not approve the NOREP. [NT 75-76, 83-84, 135, 423, S-53, S-55]
20. The teacher assigned to the autistic support classroom holds Pennsylvania certification in regular education and special education. She holds an undergraduate degree in regular and special education, and a master's degree in education. [NT 362]
21. The teacher assigned to the autistic support classroom is certified in Applied Behavior Analysis through Penn State University. She has worked on implementing and programming aspects of ABA home programs since 1999 and continues to do this part time. [NT 363]
22. The teacher assigned to the autistic support classroom will sit for her board certification in ABA this summer. [NT 363]

23. The teacher assigned to the autistic support classroom has been trained in and implemented Verbal-Behavior. [NT 363, 398-399]
24. The autistic support teacher wrote the Student's IEP in spring 2010, and in the current school year worked with the Student in the afternoon implementing the IEP by providing autistic support. [NT 364]
25. Currently the autistic support classroom has six students, the teacher, and two assistants. The sixth child came recently; at the beginning of the school year there were five children in the class. [NT 364, 408]
26. The autistic support class meets in the morning. The children receive their pull-out supportive services in the morning such that they do not need to miss time from the regular education kindergarten. In the afternoon all the students in that classroom are fully included in regular education kindergartens, split up among three classrooms. [NT 365]
27. The autistic support teacher and her assistants provide support to these children in their regular education kindergarten classrooms. [NT 365]
28. The five original children³ in this year's autistic support classroom are all verbal, all on the higher end of the autistic spectrum. They all have high academic skills. They are all being instructed at or above kindergarten level. Three of the students are being instructed at the first grade level. [NT 267, 366-367, 369, 408-409]
29. The majority of instruction in the autistic support classroom is done in small groups of two or three based on each child's individual needs. [NT 367-368]
30. The children receive pre-teaching of the Everyday Math lessons that will be covered in the regular education kindergarten and the children begin doing guided reading in the fall whereas in the regular education kindergarten guided reading does not begin until January. [NT 369]
31. Social skills instruction is done in the autistic support classroom in small groups on a daily basis, using such techniques as social stories and role play. [NT 370-371]
32. The Student receives social skills group as per the IEP with first graders because the other autistic support kindergarteners in the autistic support classroom receive their social skills group together in the morning. [NT 371-372]
33. The District's behavior specialist who is the provider of the social skills group holds an undergraduate and a master's degree in clinical psychology. She is currently enrolled in Penn State's Applied Behavior Analysis certification

³ There was no testimony about the sixth, recently added, child.

- (BCBA) program. She has worked as a behavior specialist for seven years, and has received between 20 and 30 hours of training in ABA each year in order to maintain her positions. She took a workshop in Verbal-Behavior through the Intermediate Unit a few years ago. [NT 299-301, 324]
34. Student's social skills group works at the highest level of social skills instruction that the District's behavior specialist provides in the group setting. All the children in Student's group are very verbal, all are very interested in interacting with others and they appear very close to typical in their ability to socialize. [NT 301, 325]
 35. During the social skills group Student works on goals in the IEP. [NT 309-309]
 36. Student surprised the District's behavior specialist early on with Student's ability to have multiple reciprocal exchanges on topic. Student was curious about peers and was independently asking questions to gather information from peers. [NT 309-310, 322]
 37. At the time of the October IEP the District's behavior specialist recommended a reduction from two social skills group sessions per cycle to one per cycle because the Student's use of skills in the regular education setting in the natural environment did not warrant that much time away from academics to teach social skills separately. Student was far above the level of a child who would require two social skills groups per cycle. [NT 315]
 38. Results of a Functional Behavior Analysis (FBA) that the District's behavior specialist completed in the early part of the school year (September-October) through observation in the regular education kindergarten class (natural environment) and in the social skills group supported her recommendation to the IEP team to reduce the Student to one social skills group per cycle. [NT 316-319, 321, 333-334, 343-344; S-73]
 39. The autistic support classroom utilizes ABA, which involves a stimulus or demand, a response, and a reinforcement. The majority of the children in the classroom have a token system or a star system, with verbal praise throughout. [NT 373-374]
 40. The Verbal-Behavior component is provided through daily communication work time when the children work on pronouns, idioms and other language issues that come up incidentally. [NT 370, 412]
 41. Because of the level of the children in this year's autistic support classroom, the Verbal-Behavior is at an intraverbal level, such as asking and answering questions at a higher level, rather than practicing manding (asking for things) and tacting (labeling things), as these children are functioning at a level where they do not need that type of instruction. [NT 374-375, 424]

