

*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

Student's Name: J.H.

Date of Birth: [redacted]

ODR No. 14495-13-14-KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Vivian B. Narehood, Esquire  
Gibbel, Kraybill & Hess, LLP.  
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Lancaster, PA 17602

Tredyffrin-Easttown School District  
940 West Valley Road  
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Wayne, PA 19807

Lawrence D. Dodds, Esquire  
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Blue Bell Executive Campus  
460 Norristown Road, Suite 110  
Blue Bell, PA 19422

Dates of Hearing:

January 23, 2014; February 28, 2014; March 19, 2014; March 20, 2014; April 3, 2014

Record Closed:

April 25, 2014

Date of Decision:

May 19, 2014

Hearing Officer:

William F. Culleton, Jr., Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student in this matter (Student)<sup>1</sup> moved to the respondent school district (District)<sup>2</sup> on June 18, 2012. (NT 49; S 9.) On the next day, Parents<sup>3</sup> enrolled Student [redacted] for the 2012-2013 school year. (S 9.) Student is identified with Autism and Speech or Language Disorder pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 8.) Parents requested due process under the IDEA, alleging that the District failed to provide Student with an appropriate educational program and placement in the least restrictive environment, and that the District failed to instruct Student at an appropriate instructional level.<sup>4</sup> Parents request an order that the District send out referrals to approved private schools, and that it provide compensatory education to Student. The District asserts that it has provided an appropriate program and placement.

The hearing was completed in five sessions, and the record closed upon receipt of written summations. I conclude that the District complied with the IDEA.

## **ISSUES**

1. Did the District provide Student with an appropriate program and placement during the period of time from June 18, 2012 to January 23, 2014?
2. Did the District appropriately provide Student with placement in the least restrictive environment during the period of time from June 18, 2012 to January 23, 2014?

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<sup>1</sup> Student is named in the title page of this decision; all personal references in this matter are to “Student” in order to guard Student’s confidentiality.

<sup>2</sup> The respondent District is named in the title page of this decision; its identity is withheld from the remainder of the decision in order to guard Student’s confidentiality.

<sup>3</sup> The complainant Parents are named in the title page of this decision; their identity is withheld from the remainder of the decision in order to guard Student’s confidentiality.

<sup>4</sup> Over the Parents’ objection, I determined at the outset of the hearing that I would limit the time frame for decision and decide the appropriateness of the District’s actions and inactions as set forth in the issues listed below, within the period beginning on the date of entry into the District until the first day of hearings in this matter, January 23, 2014. (NT 41-42.) I refer to this as the relevant period.

3. Should the hearing officer order the District to refer Student to an approved private school for the 2014-2015 school year?
4. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period of time from June 18, 2012 to January 23, 2014?

### **FINDINGS OF FACT**

1. Student exhibited language delay and social and learning problems at an early age. Student was assessed at approximately 18 months of age, and diagnosed with autism. At age 2, Student was diagnosed with pervasive developmental disorder, not otherwise specified. From age 3 to 5, Student received early intervention services through the intermediate unit, including speech therapy and occupational therapy. (NT 52-53; S 43.)
2. Student's cognitive functioning falls within the extremely low to low average ranges. In multiple cognitive assessments from 2007 to 2013, Student's full scale and many subtest scores fell within the first and second percentiles, with other subtest scores falling within percentiles under the tenth percentile. Student's memory functioning is in the extremely low to borderline ranges for most purposes. (NT 347-353; S 6, 43, 44, 71.)
3. Student qualified for clinical and educational classification with intellectual disability in a private evaluation at the end of 6<sup>th</sup> grade, scoring in the first percentile on a measure of adaptive functioning as well as in the extremely low range in cognitive functioning. Later adaptive scores from teachers indicated somewhat higher functioning, not qualifying for such classification. Thus, Student demonstrates some cognitive ability to perform at a level higher than that which would be expected for a child with intellectual disability. (NT 1200-1203, 1245-1250; S6, 43, 71.)
4. Student exhibits significant difficulties in language skills, learning and memory (especially verbal memory), attention, transitioning from one activity to another, fine motor coordination, emotional functioning and adaptive functioning. Student struggles with inefficiencies that span multiple areas of brain functioning. (NT 152, 180-182, 187-188; S 43, 71.)
5. While Student is able to learn skills and information that rely primarily upon literal language and rote memory, Student struggles with curricular demands for understanding, interpretation, comprehension and problem solving – the more abstract areas of the curriculum. This impacts Student's academic functioning, and also Student's social functioning. (NT 160-172, 241-242, 245, 321-322, 343-350, 362-365, 803-810; S 71.)

