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Pennsylvania

## Special Education Hearing Officer

### DECISION

ODR No. 14119-1314 KE

Child's Name: J. N.

Date of Birth: [redacted]

Dates of Hearing: 9/24/13, 10/11/13, 10/25/13, 11/11/13  
11/13/13, 11/19/13, 12/3/13, 12/4/13,  
12/6/13

### CLOSED HEARING

Parties to the Hearing:

Parents  
Parent[s]

School District  
Penn-Delco  
2821 Concord Road  
Aston, PA 19014

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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December 24, 2013

January 5, 2014

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student in this case is affected by several disabilities resulting in global developmental delays, speech/language deficits, motor skill deficits, attention, learning and behavior difficulties. Student requires intensive special education and related services for disability-related needs.

From the time Student transitioned from pre-school to school-age services until the 2012/2013 school year, both parties agree that Student's public school placements were unsatisfactory. For the 2012/2013 school year, the District proposed placing Student in its newly formed multiple disabilities support (MDS) class, which Parents rejected, resulting in a due process complaint that was ultimately settled by the District funding tuition at the private school Parents selected. In the spring of 2013, when the parties met to develop an IEP for the current school year, the District again proposed an IEP for placement in its MDS class which Parents again rejected, resulting in the current due process complaint for tuition reimbursement for the same private school.

The evidence compiled during a nine session hearing conducted between the end of September and beginning of December 2013 established Parents' sincere belief that the private school is the best place for addressing Student's complex and extensive speech/language needs. The evidence also revealed Parents' deep misgivings about the composition of the District's MDS class and their conviction that it is not the best place for Student. The evidence did not, however, establish that the District cannot provide an appropriate educational placement for Student in its MDS class. Parents, therefore, cannot prevail on their tuition reimbursement claim. The District, however, will be directed to take steps to alleviate Parents' concerns with respect to the adequacy of the District's speech/language services if/when Parents accept the District's MDS placement.

## **ISSUES**

Are Parents entitled to an award of full tuition reimbursement for the 2013/2014 school year for the private school in which they unilaterally placed Student because:

- a. The School District did not offer an appropriate program and placement for Student for the current school year;
- b. The private school in which Parents unilaterally placed Student is providing an appropriate program and placement;
- c. There are no equitable reasons for denying or reducing tuition reimbursement?

## **FINDINGS OF FACT**

### **Background/Disabilities/Educational Needs**

1. Student, an elementary school-age child, born [redacted] is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 16, 17)
2. Student has been identified by the District as IDEA eligible in the multiple disabilities and speech/language impairment disability categories, in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(7), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 17)
3. Student is described as an engaging child who seeks and enjoys social interaction with adults and peers and exhibits a strong interest in both verbal and nonverbal communication. (N.T. pp. 104, 105, 286, 287, 1254, 1521; S-1 pp. 2, 12, S-27 pp. 20—22)<sup>1</sup>
4. At age 2, after Parents became concerned about language development, Student began receiving speech/language therapy and occupational therapy (OT) as early intervention services, with the subsequent addition of educational services. (N.T. pp. 1494, 1495, 1497; S-1 p. 2)
5. Student has been diagnosed with a rare chromosomal defect that resulted primarily in a significant speech/language impairment, later diagnosed as Childhood Apraxia of Speech (CAS). Student has also been diagnosed with a severe Receptive/Expressive Language Disorder, Phonological Processing Disorder and Attention Deficit Hyperactivity Disorder. (ADHD). (N.T. pp. 1495, 1496; S-1 p. 2, S-7 p. 1)

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<sup>1</sup> Commendably, the parties agreed to use a single set of exhibits in this matter, which avoided an unnecessarily long and duplicative documentary record. Because most of the exhibits were pre-marked by the District with “S” followed by the exhibit number and exhibits added during the hearing were also marked that way, the “S-#” designation is used to reference the exhibits, all of which were admitted into the record by agreement of the parties.