42. The autistic support teacher is in regular contact with the regular education kindergarten teachers, and on a formal basis she is in contact personally or through email with them at least weekly. [NT 372-373]
43. Because the Student's IEP has academic goals, the autistic support teacher works one-to-one with Student in the afternoon kindergarten class once a cycle. [NT 375]
44. During the one-to-one sessions the autistic support teacher works on reading, sight words and comprehension. Student has done very well in these areas. [NT 384-387, 392-393-417, 416; S-68]
45. Student greets peers, interacts verbally with them and plays with them. [NT 385-386]
46. The autistic support teacher observes the Student in the regular education setting and takes data on the "attending" and "participating" goal. [NT 375-376 391]
47. Data collection is taken for Student by the autistic support teacher, the regular education teacher, the social skills teacher and the speech/language pathologist. [NT 381-382; S-66, S-68, S-69]
48. The regular education kindergarten teacher has been a kindergarten teacher for 29 years. [NT 217]
49. The regular education kindergarten teacher testified that the Student interacts very well with typical peers, initiating reciprocal conversation and playing with them. Student does assigned classroom jobs. When it's time for academic work, the Student is compliant and does very well. [NT 219-220]
50. Student has tested at the first grade reading level and on the kindergarten grade level in math, social studies, and science. There are no academic concerns. Student's report card grades have not been adjusted to accommodate Student's disability. [NT 221-222; S-69]
51. Student presents in school as "a typical kindergartner" and does well behaviorally and academically. [NT 222-223]
52. Although the Parents wanted more speech services included in the IEP, the speech pathologist's standardized testing revealed that Student did not need additional speech services. [NT 389]
53. In addition to the Student's not needing additional speech services, the District was hesitant to increase them since, as the Student only attends school a half-day, the Student was already pulled out of the regular education kindergarten class for

- OT, speech, social skills and autistic support. The children attending both regular education kindergarten and the autistic support kindergarten receive their pull-out services during the autistic support classroom [morning] part of the day. [NT 389-390]
54. The Parents' expert witness has a master's degree in occupational therapy and a master's degree in applied behavior analysis. She has held BCBA certification since 2008. [NT 143-144]
 55. The Parents' expert owns a business that provides ABA consultation and OT services to children. She provides 12 hours per month of consultation services for the Student through her business. [NT 147, 200-202, 207-208]
 56. The Parents' expert has also provided home based ABA consultation through her business to the older sibling. The Parents have developed considerable trust in this individual. [NT 111-112]
 57. The Parents' expert observed the autistic support classroom during the previous school year when the Student's sibling was enrolled. She observed the children in the class that year to have significantly more severe language delays and behavior problems than the Student has. She was concerned that if other children at that same level were in the autistic support classroom this year it would not be an appropriate placement for the Student. However, she did not observe this year's autistic support classroom. [NT 193-194]
 58. The Parents' expert did an initial evaluation of the Student in May 2010 at the Parents' request, and began providing consultation services to the Student in September 2010. [NT 147-149, 154]
 59. Based upon her assessment, the Student had some subtle language deficits. Student's knowledge of basic pre-reading and math skills were not a major concern. [NT 152, 157; P-12]
 60. The Parents' expert devised a set of goals based upon her evaluation of the Student. The overall goals of the home program are to increase the Student's functional communication and social interaction skills and support the Student in learning academic material so that the Student can be fully mainstreamed and no longer require special education services. [NT 156]
 61. The Student's needs are more subtle than other children with autism. Student's goals involve increasing the number of Student's conversational exchanges, expanding Student's preferred conversation topics to create a back-and-forth with other children, recognizing when someone is making fun versus complimenting the Student and responding appropriately as opposed to scowling or getting upset. [NT 157-158]