6. Student demonstrates limited ability (below the second percentile in standardized testing) to understand the perspectives of others, the meanings of idioms and the meanings of common expressions. Student also demonstrates significant difficulties in certain aspects of reciprocal social behavior, such as are seen typically in children with autism spectrum disorders of moderate severity. (NT 99, 170-172, 719, 781-787; S 43, 71.)
7. Student's pace of learning has been slow in grade school and continues to be slow. A private educational evaluation in June 2007 predicted that Student's cognitive levels would make it extremely difficult for Student to progress academically at a rate expected in the regular classroom setting. Student continues to need significant amounts of repetition in order to learn both directions for assessments and concepts in the curriculum. In core academic areas, Student continues to rely upon supports, such as prompting, comprehension strategies, touch points and graphic organizers. (NT 178-179, 364, 390-392, 653-654, 775-778, 803-810, 1181, 1245-1250, 1258-1261, 1314; S 6, 43, 71 p. 16-17.)
8. Student is able to make significant progress in learning academic and social skills when given consistent, intensive instruction with supports. (NT 865-866, 1258-1261; S 71.)
9. Student is very unlikely to be able to advance through four grade levels in reading comprehension at an independent level during one half of a school year. (NT 175-176, 226-231, 547-548.)
10. Student's academic achievement is in the borderline to low average range in most tests of reading, writing and mathematics achievement. This is commensurate with Student's cognitive abilities. (NT 226-231; S 43, 71.)
11. From January 2011 to January 2012, Student advanced from 4<sup>th</sup> to 5<sup>th</sup> grade. However, Student remained within the 2<sup>nd</sup> grade curriculum in 3 different reading textbooks. In one of them, the "Read Naturally" program, in January 2011, Student was reading 68 words correct per minute at the 2.3 level, scoring 47% in comprehension. In January 2012, Student was reading 80 words correct per minute at the 2.6 grade level, scoring 25% in comprehension. (S 6.)
12. During the same time span, Student continued to learn the definitions of words at a 2<sup>nd</sup> grade level, and remained at a 2<sup>nd</sup> grade level in spelling. (S 6.)
13. In writing, in January 2011, Student was able to produce paragraphs of 4 to 5 sentences with 25% accuracy on conventions, with scaffolding and teacher support. In January 2012, Student was producing 6 sentences with 50% accuracy for punctuation and 80% accuracy for capitalization. (S 6.)

14. In mathematics, as of January 2011, Student was working in a 2<sup>nd</sup> grade textbook, adding 2 digit numbers and subtracting 2 digit numbers. Student was able to count money and make change with 80% accuracy. By January 2012, Student continued to work on the last several chapters of the 2<sup>nd</sup> grade workbook, adding and subtracting 3 digit numbers with regrouping, learning measurement, fractions and 4 digit place value. Student also could do comparison and ordering of numbers and solving with 0, 1, 2 3, 4 and 5. (S 6.)
15. In February 2012, Student was learning to write in cursive, and had learned to write Student's first name utilizing a checklist and structured paper, but not all letters. Upper case "[redacted]" was particularly difficult. Learning required constant repetition. (S 6.)
16. Student received special education services in kindergarten and third through fifth-grade from school districts other than the respondent District. In 5<sup>th</sup> grade, Student was placed in supplemental learning support through the local intermediate unit. (NT 58-60; S 8.)
17. When student was in 5<sup>th</sup> grade, the intermediate unit offered an IEP in March 2012, and revised it in April 2012. The revised IEP placed Student in a small learning support classroom for all academic subjects, and called for approximately 22% of the day in regular education settings, including art, library, music and physical education. (S 8.)
18. In 5<sup>th</sup> grade, Student was instructed in a one to one format for reading. For mathematics, Student worked at a table with the teacher and 2 other students. (S 8.)
19. In 5<sup>th</sup> grade, Student received speech and language therapy once per week for 30 minutes, in a group of 1 to 2 students. Student also received occupational therapy once per week for 30 minutes. (S 8.)
20. Student's 5<sup>th</sup> grade IEP indicated that Student needed accommodations including repeated directions, academics taught at a slower pace, repetition of learned academics, visual and verbal prompts, small structured environment with a low student/teacher ratio and frequent breaks. (S 8.)
21. Parent enrolled Student in a District middle school for 6<sup>th</sup> grade, providing enrollment documentation on June 19, 2012. (S 9, 10.)
22. When enrolled, available testing for reading comprehension indicated that Student's comprehension was in the 25<sup>th</sup> percentile in third grade level materials and at the 20<sup>th</sup> percentile in fourth grade level materials. (S 8, 11.)
23. On July 20, 2012, the District offered an IEP and conducted an IEP team meeting with Parents to discuss it. Student was to be placed in supplemental autistic support, and the IEP called for approximately 62% of the day in regular education settings. The IEP provided for direct instruction of basic skills for reading, mathematics and English, as