6. CAS is a neurological disorder that disrupts the motor speech system and is often described as a motor planning disorder. CAS affects Student's ability to correctly form and retrieve words, as well as to properly articulate sounds and speak with appropriate rhythm and emphasis (prosody). The disorder also adversely affects acquisition of literacy skills, including learning to read. (N.T. pp. 45—48)
7. Many children with CAS, including Student, also have difficulty with other motor planning tasks and with sensory regulation, often requiring OT and/or physical therapy (PT) (N.T. pp. 252, 379, 1513, 1514; S-7 pp. 9, 12, 13, S-8 pp. 5, 6)
8. In addition to speech/language delays and learning difficulties in language arts and math, Student also has significant issues with non-compliant behaviors, including work refusal and avoidance and a short attention span, which adversely affect Student's educational progress and ability to maintain appropriate social interactions. (N.T. pp. 350, 351, 1305; S-1 p. 2, S-7 p. 4, 5, S-23, S-26)
9. When Parents first had Student tested by an independent psychologist at age 4, attention/behavior issues made it difficult to reliably assess Student's cognitive potential. More recently, however, when both the District and the private school psychologist were able to gain greater cooperation during testing, Student's intellectual potential was measured in the low average range. That still may not accurately reflect Student's true cognitive ability due to the continuing effects of significant language and motor skill deficits. (N.T. pp. 1242, 1243; S-1 p. 7, S-7 pp. 3, 17, 18)
10. Due to Student's significant and complex disability-related educational needs, Student requires intensive, individualized 1:1 or small group academic instruction, particularly in reading and math, intensive individual and group speech/language therapy, a language-rich classroom environment, OT, PT, a sensory diet, a consistently implemented positive behavior support plan and a behavior therapist or trained instructional aide to provide daily behavior support and to help maintain focus in the classroom, as well as to take behavioral data. (N.T. pp. 51, 399, 400, 407, 413, 527, 1382, 1383; S-1 pp. 12, 13, S-8 p. 5, S-15 p. 1; S-27 pp. 20—24)
11. To engage and cooperate in school activities and therapies, Student needs to work for tangible reinforcers. Although Student is motivated by many things, reinforcers must be changed frequently to maintain Student's motivation. (N.T. pp. 1027, 1252, 1383, 1384)

### Educational History

12. After several unsatisfactory public school placements, Parents enrolled Student in a half day pre-K program at a private school operated by a speech therapist and an occupational therapist that specializes in educating children with CAS and other severe speech/language disorders. Parents also obtained ABA therapy for three afternoons/week. During the summer, Parents added intensive speech/language therapy. Student's speech, motor skills and behaviors began to improve after beginning that combination of services. (N.T. pp. 1499, 1500—1506, 1511—1514)

13. At the beginning of the 2012/2013 school year, Parents enrolled Student in the private school Student attended for language services during the summer. The private school provides speech/language services and language arts instruction based upon a phonemically-based, structured, systematic, linear language/reading instruction program known as the Association Method. The private school also provides intensive motor-speech training and practice and OT services with an emphasis on sensory integration (SI). (N.T. pp. 255, 256, 1247, 1248, 1512)
14. Prior to Student's enrollment in the private school, which had been recommended by a private speech/language therapist treating Student, the District proposed a placement in its Multiple Disabilities Support class (MDS) that it was planning to open in September 2012. (N.T. pp. 1509, 1515)
15. Parents proceeded with the private placement and sought tuition reimbursement, which the District ultimately agreed to provide for the 2012/2013 school year. (N.T. pp. 1515, 1516, 1517—1519)
16. Currently, Student remains in the private school Parent selected at the beginning of the 2012/2013 school year in a class with 5 other children, including three others with a CAS diagnosis. Academically, Student is in the middle of the group and one of the two most social children in the class. (N.T. pp. 349, 350, 1339, 1340)

#### District's Proposed Placement, Program /Current Private School Functioning, Services

17. After completing a reevaluation of Student in March 2013, the District developed an IEP for the 2013/2014 school year which included goals in areas of PT, OT, speech/language, reading, math and social skills, and offered a placement in its MDS class. (S-7, S-12 pp. 39—54, S-13 p. 2)
18. The District's MDS class is based on principles of verbal behavior (VB) which benefits the children in the class, especially with respect to constant communication with them to build language skills, but the teacher also uses additional strategies to meet student needs, including general ABA strategies, communication boards, modeling and repetition. (N.T. p. 887—893)
19. The District's special education supervisor, a Board Certified Behavior Analyst (BCBA), who has extensive experience with VB is frequently in the classroom, helped to develop the curriculum and behavior support strategies. Instruction is a combination of whole group and individualized instruction. Currently, there are seven children placed in the class, which is staffed by a lead teacher, two instructional assistants who are also certified teachers and two other instructional assistants. The children are not all in the classroom at the same time due to receiving therapies and participating in specials at various times. (N.T. pp. 637, 639, 897, 903—905, 907, 908)