62. In the home program the Student receives 12 hours a week of one-to-one therapy from two aides, and 12 hours a month of consultation from the Parents' expert. [NT 159-161]
63. The data charts produced by the Parents' expert from data gathered by the ABA home team reflect a high level of mastery of desired responses [e.g. capital letters, Dolch sight words, skip counting, irregular plural nouns, irregular verbs, summarizing stories, reciprocal conversations (number, length, without omitted words or phrases, without tense errors, without pronoun errors, without plural noun errors, without abrupt transitions, without clarity/volume errors, staying with a peer, making transitional statements, without defective/omitted prepositions), defining idioms, matching words that rhyme, tacting, recalling and telling movie scenes] and a low level of occurrence of undesired responses [e.g. unkind words, unkind faces, poor sportsmanship, scowls]. P-24
64. The high level of mastery of the targeted behaviors in the home ABA program has been charted using numerical data points. For example, Student mastered Dolch sight words at a level of 80% between 10-2-10 and 12-25-10 and at a level of 90% beginning 2-5-11; summarizing stories has been at 80% or above in 10 of 14 data points since 2-18-11; incidents of unkind words, unkind faces and poor sportsmanship started at 2 on 2-25-11 and have been at 0 frequency since 3-2-11; total scowls in session in 6 out of 32 data points has been at one or below, with zero being recorded for the last 9 data points. Percentage of grammatical accuracy in reciprocal conversations has been consistently around 90% with many instances of 100%; percentage of reciprocal conversations without abrupt transitions has been at 100% in virtually all data points since 1-10-11; clarity/volume errors are predominantly at 80% or above since 1-10-11; and, percentage of conversations without miscellaneous errors has been at virtually 100% since 1-10-11. [P-24]
65. Other mastery, demonstrated by consistently upward achievement for desired skills and consistently lowered frequency of occurrence for undesirable behaviors cannot be described clearly because the graphs do not show the ceiling (for example irregular plural nouns, idioms, rhyming). [P-24]
66. As assessed using the VB-MAPP, Student's skill set is strong. There are a few areas of deficit that would require minor levels of instruction to meet the goals. Group functioning was not tested since the Student receives ABA instruction alone the great majority of the time. [NT 399-400; P-24a]
67. Based on the data collection done by the home ABA team regarding when a skill was introduced and when it was mastered, the autistic support teacher observed that Student was mastering skills frequently. Based upon her own experience of providing ABA in home settings and working on home programming, and based on seeing the Student perform in the regular education kindergarten setting, she

- concluded that Student could have mastered these skills without a high level of one-to-one instruction. [NT 421, 428-429; P-24]
68. The District's behavior specialist, who has developed and run home-based ABA programs, testified that they tend to be very restrictive because [the number of hours doing] ABA limits a child's exposure to everyday interaction, and ultimately the goal is to take the instruction into the natural environment and to be independent. [NT 346]
 69. The District's behavior specialist believes that the Student is at a point where Student is able to learn in the natural environment with minimal assistance or redirection with prompting. [NT 346-347]
 70. The Parents' expert observed the Student in the regular education kindergarten classroom on two occasions in this current school year. In December, during a brief observation, she observed the Student following routines with very little support, smiling and looking happy. In an observation that was recent, she observed that a lot of concepts specifically targeted in the home program had generalized to the school setting. Student was following routines with very little extra support compared with peers, and Student seemed happy to be there. [NT 176-180]
 71. During the Parents' expert's observation she saw that many of the skills worked on in the home ABA program were being presented in the classroom. [NT 181]
 72. In a letter dated August 8, 2010 the Parents through counsel proposed a set of goals prepared by their expert to be added to the IEP. [NT 55; S-35]
 73. The autistic support teacher offered the opinion that some of these goals were inappropriate for a child in kindergarten, and some are addressed in kindergarten with typical peers. The regular education teacher's testimony, given in another hearing session prior to the session in which the autistic support teacher testified, corroborates this. [NT 225-227, 244, 376-380, 401-406]
 74. The Parents' expert proposed some goals to be met as criteria for reducing private ABA home-based services to 10 hours per week and then to 8 hours per week. The autistic support teacher testified that although the goals were appropriate, they should and would be addressed on an ongoing basis with a child on the autistic spectrum and should not be used as criteria for discharge from ABA. [NT 81-82, 163, 393-396; S-71]
 75. The Parents' expert observed the autistic support classroom in January 2010, last school year. She observed in the afternoon when there were only two students in the classroom at that time of day, one of whom was the Student's sibling. The students present in the classroom at the time the Parents' expert observed were more impaired and needed a higher level of support such that they did not spend