well as speech and language instruction. The IEP called for Student to be in regular education for special subjects and science with shared adult support. It provided an advisory support class daily with a special education teacher for instruction in social skills and support in academic area classes. (NT 989-990, 998-1000; S 11, 96.)

24. For the classes in regular education settings, the curriculum, assignments, homework and tests were modified for the purpose of providing Student with an opportunity to access them. (NT 323, 1008-1020; S 55, 56; J 112, 121, 122.)
25. The July 2012 IEP offered speech and language therapy in twenty-six half hour sessions on a one to one basis and twenty-six half hour sessions in group. It also offered twenty-six half hour sessions of occupational therapy and consultative physical therapy once per month. (S 11.)
26. The July 2012 IEP offered ESY services, 4 days per week, 3.50 hours per day, for approximately 4 weeks. It included five one hour sessions of explicit teaching of social skills, five half hour sessions of speech therapy, five half hour sessions of occupational therapy and eight one hour sessions of individual tutoring. (S 11.)
27. Student attended ESY during the summer of 2012, but Parent did not schedule Student for the individual tutoring offered in the July 2012 IEP. (NT 294, 742-745; S8, S 14, S 19.)
28. The July 2012 IEP offered two goals addressing reading comprehension, two goals addressing written expression and one goal addressing mathematics concepts and applications. (S 11.)
29. The July 2012 IEP offered modifications and specially designed instruction including direct instruction for mathematics and reading; pre-teaching vocabulary for core classes; shared adult support throughout the day, watching for signs of bullying; advance notice of transitions; assignment book checking and monitoring; clear behavioral expectations and consequences; modified length and number of assignments and homework requirements; adapted tests; extended time for tests; frequent breaks; small group and individualized instruction; wait time for processing and responding; repeat and rephrase oral directions; graphic organizers; one on one time with an adult to proofread and edit writing; provide pictures to inspire writing; and allow student generated writing topics. (S 11.)
30. Parents did not approve the IEP or the associated NOREP. Parents expressed concern that the IEP goals were set “very low”, and questioned the adequacy of support and the measurability of certain goals. (S 12.)