20. At the time of her observation of the MDS class in April 2013, the private speech therapist was concerned about Student's placement in that class because it appeared that Student would be the highest functioning student in terms of expressive language and verbal spontaneity. She was also concerned that the class does not provide specialized treatment for CAS. Since the observation, another child has joined the class who is more verbal than Student (N.T. p. 136; S-20 p. 2)
21. The behavior therapist who previously worked with Student observed the District's MDS class in the spring of 2013 and fall of 2013, after a new teacher began. She noted the high level of physical support the students in the class needed and were provided that Student does not need. She also noted a high level of verbal and visual prompting in whole group language activities. (N.T. pp. 530, 531)

### Academics

22. Student was observed at the private school September 2012 in connection with a private evaluation, in February 2013, in connection with the District's reevaluation, and in late October/early November 2013 by both District staff and the private school psychologist who evaluated Student in connection with the current due process hearing. (N.T. pp. 1248; S-1 pp.4, 5 )
23. At the time of the September 2012 observation, Student was estimated to be working at an early kindergarten academic level by Parent's independent school psychologist. (N.T. pp. 1246; S-1 pp. 4, 5, S-27)
24. Student also appeared to Parent's private school psychologist to be working at an early academic level at the time of the late October 2013 observation. The private school's November 2013 IEP confirms that assessment, noting Student's need to improve phonological awareness and pre-reading skills, along with vocabulary, story structure and sequencing, fluency, accuracy and reading comprehension of pre-primer texts by answering explicit questions. Most of Student's baselines for 1<sup>st</sup> grade reading skills, such as identifying high frequency 1<sup>st</sup> grade sight words, were placed at 0. (N.T. pp. 1250; S-27 pp.23, 24, 36—38)
25. Comparing Student's reading/language arts skills and needs described in the private school's recent IEP to the language arts objectives in the District's IEP proposal indicates that the District's proposal focuses on skills that Student needs to develop, although the baselines for expressively and receptively demonstrating one-to-one letter correspondence have advanced from 9 sounds mastered to 20. The sight word baseline might also have increased. Although the private school classroom teacher noted Student's ability to retell story details, the private school IEP states that Student is not able to retell 5 details without prompting, to sequence events or to describe the appearance of characters or setting. (N.T. pp. 1386; S-12 p. 53, S-27 p. 15)
26. The math instruction the District provides in the MDS class is Connecting Math, a systematic, sequential, direct instruction program. The students receive both small group

and individualized 1:1 instruction. Multi-sensory activities, such as singing number songs, are included in the instruction. (N.T. pp. 920, 1260—1264)

27. The math objectives in the District's proposed IEP provide for Student to apply one to one correspondence to count objects to 10, receptively and expressively identify numerals 0—10 from an array of 3 with 90% accuracy. The private school teacher confirmed that the baseline in the District's proposed IEP is accurate. (N.T. pp. 1385, 1386; S-12 p. 51)
28. The private school's November 2013 IEP indicates that Student has mastered rote counting to 10, can count objects 1—3, match sets 1—3 to numeral and trace numerals 1—10. Student has not mastered matching sets beyond 3, counting objects to 10, matching 1—10 to numeral and Student is unable to identify number words 1—5, match numerals to number words 1—5 or draw 4 basic shapes without a pattern. (N.T. pp 1385; S-27 pp. 14, 39)
29. During the September 2012 observation, Student was participating in a whole group calendar activity that occurs daily and involves reading sentences identifying the day before, the current day and the next day, as well as the weather. (N.T. pp. 1344—1348; S-1 p. 4 )
30. In the IEP the private school developed for Student in November 2013, working on the same calendar activities as a group language activity was identified as an area of continuing need, encompassing skills that Student has not yet even partially acquired. (S-18 p. 17, S-27 pp. 13, 44)