- the entire afternoon in regular education kindergarten classrooms like the other children placed in the autistic support classroom that year. [NT 365-366]
76. The Student's last approved IEP was for preschool Early Intervention services. The [local] IU funded 12 hours of ABA⁴ weekly. [NT 32-33; P-10]
 77. The NOREP the Parents disapproved in May 2010 noted above the signature line, "[except for interim alternative educational settings] your child will remain in the current program/placement only if you request a due process hearing or mediation through the Office for Dispute Resolution. If you do not request Due Process or Mediation through the Office for Dispute Resolution, the LEA will implement the action/recommendation". The NOREP provides contact information for the Office for Dispute Resolution. [NT 101-103; S-34]
 78. Although the Parents checked "Mediation" on the NOREP they did not file for Mediation with the Office for Dispute Resolution until September 1, 2010. [NT 103; S-37]
 79. The District declined to participate in mediation and in a letter dated September 1, 2010 the District through counsel so informed the Parents. [NT 113-114; S-38]
 80. The September 1, 2010 letter from the District counsel to Parents' counsel also noted, "Please be advised that the District does not intend on reimbursing pendent services for [Student] unless Due Process is requested and a complaint is filed with the Office for Dispute Resolution". [P-2]
 81. Although the Parents checked "Due Process Hearing" on the disapproved NOREP they signed on September 6, 2010, they did not file their Due Process complaint until January 28, 2011. Above the signature line the NOREP again stated, "[except for interim alternative educational settings] your child will remain in the current program/placement only if you request a due process hearing or mediation through the Office for Dispute Resolution. If you do not request Due Process or Mediation through the Office for Dispute Resolution, the LEA will implement the action/recommendation". The NOREP provides contact information for the Office for Dispute Resolution. [NT 108-110, 116; S-40, P-5]
 82. By an October 11, 2010 letter directly to the Parents, the District noted that the Parents indicated they wanted a Due Process Hearing when they checked the NOREP. The District provided online Office for Dispute Resolution contact information for the Parents to obtain complaint forms. The District also included a copy of the Procedural Safeguards Notice. [NT 115-117; S-49]
 83. Again, by letter dated November 15, 2010 directly to the Parents the District reiterated that it is the responsibility of the Parents to file a Due Process

⁴ In the IEP this service is referenced as "Personal Care Assistant".

- Complaint if they want a hearing, and again supplied the website for obtaining complaint forms. [NT 120-121; S-57]
84. The Parents are given copies of the Procedural Safeguards “all the time” according to the [parent]. [NT 117]
85. By letter dated December 9, 2010 directly to the Parents, the District informed the Parents that pendent services would “not be provided or funded by the District until a Due Process hearing complaint is filed with the Office for Dispute Resolution”, reiterated that it is the Parents’ responsibility to file, and again provided the Office for Dispute Resolution website and again enclosed the Procedural Safeguard Notice. [NT 67-68, 123; S-60]
86. The Parents filed their Due Process complaint on January 28, 2011. [NT 120-121, 124-125; P-5]

Discussion and Conclusions of Law

In the instant matter, the Parents have continued their child’s home-based ABA program, previously provided through the IU, from the beginning of the current school year through the present, and are seeking reimbursement for this service as having been necessary for FAPE as well as an order that the service must be incorporated into the current IEP. Alternatively the Parents argue that pendency applies to the ABA program and that they should be reimbursed for past expenditures, even if the program is no longer found to be required for the Student to receive FAPE