31. Student began 6<sup>th</sup> grade in a District middle school. Student was placed in supplemental autistic support, and was assigned to special education classrooms for approximately 49% of the day. Student received instruction in a special education classroom or an individual pull out class session for 5 periods per day; this included mathematics, English, reading (a second period was added shortly after the school year began) and either social skills pull out or occupational therapy pull out. (NT 60, 1032-1033; J 110 p. 22.)
32. Student's special education case manager instructed Student in reading, mathematics and social skills. The teacher held a Masters degree in special education, with 30 additional advance credits. The teacher had approximately 26 years of experience, including eight years with the District as an autistic support and learning support teacher. The teacher is state certified for autism. (NT 973-975, 998-1000.)
33. Student attended reading classes in special education settings, in which Student received instruction in word making and reading comprehension strategies. The case manager focused on decoding, utilizing a published remedial program. The teacher used judgment to determine that Student was appropriately placed at the level the class was in, and Student performed well at that level during the school year. (NT 986-987, 1034-1036, 1113-1115.)
34. The teacher also used a published remedial program to teach reading comprehension, but did not conduct the placement assessment for the comprehension level in which Student was placed. (NT 1113-1115.)
35. For mathematics, Student worked with a teacher and one peer for direct instruction. The special education teacher utilized a mathematics textbook at a fourth grade level, and supplemented this with a research based computer program for review and repetition at a third grade level. The computer program was sequential and provided formative progress monitoring at a third grade level. The program showed that Student had made slow progress in mathematics especially in operations with whole numbers, and in fractions and decimals. (NT 1025-1029; S 43, 53.)
36. Student received instruction in writing in a special education, small group setting, with an IEP goal that was monitored and reported in the present levels of the IEP. (NT 1079; S 11, 19, 25, 33.)
37. In 6<sup>th</sup> grade, Student was placed in a regular education classroom for specials and science. Although teachers assured Parents that Student understood the science material, Parents saw no evidence of Student's understanding of the material when Parents worked with Student on Student's science homework. (NT 263-265, 270-272, 988-; S 54, 106.)

38. Science teacher, in consultation with the special education teachers, modified Student's curriculum, assignments and homework to reduce the level of skill and the amount of information in which Student was instructed. (NT 1162-1163; S 72.)
39. Student learned some basic information in Student's science class. Student was unable to learn much of the information taught in that class. The IEP team made the judgment that Student derived meaningful learning from working with the other students in the science class; therefore, the team determined that Student would be taught basic information from the entire curriculum being presented to the class, rather than teaching Student scientific information on a sequential basis. (NT 1128-1136; J1 12, 122.)
40. In October 2012, available testing for reading comprehension indicated that Student was able to perform at the 25<sup>th</sup> percentile in fourth grade reading material, but that curriculum based testing showed an instructional level of second grade. Student's fluency was also most functional at the second grade level. Student's word recognition was instructional on the fourth grade word list. (S 17, 18.)
41. On October 15, 2012, the IEP team revised the IEP. It continued the placement in supplemental autistic support, but reduced the estimated time spent in the regular classroom to 51% of the day. It continued Student's placement in regular education science with shared adult support. (S 18.)
42. The October 2012 IEP revised one of the reading comprehension goals to specify four areas of reading comprehension that would be assessed for progress monitoring. It revised one of the written expression goals to specify the grade level rubric to be used in progress monitoring, and to raise the number of points to be attained from 2.5 to 3.5, out of six possible points on the rubric. The revision also eliminated one written expression goal. The mathematics goal was unchanged. (S 11.)
43. The October 2012 IEP revision added a goal for timed reading of words correct per minute; two occupational therapy goals addressing correct sizing and spacing of printing and cursive writing as well as addressing written expression skills; and four speech and language goals addressing articulation of /s/, synonyms, multiple meaning words and "how" questions. (S 18.)
44. The October 2012 IEP revision added some modifications and specially designed instruction, including keyboarding, communication book between home and school, and collecting data on amount and degree of prompting. (S 11, 18.)
45. Parents did not approve the October 2012 IEP revisions and the associated NOREPs dated October 22, 2012 and November 15, 2012. Parents expressed concern that Student was not receiving meaningful benefit from participating in regular education science class; that the IEP did not have a goal for reducing Student's dependence upon prompting



and redirection; that an impending change in occupational therapy services was unclear to Parents; and that Parents desired Student to be educated full time in a small structured learning environment, with a multi-sensory approach, such as an approved public school, which Parents requested. (S 19, 22.)