#### Behaviors/Noncompliance

31. The private school continues to implement the behavior plan developed by the ABA therapist who previously worked with Student, which recommends “planned ignoring” of non-compliant/negative behaviors to avoid reinforcing the behaviors. If Student remains non-compliant for an extended period, however, the staff will try a different strategy. The private school staff discusses the behavior plan at weekly meetings and have made some changes informally, but those are not reflected in the written plan, which has not been updated. No one currently takes data, however, to assess the continued effectiveness of the plan. (N.T. pp. 1252, 1331, 1332, 1336, 1337, 1456, 1463—1466; S-26)
32. During the September 2012 private school observation, Student was generally described as compliant and engaged in the prescribed academic tasks with the promise/reminders of the reward Student chose to work for, although Student was well aware of and engaged the observer in conversation. Student was less compliant during speech therapy. The psychologist noted in her report the teacher's observation that Student's progress increases when non-compliance decreases. (N.T. pp. 1311; S-1 pp. 4, 5)
33. At the time of the September 2012 observation, Student was accompanied by an ABA behavior therapist throughout the day due to attention and behavior problems. Those services were initially reduced due to behavior improvements, resulting in an increase in

behaviors, and were discontinued entirely when Parents could not afford to provide the ABA services. Parents subsequently applied for behavioral health services and were recently approved for 10 hours/week for a 45 day period, but behavior therapy services had not resumed by the time the due process hearing ended. (N.T. pp. 1382, 1457, 1519; S-1 p. 1 )

34. The District intends to conduct an FBA, develop a positive behavior support plan for Student and address noncompliant behaviors. The District also intends to provide a 1:1 aide for Student throughout the school day to provide behavioral support. (N.T. pp. 676, 677; S-12 pp. 60—62)
35. According to the District observers' written reports, Student's behavioral compliance in completing academic and speech therapy tasks during the District's observations at the private school was far less than described by the private evaluator in September 2012. Parents attributed Student's non-compliance at those times to Student's knowledge of being observed, although the most recent observation occurred via Skype, with a blank computer screen as the only indication of an observer. (N.T. pp. 519, 520, 1037, 1389, 1390; S-7 pp. 4—6, S-23)
36. The BCBA who developed the behavior plan for Student attributed the non-compliant behaviors observed by District staff and described in the observation section of District's reevaluation report were attributed to the reduction in behavior support services that began about the time of the District's observation and a lack of consistency in the private school staff's implementation of the behavior plan without the constant presence of the behavior therapist. (N.T. pp. 517—519)
37. Student's teacher maintained that Student's compliance during the November 2013 observation was far higher than reported, that Student completed all tasks during that period and she followed the principles of the behavior plan throughout that period. The reading specialist, however, acknowledged that Student's noncompliance was very high. Both the teacher and the reading specialist admitted that they were not consistent in following the behavior plan at all times during the District observation. (N.T. pp. 1037, 1061—1072, 1391—1394, 1396—1406, 1408—1411, 1413, 1414, 1415, 1421, 1422, 1466—1468, 1471; S-23 p. 5)
38. Student's non-compliance during the most recent District observation was also attributed to an atypical day, immediately following Halloween. (N.T. pp. 1407)
39. The private school teacher admitted that she did not prompt Student to speak in complete sentences during the District's November 2013 observation due to being distracted by the knowledge of being observed. (N.T. pp. 1407, 1408; S-23 p. 3)
40. Due to Student's frequently non-compliant behaviors, Parents' private school psychologist estimated that up to 50% of Student's instructional time is lost. If the private school had the daily behavior support it needs, as when the behavior therapist



accompanied Student, it would be possible to work toward reducing Student's non-compliant behaviors. (N.T. pp. 1306, 1456, 1457)