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome determining rule applies only when the evidence is evenly balanced in “equipoise,” as otherwise one party’s evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parents requested this hearing to challenge the District’s program and were, therefore, assigned the burden of persuasion pursuant to *Schaffer* and also bore the burden of production. On the issue of program/placement, the Parents failed to meet their burden of persuasion and could not prevail, given the preponderance of the evidence in the District’s case and the resulting lack of evenly balanced evidence between the parties. With regard to the pendency issue, the documentary evidence presented by both the Parents and the District supports a finding that the District indicated that the home based program would be funded at the point when the Parents filed for due process, and therefore the Parents partially prevail on this point.

Once disabled children are identified as being eligible for special education services the IDEA requires the State to provide them with a “free appropriate public education”. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26

School districts provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefit”, a principle established by nearly 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009).

“Meaningful educational benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk*.

Under the Supreme Court’s interpretation of the IDEA in *Rowley*, and in interpretations rendered in other relevant circuit court cases, a school district is not required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity”. There is no requirement to provide the “optimal level of services.” *Mary Courtney T. v. School District of Philadelphia*; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania’s federal court in the Eastern District recently noted, “Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit.

After the District evaluated Student as part of the transition to school-age programming, the IEP team developed a program and placement that included daily participation in the

autistic support classroom in the mornings and daily participation in the regular education kindergarten classroom in the afternoons. [FF 7, FF 8] The Parents rejected the proposed placement in the autistic support classroom and refused to allow Student to attend it, based on their belief that the other students in that class were considerably lower functioning than Student. [FF 9] They formed this impression because an older sibling of Student, who was significantly lower functioning than Student, had been in that classroom the previous [2009-2010] school year. [FF 10] Unfortunately the Parents did not inquire about the make-up of the group of children entering that classroom for the 2010-2011 school year, and although they and their expert observed the classroom the previous year when the sibling was in it, they did not observe the classroom in the 2010-2011 school year. [FF 15, FF 57] The makeup of the autistic support class in 2010-2011 is different from the previous year; in 2010-2011 all the children are verbal and all, like Student, are high functioning. [FF 28, FF 41]

The autistic support classroom is taught by a teacher who is dually certified in regular and special education, who is in the process of obtaining her Behavior Specialist certification from the Penn State program, and who has had training in both Verbal-Behavior and ABA. [FF 21, FF 22, FF 23] There are two teaching aides in the classroom as well, such that the current 6 children are covered by a 2:1 student-teacher ratio. [FF 25] The autistic support class utilizes principles of ABA and Verbal Behavior during the class sessions, in accord with the functioning levels of the children. [FF 39, FF 40, FF 41] The autistic support classroom staff teaches and pre-teaches kindergarten to first grade academic material depending on the level of each child. [FF 28, FF 29] The children's supportive services, such as speech/language therapy, occupational therapy, and the social skills group, are provided in the morning to avoid the children's being pulled from the afternoon regular education setting to receive them. [FF 26]

During the hearing the District presented preponderant evidence that it offered the Student an IEP that went well beyond the guaranteed "basic floor of opportunity". The all-day program and placement that combined the autistic support classroom and the regular education classroom, with delivery of supportive speech, OT and social skills therapies, offered a reasonably calculated plan under which the Student could derive meaningful educational benefit. The District is uniquely fortunate to have a master's level autistic support teacher who combines dual certification in regular and special education, with pending certification in ABA and with training in Verbal-Behavior. Given the makeup of the current autistic support classroom, the high functioning child who is the subject of this hearing is missing a superb opportunity that is not outweighed by the home based program.

Hearing Officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses" and "give some reason for discounting"⁵ or crediting evidence. Further, Hearing Officers' decisions are to "specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions".⁶ The Third Circuit, in *Shore Regional High*

⁵ *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

⁶ *Id.* at *34.