46. Student's autistic support teacher and the IEP team took into account the reading specialist's recommendation that Student would learn best when instructed with second grade materials. The teacher and team also considered data indicating that Student's word reading and word recognition skills were at a fourth grade level, as well as progress data from the beginning of the year indicating that Student was able to make progress in comprehension and fluency at the fourth and fifth grade levels, when instructed with supports. The teacher and the team decided to continue instructing Student at the fourth and fifth grade levels for reading comprehension and reading fluency. (NT 1089-1098, 1156-1158, 1242-1250, 1258-1261; S 17, 18, 47, 48, 50, 51, 71.)
47. Reading assessment as of January 2013 showed Student's performance in reading comprehension at the fourth grade level to be within the 10<sup>th</sup> percentile. Student's reading fluency was between the 15<sup>th</sup> and 20<sup>th</sup> percentile. In the reading program, Student's scores on answering comprehension questions were lower than those obtained in October 2012. (S 25.)
48. On January 8, 2013 the IEP team revised Student's IEP. Student's placement was unchanged. Previous specially designed instruction was continued. Additional occupational therapy services were provided and the IEP offered a social skills group to student, three times per cycle, 45 minutes per session. New present levels were reported. Two reading comprehension goals, a reading fluency goal, a written expression goal and a mathematics goal were changed from fourth to fifth grade level curriculum. An occupational therapy goal was changed to reflect no further need in cursive writing of lowercase and uppercase letters. A social skills goal was added at Parents' request, based upon Parents' report of Student's social weaknesses. Specially designed instruction was added for delivering reading instruction. Shared adult support was withdrawn from special classes except physical education because it was unnecessary. (NT 991, 998-1000, 1004-1006; S 18, 25, 49, 96.)
49. Parents approved the NOREP for the January revised IEP. In an addendum to the NOREP, Parents requested specific SDI for speech articulation and improved measurability for the social skills goal. (S 27.)
50. On March 21, 2013 the IEP team revised the IEP to add current present levels and to reduce the number of sessions per cycle of occupational therapy offered. Parents did not approve the NOREP. (S 33, 34.)

51. Student's sixth grade teachers implemented the specially designed instruction and modifications called for in the IEP. (NT 983-985, 1041-1044; S 11, 18, 25.)
52. Student continued to require substantial amounts of repetition and practice in order to master both curricular material and testing procedures. (NT 1068-1071, 1100.)
53. Student's reading comprehension progress was monitored through the assessment portion of a reading instruction program, utilized solely for progress monitoring. This involved answering questions about the principal aspects of a story, such as the main idea. Student met Student's goal at a fourth grade level in January 2013; thereafter, Student was assessed at a fifth grade level, and continued to show progress. (NT 1053-1056; S 48.)
54. Student's reading fluency was monitored through a words correct per minute probe. After an intervention to motivate Student in November, Student demonstrated progress, and during the sixth grade year, the assessment was changed to a fifth grade level by March 2013. Student continued to demonstrate progress on this assessment at the fifth grade level. (NT 1057-1062; S 48, 50.)
55. Student's reading comprehension progress in sixth grade was monitored also through a separate monitoring probe that involved understanding the meaning of the sentence and inserting the correct word at various points in the sentence. Student met Student's IEP goal at a fourth grade level in April 2013; thereafter, Student was assessed at a fifth grade level and continued to show progress. (NT 1056-1057; S 48, 51.)
56. Progress monitoring in mathematics, utilizing a separate progress monitoring instrument, showed that Student exceeded Student's mathematics goal between September 2012 and April 2013. At that point, Student's instruction was changed to a fifth grade level, after which Student began to make progress toward the new fifth grade level goal. (1029-1030; S 52.)
57. On May 10, 2013 the IEP team revised Student's IEP to add ESY services. (S 37.)
58. In May 2013, Parents had Student evaluated by private evaluator. The dates of evaluation sessions were May 31, 2013, June 3, 2013, and June 5, 2013. (S 43.)
59. The private evaluator conducted standardized achievement testing that addressed reading, mathematics and written expression. (S 43.)
60. In reading, Student performed in the borderline range. Student's sight word recognition and decoding skills were low average. Student's comprehension skills were borderline. (S 43.)
61. In mathematics, Student performed in the borderline range. Mathematics fluency was borderline, while word problems and mathematics reasoning were low average. Student

was unable to solve problems involving making purchases and determining correct change. Student was able to solve simple addition problems and two digit by one digit multiplication problems; however, student was unable to solve two digit subtraction problems requiring borrowing, and did not attempt items involving fractions, long division, decimals or negative integers. (S 43.)