### Speech/Language Services

41. In its proposed IEP, the District provides for two hour/week of individual speech/language therapy in 4 30 minute sessions, 1 30 minute period of group therapy, a 30 minute weekly session co-treating with the OT. (N.T. pp. 221, 222, 224 ; S-12 p. 65)
42. To properly deliver the intensive language environment in the MDS class, the teacher, instructional assistants and the speech/language therapist collaborate daily. The teacher also consults frequently with other service providers such as the OT. (N.T. pp. 936, 937)
43. According to the private speech/language therapist experienced with CAS who has worked with Student, the District's MDS class is a language rich environment with elements of verbal behavior and ABA which the children appear to enjoy while learning and using language. The amount of speech/language services the District proposes to provide and inclusion opportunities were identified as positive aspects of the program. (S-20 p. 1)
44. The District's current IEP proposal includes a functional communication goal centered on Student expressing wants and needs, asking/answering questions, protesting. It also includes an articulation goal to address the motor speech skills Student needs to continue to develop and a receptive language goal of demonstrating understanding of spatial concepts, answering "wh" questions and sorting noun pictures by category and function. To the extent that Student has mastered any of the skills that Student was not demonstrating at the time the IEP was developed in March 2013, the objectives will be revised. (N.T. pp. 115, 116, 125, 126; S-12 pp. 45—50)
45. Although Student can generally communicate wants and needs, verbalizing with articulate, structurally sound language remains an area of need. In the IEP developed by the private school in November 2013, improving Student's ability to verbally express wants, thoughts and desires is listed as one of Student's emotional/relational needs, but there is no goal for further developing that skill. (N.T. pp. 1273, 1396; S-27 p. 17 )
46. Integral stimulation is a type of intensive motor speech therapy that is appropriate for treating children with CAS through multi-modal cues—kinesthetic, tactile, visual and verbal. The technique builds on the sounds a child has already acquired, as well as the normal developmental sequence of sound acquisition (N.T. pp. 52, 72—74)
47. The PROMPT method is another recognized technique for facilitating development of motor speech skills that uses a tactile/kinesthetic approach and requires intensive training of the speech/language therapist. (N.T. pp. 69—71).

48. Although the District’s speech/language pathologist is familiar with both integral stimulation and the PROMPT method, she has not been trained in either technique. (N.T. pp. 68, 69, 71)
49. The District’s speech/language therapist recommends access to augmentative supports such as a picture board to support Student’s verbal communication. She also recommends systematic drill and practice of target sounds, building from single syllable to multi-syllable words with tactile, visual and verbal cues, multi-modal cues from the speech-language therapist and teachers across all settings for producing target sounds, voice recording and mirrors to increase self-awareness of speech sound production and proper positioning for speech sounds, small group practice. (N.T. pp.60, 61, 118—122, 174, 175; S-7 p. 30, S-12 pp. 57, 58, S-21)

#### Sensory/OT/ PT

50. The children in the MDS class have access to an adjacent room with various equipment for sensory integration, which the entire group uses daily after lunch and is available for sensory breaks. (N.T. pp. 871, 903,)
51. The District’s proposed IEP provide for opportunities to participate in proprioceptive activities, movement breaks, use of resistive manipulatives (building with Legos) and a sensory diet. (S-12 pp. 55, 56, 60, 63)
52. Student’s “sensory diet” at the private school, administered twice each day, consists of bouncing on a “hippity hop” ball up and down the hallway several times and 20 “sit-stands” similar to squats, involving sitting on an object on the floor and standing up. (N.T. pp. 439, 1341 )
53. Occupational Therapy is proposed for 1.5 hours weekly, divided into two thirty minute sessions of individual therapy and one group session, as well as 15 minutes/month for consultation. OT goals focus on school-related activities using a writing implement with appropriate force, copying letters with vertical and horizontal lines. (S-12 pp.41—44, 60)
54. The District proposes 45 minutes of direct PT services weekly, as well as 15 minutes of consultative services for Student’s IEP team. (S-12 p. 65)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Applicable Legal Standards**

#### FAPE/Meaningful Benefit

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is

entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). “Meaningful 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 (3<sup>rd</sup> Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Under the interpretation of the IDEA statute established by the *Rowley* case and other relevant cases, an LEA is not required to provide an eligible with services designed to provide the “absolute best” education or to maximize the child’s potential. *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995). Based upon that principle, a school district’s choices concerning the details of a program and placement reasonably likely to provide meaningful benefit to an eligible child, including methodology, is given considerable deference. *Rowley; Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012); *Lessard v. Wilton-Lyndeborough Cooper Sch. Dist.*, 592 F.3d 267 (1<sup>st</sup> Cir. 2010).

### Due Process Hearings/Burden of Proof

The substantive protections of the IDEA statute and regulations are enforced via procedural safeguards available to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia* 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009).