School Bd. Of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004), held that “if a state administrative agency has heard live testimony and has found the testimony of one witness to be more worthy of belief than the contradictory testimony of another witness, that determination is due special weight. *Id.*,”⁷ *Carlisle Area School v. Scott P.*, 62 F.3d 520, 527-29 (3d Cir. 1995). Testimony from the autistic support teacher and the District’s behavior specialist was strongly persuasive in two respects: that participation in the autistic support class would significantly benefit this Student and that the home-based ABA program is no longer necessary for the Student to receive FAPE.

The benefits that the Student could derive from participation in the autistic support classroom in the morning and the regular education classroom in the afternoon are considerable. First the Student would have all-day programming with peers rather than spending half the instructional day one-to-one with adults. Second, the high functioning level of the children in the autistic support class would ensure that the Student has appropriate models for language and communication. Third, the Student would be afforded the opportunity for specific small group or individual pre-teaching and re-teaching of the material taught in the regular education kindergarten classroom, and instruction on first grade material as appropriate. Fourth, the Student would not miss time in the presence of typical peers in the regular education classroom; at present the Student is pulled out for OT, speech therapy, social skills group and autistic support whereas if the Student attended the autistic support class these services would be provided during that portion of the day. Fifth, the Student would have social skills group with the peers in Student’s class. Sixth, the ABA and Verbal Behavior components of the autistic support class are provided in the natural setting by a teacher who is trained in these techniques, and are geared toward the high level of functioning of the children in the current autistic support class. Last, as noted earlier, the autistic support teacher offers a unique set of education, training and experience that elevates the District’s proposed program to a high level of excellence.

The home-based ABA program is not necessary for this Student to receive FAPE for several reasons. First, Student quickly mastered almost all the goals tracked through the data charts prepared by the home team, demonstrating a readiness to continue working on these skills on an ongoing basis in the natural setting among peers. [FF 63, FF 64] Second, the home-based ABA program is duplicative of much that Student is being taught in the regular education kindergarten, that Student could be taught in the autistic support classroom, and that the autistic support teacher is reinforcing in her one-to-one sessions with Student. [FF 70, FF 71, FF 73] Third, the criteria for discharge set forth by the owner of the business providing home-based ABA services appear to require a level of mastery that goes well beyond what would be considered appropriate and may even be entering the realm of being unrealistic for a child Student’s age, even if Student is smart and high functioning. [FF 74] Fourth, although the Student has achieved a high level of mastery (94% in one case, for example) the provider has kept certain goals in case the Student slips back, suggesting an overly cautious tendency to continue services past the necessary point. [FF 64]

⁷ Citing *S.H. v. State-Operated School Dist. of City of Newark*, 336 F.3d 260, 271 (3d Cir. 2003)

The Parents have relied upon the opinion of their private provider who testified as their expert in this hearing. The private provider has supported their decision not to send the Student to the autistic support classroom although she has not observed it this school year and she has determined that her services continue to be necessary for the Student. Notably the home ABA program is often delivered during the time of day that the Student would be in the autistic support classroom. The testimony of the private provider was credited with considerably less weight than the testimony of the autistic support teacher and the District's behavior specialist. This was the case partly because she holds a business interest in the outcome of this proceeding, but primarily because her charted data did not support the need for continuation of services even if there was a need to begin with, and also because the District's witnesses persuasively testified that the program and placement offered to the Student was appropriate in itself and could address any needs identified by the private provider.

It is certainly understandable that these clearly loving Parents have grown to trust the private provider who worked with their older very impaired child and it is also understandable that they are reluctant to stop a service for the Student that they have perceived to be beneficial for both their children. It is also understandable that the private provider has developed a relationship with the family, has been in the family's home numerous times and would want to be absolutely certain that the Student was ready before discontinuing services. Although the Parents and the home ABA program provider have the right to continue these services privately if they wish, it is important that they consider the benefits of the program offered by the District versus the costs of maintaining the home program, not only in terms of financial expenditures but also in terms of limiting the Student's access to peers for half the day, cutting down the time in regular education in order for supportive services to be delivered, and denying the Student the opportunity to participate in an excellently planned educational program..