62. In written expression, Student performed in the low average range. Spelling was average, writing short sentences was borderline and writing a sentence in response to a picture and/or verbal prompt was low average. Student's sentences or limited with limited details. (S 43.)
63. Student has limited functional mathematics skills; Student cannot calculate what \$30.00 can buy at a store, when given the prices of items. (NT 357-359.)
64. For the 2012-2013 school year, Student received marks ranging from 80 in special education reading courses to 100 in music. (S 54.)
65. Student's achievement scores in reading and mathematics, as assessed in the private evaluation performed in May and June 2013, when compared with Student's comparable achievement scores that were obtained by the local intermediate unit in its re-evaluation report in February 2012, show that Student maintained or exceeded Student's percentile ranking over that approximately one year period, when compared with same age peers. In addition, Student performed at a level commensurate with Student's cognitive ability in the private testing in 2013. Student made progress in these academic areas, enabling Student to maintain Student's ranking compared with peers of the same age, and enabling Student to continue to perform at a level commensurate with Student's cognitive ability. (NT 1183-1192; S 6, 43.)
66. During the period from the end of Student's sixth grade year to the middle of Student's seventh grade year in early 2014, Student grew and changed physically, and changed in behaviors toward Parents. This Student became less forthcoming with Parents regarding what was happening in school, as compared with the years when Student was in elementary school. (NT 414, 417-425, 428-429, 437-445.)
67. In seventh grade, the District provided Student with explicit teaching of social skills. (NT 1000-1004; S 65, 96, 65.)
68. In regular education settings, Student engages socially with peers. Student is on the school [redacted] team and attempts to cultivate friendships with same age peers. (NT 61, 139-140, 347-352, 461-462; S 43.)
69. Although Student communicated less frequently with Parents about school during sixth and seventh grade, as contrasted with Student's communications when Student was in

elementary school, the topics that Student discussed more frequently with Student's father related to science and history, to which Student was exposed in regular education classes. Student particularly enjoyed the regular education history class, because Student liked the teacher. Student spoke about history with enthusiasm. Student's anxiety was not due to Student's participation in general education history classes. (NT 420-422.)

70. Student has difficulty understanding social communications and has engaged in inappropriate behaviors in the classroom occasionally. (NT 69-70, 240, 326-328; S 43; J 110 p. 20.)
71. In June 2013, during private emotional and behavioral assessment, Student reported slightly above average symptoms of depression and anxiety, with thoughts of self-harm including a plan. Symptoms of depression were not diagnosed to be at a clinically significant level, but the thoughts of self-harm required immediate protective action by Parents. (NT 155-160, 231-233, 246-247; S 43.)
72. In September of Student's seventh grade year, the District acquiesced in Parents' desire to avoid assignment of Student to regular education for health education. Instead, the District assigned the most important parts of the health curriculum to be taught to Student during the advisory period with an experienced special education teacher who had taught Student previously. (NT 301-304; S 63.)
73. At the beginning of 7<sup>th</sup> grade, Student expressed both at home and in school that Student was experiencing anxiety because of new classes and new teachers. Throughout Student's 7<sup>th</sup> grade school year, Student experienced significant levels of anxiety. This anxiety has resulted in escalation of angry and sometimes physically threatening behavior towards Student's mother. (NT 76-81, 117-119, 206-208, 328-331, 286-387; S 4, 68; J 110 p. 20.)
74. Reading assessments at the beginning of seventh grade indicated that Student was able to comprehend fifth grade instructional material at the 21<sup>st</sup> percentile. Previous assessments in 2012 and 2013 had reported that Student's comprehension abilities were at an instructional level of second grade, and that Student did not use comprehension strategies without prompting and motivational techniques. (NT 585-597, 626-627, 654-655, 836-837; S 62.)
75. By September 2013, Student had met Student's speech articulation goal and Student's goal for answering "how" questions. (NT 745-747, 762; S 62.)
76. On September 17, 2013, the IEP team revised Student's IEP. The team added new present level data. The team deleted the speech articulation, "how" questions, and cursive writing goals. The team added a new social skills goal; this goal addressed attending to speaker, waiting one's turn, staying on topic and keeping focus through four

conversational volleys. The team added a new functional mathematics goal, addressing the skill of purchasing items and making change. The team revised specially designed instruction for mathematics, speech and following directions. It added a new specially designed instruction for teaching Student to divide tasks into manageable units, as well as providing extra repetition and practice for student. Shared adult support for general education and specials with attention to bullying remained. Social skills instruction services were increased to one time per day for part of the IEP year. The IEP continued to provide regular appointments with the school counselor. (S 62.)