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court held that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, or more clearly, the risk of non-persuasion. Consequently, in this case, because Parents challenged the appropriateness of the District's program/placement proposal for the 2013/2014 school year, they were required to establish that the District's proposed IEP and proposed placement in its MDS class was not reasonably calculated to assure that Student would receive a meaningful educational benefit.

The burden of proof analysis actually affects the outcome of a due process hearing, however, only in that rare situation where the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.* In this case, the preponderance of the evidence supported the District's position that it offered Student a FAPE, so allocating the burden of persuasion did not affect the outcome.

### Tuition Reimbursement

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court established the principle that parents do not forfeit an eligible student's right to FAPE, to due process

protections or to any other remedies provided by the federal statute and regulations by unilaterally changing the child's placement, although they certainly place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE or otherwise acted appropriately.

To determine whether Parents are entitled to payment from the District for the private school they selected for the current school year, a three part test is applied based upon the *Burlington* decision and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). The first step is to assess whether the program and placement offered by the School District was appropriate for the child, and only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program selected by Parent appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof.

#### Appropriateness of the District's Proposed IEP

The District describes the dispute between the parties as primarily a contest over methodology, in essence, whether the District's proposed placement in its MDS class, based on VB principles, can appropriately address Student's significant needs, or whether meaningful progress is reasonably likely only if Student continues to be instructed with the Association Method used by the private school. The issues, however, are a bit more nuanced and complicated than choosing between two different instructional methods.

As the evidence overwhelmingly established, Student's needs are many and complicated. First, due to the CAS diagnosis, Student needs speech therapy interventions that address the motor aspects of speech production, including forming and speaking words, as well as developing appropriate speech rhythm. (FF 6) In addition, Student has more traditional

receptive/expressive language needs, including understanding language concepts in order to communicate effectively, and developing phonemic awareness and sound/symbol relationships that underlie academic literacy skills. (FF 5)

Second, because Student's disabilities affect motor skills beyond speech, and have sensory effects, Student needs OT and PT, as well as opportunities for sensory input for self-regulation. (FF 7, 10) Next, whether due to the language difficulties, sensory issues, ADHD or a combination of disability effects, Student has significant behavior issues centering on non-compliance with academic demands. (FF 8, 9, 11) Student also has academic needs requiring intensive 1:1 instruction in reading/language arts and math. (FF10)

The evidence in this case establishes that the District has very carefully considered Student's extensive disability-related needs and has fashioned an appropriate IEP to address them. The evidence also establishes that the District's proposal to place Student in the MDS class is appropriate. Contrary to the Parents' contentions, the evidence does not support a conclusion that Student is functioning far above every other child in the class with respect to academics or language and would not, therefore, fit well within the class or benefit from activities and whole group instruction, such as calendar.

In any event, the District proposes individualized instruction for Student in language arts and math, and, indeed, is required to meet Student's individualized academic needs regardless of the instructional levels of other children placed in the same classroom.

Understandably, Parents prefer what they termed the "best place" for Student, but as noted above, the standard for assessing whether a school district has proposed an appropriate program and placement does not require "the best." In addition, the testimony in this case suggests that Parents' primary focus is on assuring that Student will continue to make progress

toward remediating the effects of CAS through the services of a very experienced motor speech therapist. The IDEA, however, focuses primarily on developing academic skills to enable an eligible student to participate and make progress in the general education curriculum. Although remediating Student's severe language disabilities is currently an essential component of special education, it cannot be the sole or primary focus of special education, and tuition reimbursement cannot properly be awarded based primarily on the experience and effectiveness of the staff providing speech/language therapy.

#### Student's Academic/Behavioral Progress and Needs

Parents contend that Student has made extraordinary progress in all areas while enrolled at the private school, but the evidence does not support such a broad conclusion.