Pendency

During the pendency of judicial or administrative proceedings, the IDEIA's "stay put" provision mandates that "unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement. 20 U.S.C.A § 1415(j) Under this provision "all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved."⁸ Under the statute, "proceedings" refers to "administrative and judicial proceedings."⁹

The stay-put provision represents Congress's "policy choice" that "the danger of excluding a handicapped child entitled to an educational placement from that placement was much greater than the harm of allowing a child not entitled to an educational placement to remain in that placement during the pendency of judicial proceedings."¹⁰

⁸ *Drinker by Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864–65 (3d Cir. 1996).

⁹ See *Drinker*; also *Verhoeven v. Brunswick Sch. Comm.*, No. 98-2348, 1999 WL 721698, at *5 (1st Cir. Sept. 21, 1999)

¹⁰ *R.B. ex rel. Parent v. Mastery Charter School*, 2010 WL 5464892 (E.D.Pa. 2010) citing *Cronin v. Bd. of Educ.*, 689 F. Supp. 197, 202 (S.D.N.Y. 1988)

The District notified the Parents of the stay put provision in its Procedural Safeguards, citing the federal regulations, “Once a due process complaint is sent to the other party, during the resolution process period, during mediation, and while waiting for the decision of any impartial due process hearing or court proceeding, unless the parents and the LEA agree otherwise the child must remain in the child’s current educational placement. 34 CFR §300.518” [FF 77]

Although it is arguable whether or not the home based program in fact qualified as “the current educational placement”, it is not necessary to reach that determination in the instant matter. Neither is it necessary, if the home program was indeed a pendent placement, to reach the determination of whether the eight-month gap between the Parents’ first disapproval of the May 2010 NOREP and the January 2011 filing for Due Process rendered pendency no longer operative.

The District itself consistently and repeatedly told the Parents that pendent services would “not be provided or funded by the District *until* a Due Process hearing complaint is filed with the Office for Dispute Resolution,” reiterated that it was the Parents’ responsibility to file for Due Process if they chose, and provided the Office for Dispute Resolution contact information and the Procedural Safeguard Notices. The Parents were on explicit notice directly from the District that *pendency* would not apply *unless* they filed a Due Process complaint. The Parents were not naïve, having previously requested due process regarding their older child; they were represented by competent and experienced counsel in that matter as well as in this one. Previously the NOREPs the Parents rejected in May and in early September had wording that was both prominently situated and clear regarding the requirements for pendency to attach. In early September 2010 the District made it clear that it was exercising its option to decline to participate in mediation. The District provided the Parents with three separate very direct letters stating unequivocally that it would not fund any pendent service *until* the Parents filed for due process, that is, initiated a judicial proceeding. [FF 80, FF 81, FF 82, FF 83, FF 84, FF 85] After a delay for reasons left unexplained, the Parents filed their Due Process complaint on January 28, 2011. [FF 86]

I conclude that the District, itself represented by competent counsel, clearly indicated that *until* the Parents filed, pendent services would not be funded, thus rightly or wrongly implying that *once* the Parents filed the services *would* be provided. Therefore, I find that in this case an equitable outcome is an order that the District reimburse the Parents for the number of hours of home programming, including the consultative/supervisory services of their expert, that were actually delivered beginning on January 28, 2011 and ending on the date of this decision, April 14, 2011.

ORDER

It is hereby ordered that:

1. The IEP offered to Student in August 2010 was appropriate in terms of offering a half-day in the autistic support classroom and a half-day in regular education kindergarten and in eliminating the home-based ABA program.
2. The IEP offered to Student in October 2010 was appropriate in terms of placement in regular education kindergarten for half the day with the designated levels of speech/language therapy, occupational therapy, social skills groups and autistic support, and without provision of a home-based ABA program.
3. In order for Student to receive FAPE Student does not require ten hours per week of home ABA programming including supervision and staff meetings.
4. Although the Student does not require the home ABA program in order to receive FAPE, the District's indication that it would consider the pendency provision of the IDEA to be triggered when the Parents filed for Due Process supports reimbursement to the Parents for the specific hours of direct and consultative/supervisory service provided to the Student beginning on January 28, 2011 and ending on the date of this decision, April 14, 2011.

Any claims not specifically addressed by this decision and order are denied and dismissed.

April 14, 2011

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official