77. Student's teachers implemented the specially designed instruction and modifications called for in the IEP, except for data collection by the one to one aide accompanying Student to regular education classes and one special class. (NT 488-502, 983-985; S 11, 18, 25, 62.)
78. In seventh grade, Student was assigned to two special education reading classes per day. One class was provided by the Student's case manager; the other was delivered by a learning support teacher. (NT 459, 1278, 1304.)
79. Student's case manager had two years of teaching experience with the District as a special education teacher, and eight years total teaching experience. The teacher had a Master's degree and numerous credits and hours in ongoing training. The teacher was certified in special education, kindergarten to 12<sup>th</sup> grade, and was studying to obtain certification in autism. (NT 454-460.)
80. The case manager's reading class delivered explicit instruction using instructional programs called SRA Corrective Reading Decoding program, SRA Comprehension, and Intervention by Design, Intermediate Kit. The case manager delivered the programming in a small group setting. (NT 477, 549, 583-584; J 128, 129.)
81. The SRA Corrective Reading Decoding program utilizes a placement assessment in order to assign the student to one of four levels, which address decoding problems of decreasing severity. The first level, "A", is for students who are extremely deficient in decoding skills. The fourth level, "C", is appropriate for students who have mastered many basic reading skills but who have trouble with multisyllabic words and typical textbook material. (J 128.)
82. Student was assigned to be Decoding "C" level. Student began seventh grade at a level of approximately lesson 42, and progressed until the middle of the school year to approximately lesson 55. (NT 366-373, 524-528; S 32; J 128.)
83. Student was assigned also to the SRA comprehension skills program at level "B 2". The B 2 level is for students who have completed the Comprehension B 1 level. It continues and expands upon the skills presented in the B 1 level. (NT 529-531; J 129.)

84. The Comprehension “B 1” level is for students with severe difficulty in understanding material taught in classrooms. Such students do not have good skills in recitation, repeating sentences, retaining information, or answering questions. Such students have difficulty comprehending material when it is presented orally. Such students lack some common basic information and they are deficient in thinking operations. Such students have trouble identifying how things are the same and completing deductions that involve the word “maybe”. (NT 529-531; J 129.)
85. The case manager believed that Student had been placed at an appropriate level in this program during sixth grade, so the case manager continued Student at the lesson after the last lesson mastered in sixth grade. Student began at about lesson approximately 30 to 34, and was at lesson 45 by February 2014. (NT 530-531.)
86. In addition to the SRA programs, Student’s case manager utilized Intervention by Design, a reading program that addresses vocabulary skills, comprehension skills, phonics skills and fluency skills, utilizing different methodology. (NT 531-532.)
87. The learning support teacher who instructed Student in Student’s second daily reading class delivered direct instruction in reading comprehension and fluency in a setting with one or two other students and the teacher, a special education teacher. (NT 474, 476-477, 1304-1306; S 99.)
88. The learning support teacher utilized the Reader’s Journey program, which is a language arts based program that addresses fluency and comprehension. It is a program of explicit, systematic instruction of reading comprehension strategies. (NT 537-538, 1310-1313; J 133.)
89. The two reading teachers conferred frequently in order to coordinate their instruction of Student. (NT 1325-1326.)
90. Although the SRA, intervention by design and Read Naturally program levels do not correspond to curricular grade levels, Student’s case manager believed that some of the levels assessed in these programs were roughly equivalent to curricular grade levels. Therefore, Student’s case manager believed that Student was instructed utilizing reading materials that were, for most purposes, at a fifth grade level in reading, although the case manager was setting reading comprehension goals at a sixth grade level. (NT 494-495, 540-548, 555-558, 603-622; S 37, 62, 71.)
91. In seventh grade, Student was assessed on fifth grade material for progress monitoring of reading fluency. Student met Student’s IEP fluency goal by October; however, Student regressed due in part to missing some classes, and then began improving toward meeting the goal. (NT 1314-1317, 1388-1389; S 100.)