Although there is no reason to discount Parents' testimony that Student has improved with respect to language intelligibility and home behaviors, the evidence establishes that with respect to addressing Student's noncompliant behaviors and developing academic skills, the private school has not been very effective. The evidence suggests that Student began making progress in speech development when provided with motor speech therapy and ABA services prior to enrollment in the private school, and that Student's behaviors in the school setting have deteriorated since the ABA services were discontinued. (FF 12, 35, 36, 40) Despite the general and subjective testimony of the private school staff that Student has continued to make behavioral progress, and is not nearly as noncompliant on a regular basis as indicated by the District's observations, no data is being taken at the private school, and, therefore, there is no objective support for the assertions of the private school staff. Moreover, the behavior therapist who developed the behavior plan that the private school staff is still using, but without continuing review and support by a behavior specialist, noted that the private school staff was

not consistently implementing the behavior plan at the time her support was being faded early in 2013. (FF 36) It is, therefore, quite reasonable to infer that the behavior plan is not currently being consistently implemented, as the private school staff ultimately admitted it was not during the District's most recent observation. (FF 31, 37)

The evidence in this case strongly suggests that Student will benefit greatly from a behavior plan developed and overseen by a BCBA, as well as a 1:1 aide, as the District proposes. In addition, based upon Student's past behavioral success when provided with ABA therapy and a 1:1 aide, the District's MDS class, which also incorporates ABA principles, is an appropriate setting for Student in terms of addressing behavioral needs.

#### IEP Academic Goals and Objectives

Parents relied heavily on the argument that the District's proposed IEP is not currently appropriate because Student has mastered skills that the academic and speech/language goals IEP goals address.

It would not be particularly surprising for the short term objectives and baselines in the IEP proposed by the District to be outdated since it was developed in March 2013, but that would not make the IEP proposal inappropriate. To accept Parents' position that the District's IEP is not appropriate unless no detail needs to be updated rather look more broadly at whether the proposed goals and objectives appropriately identify and address all areas of Student's needs would be to assure that a school district could not possibly prevail on the first prong of the tuition reimbursement analysis when parents remove a child from the school district without allowing it the opportunity to implement a proposed IEP. Under those circumstances, the school district would be forced to defend the particulars of an IEP for future programming long after the IEP



was developed based on information that was current at the time but may not fully address new issues that arose after the IEP was proposed.

Nevertheless, in this case, it is striking that in most respects, the evidence established that the proposed IEP is not as outdated as might be expected with respect to language arts/reading and math. The IEP that was developed for Student by the private school in November 2013, as the due process hearing was drawing to a close, included present levels and short term objectives in reading and math that are not qualitatively very different from the District's IEP proposal, although some new baselines would likely need to be updated. *See* FF 24, 25, 27, 28.

Based upon very recent information provided by the private school, the District's IEP proposal with respect to reading and math are appropriate for Student in that they address basic skills that Student still needs to acquire.

#### OT/PT

Since Student has deficits in motor skills, it is clearly appropriate for the District's proposed IEP to include PT services. Although Parents suggested that Student has ample opportunity to engage in gross motor activities in community settings, that is an argument that addresses whether the private school is appropriate in the absence of PT services. That, however, is not a matter that needs to be addressed, since the District's proposed program and placement is appropriate.

With respect to OT services, the private school is providing more than the 1.5 hours/week the District proposes. There is no reason to believe at this point, however, that the District's proposal is inadequate. The focus of OT in the District's proposal is to develop school-related motor skills, such as holding a pencil and cutting with scissors. (FF 53) Those are appropriate goals for school-based services.

Although the recent private school IEP includes far more OT goals, as well as more time for services than the District's proposal, it is notable that notwithstanding amount of OT services Student has been receiving at the private school, no OT objectives have been met. (S-21) The benefits of so many objectives and of the amount of time devoted to such services, therefore are questionable. Certainly, there is no reason to question the adequacy and appropriateness of the District's proposal simply because the proposed OT services do not mirror the private school's OT services.

Finally, although the details are not specified in the IEP, Student will also have the opportunity to engage in sensory activities daily and will have a sensory diet. (FF 50, 51) The District, therefore, has recognized and addressed Student's sensory needs.

#### Speech/Language Services

Student's speech/language needs are very significant, and as noted, appear to be Parents' primary focus. It is, therefore, not surprising that Parents' arguments are most heavily focused in this area, particularly with respect to whether the District can effectively address Student's speech/language needs in the VB-based MDS class. Parents repeatedly referenced the testimony of the District's supervisor of special education linking CAS and Autism Spectrum Disorder (ASD), which is not a diagnosis for Student. That testimony may have been overbroad in suggesting that CAS and ASD are commonly related disorders and that most children diagnosed with ASD also have CAS. Nevertheless, Parent's suggestion that the District's testimony demonstrates a lack of knowledge concerning Student's complex and significant speech/language needs, and therefore, that the District cannot appropriately address those needs in a classroom based on principles often used to address the needs of children with ASD is also overbroad. First, children diagnosed with ASD also often have significant speech and language

impairments. See, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)* pp. 55, 58. In addition, the student population enrolled in the private school that Parents selected include ASD and the school holds itself out as an appropriate placement for children diagnosed with ASD as well as significant speech/language disorders. (N.T. pp. 349, 1295) Moreover, the evidence in this case established that Student received and benefited from applied behavior analysis (ABA) techniques, which are generally associated and used with children who have an ASD diagnosis. Finally, although Parents argued strongly that there is no research basis for the District's proposal to use teaching strategies based on VB principles, as the Court of Appeals decision in *M.R. v. Ridley* makes clear, the District is not required to establish a peer-reviewed research basis for its chosen methodology in order to establish that it is appropriate for Student. There is no reason to automatically reject the potential usefulness of VB techniques on that basis alone.

It is not surprising that the District proposes to use techniques that are also used with children who are diagnosed with ASD to address functional communication needs, such as reinforcing approximations of speech sounds as other behavior approximations are reinforced with VB/ABA techniques. The District has broad leeway for selecting methodology, and does not have to have to guarantee its effectiveness in order to support the appropriateness of its proposal as one means for addressing Student's significant language needs. There is no reason to conclude that the District's proposal to address Student's language disability, in part, with VB techniques is not reasonably likely to result in meaningful progress.

#### Motor Speech Services

Although using VB/ABA techniques with Student is appropriate, VB alone would not be sufficient, and is not the only way the District intends to address Student's speech needs arising

from CAS. Both the goals and SDI in the District's proposed IEP contemplate teaching and practicing motor skills needed to produce intelligible speech. *See* S-12 pp. 47, 48, 57, 58. In this regard, Parent's concerns with respect to having Student's oral motor issues addressed by a speech/language pathologist with far less experience in addressing the motor aspects of speech than Student's current practitioner are valid, but can be addressed. Noting that the District's speech/language pathologist does not have specialized training and expertise in motor speech skill facilitation, that her skills in that area are evolving and that she is willing to learn more and advance her skills (*See* N.T. pp. 65, 67—69), the District will be required to provide additional supports and training for the staff that will work with Student to assure that the proposed motor speech services are effectively delivered.

To that end, the District will be directed to engage the services of the speech/language therapist who observed the MDS class, or another local speech/language therapist with recognized experience and expertise in working with children with CAS, to observe the speech/language therapy the District provides and make suggestions with respect to content, implementation and amount of time devoted to speech/language services, in general, and particularly with respect to motor speech skills. The outside expert must also be provided the opportunity to observe the classroom and the speech/language services to assess the effectiveness of the speech/language services as delivered, to assess whether the classroom environment is effectively supporting language development/practice language skills, and the effectiveness of strategies to assure that Student's speech production is appropriately generalized to the classroom and other school settings via appropriate staff support provided by the speech/language therapist. The District shall also seriously consider the observer's suggestions, if any, for improving Student's speech/language services and/or extension of Student's language

program into the classroom. If suggested by the speech/language pathologist who evaluates the direct services and language environment of the classroom, the District shall seriously consider obtaining additional training specifically directed toward treating/dealing with CAS for the speech/language therapist who provides services to Student, as well as for the classroom teacher and paraprofessionals working directly with Student. At a minimum, the District shall provide for 12 hours of observation/training by the outside expert, with more time in the beginning to assure a good transition from the private school services and at least two later visits to assure that the speech/language services remain appropriate.

The obligations detailed above shall be undertaken by the District only if/when Parents notify the District of their intention to return Student to the District for placement in the MD classroom.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is **HEREBY ORDERED** that Parents' claim for reimbursement of the tuition paid and/or owing to the private school in which Student is enrolled for the current school year is **DENIED**.

It is **FURTHER ORDERED** that at such time, if any, that Parents notify the School District that they are accepting the District's proposed placement for Student, the District shall arrange for a speech/language therapist with recognized expertise in treating Childhood Apraxia of Speech to provide a minimum of 12 hours of observation of District staff as described more fully in the accompanying decision to assure that the District is appropriately meeting Student's need for motor speech therapy.

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

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER

January 5, 2014