92. In seventh grade, Student was assessed on fifth grade material for progress monitoring of a form of reading comprehension known as “MAZE”. Student met Student’s IEP comprehension goal by the end of September; the goal was adjusted and Student made progress toward the new goal. (NT 1317-1319; S 101.)
93. In seventh grade, Student was assigned to a daily special education mathematics class. The class consisted of four students. The teacher utilized stations in order to provide direct instruction to the Students in her classroom in smaller groups of two students. (NT 476, 889, 902-904; S 99.)
94. The mathematics special education teacher created an instructional scope and sequence aligned with Pennsylvania alternate curriculum standards. The teacher selected parts of a published mathematics textbook, as well as supplemental programs, for purposes of instructing Student in this curriculum. Student was instructed, and Student’s progress was monitored, at the fifth grade level. (NT 890-901, 941; S 62, 72, 85, 108, 109.)
95. Student’s progress was monitored through a separate published progress monitoring assessment method based upon grade level achievement at a fifth grade level. (NT 928-930; S 102.)
96. The mathematics curriculum provided to Student included functional mathematics, in which practical mathematics skills were taught in various environments, including the school store and the classroom. Student relied upon a form that set forth the steps required to do calculations for making purchases at the school store. Student needed prompts in order to utilize the form appropriately. Student used a calculator to calculate sales tax. (NT 890-891, 924-928, 948-953; S 70.)
97. The mathematics special education teacher modified delivery of the curriculum to Student by providing extra repetition and practice as needed, as well as motivational initiatives. (NT 902-903, 918-924, 932, 935-937, 958; S 92.)
98. Mathematics special education teacher provided Student with access to a research based computer program for repetition and practice, to be utilized primarily for homework, but also in the classroom. This program provided formative progress monitoring to the teacher on Student’s mastery of skills within the scope and sequence. The program indicated that, of 17 skills that Student practiced between September 2013 and January 2013, Student mastered four skills, and made further progress in five other skills. (NT 918-924, 938; S 92.)
99. The mathematics special education teacher provided an opportunity for independent practice in the classroom through a computer-based program that required mastery of skills sequentially. The program also provided formative progress monitoring had indicated that Student made slow progress in mathematical operations with whole

numbers and slight progress with fractions, proportions, geometry and measurement. (NT 905-918; S 93.)

100. In seventh grade, Student was assigned to a special education English class in which the teacher instructed Student in writing. There were five students in the class, including autistic support and learning support students. The class utilized a writing program that was structured, multisensory and systematic. The program utilized repetition and practice, modeling and graphic organizers. (NT 1280-1288; S 66, 76-79, 99, 124, 125.)
101. In seventh grade, Student received speech and language services (26 sessions each of individual and group therapy) and occupational therapy services on a pullout basis. Speech and language in the group setting was scheduled for one period per cycle, pulled out of Student's advisory support period, consisting of Student and two peers. Occupational therapy was scheduled for Student's fourth period, which otherwise was utilized for special subjects. (NT 478, 755, 761; S 99.)
102. Speech therapy in the small group setting addressed the skill of making inferences. (NT 759.)
103. In seventh grade, Student was assigned to regular education classes for specials, including technical education, physical education, music, family and consumer science, art, and activities. Student was assigned to regular education for one period per day for non-core curriculum academic subjects, including science, health and social studies. Supplementary aids and services included shared adult direct support in the general education class and in physical education, delivered according to a specially designed instruction item in the IEP. Supplemental services also included repetition and assistance during advisory period for general education subjects. (NT 470-472, 477, 501-502; S 45, 99.)
104. In the regular education academic class, history, the curriculum, assignments, homework and tests were modified for the purpose of providing Student with an opportunity to access them. (NT 664-665.)
105. In sixth grade and in seventh grade, Student attended a "Buddy Group", in which Student engaged in social interactions with the students in the autistic support class. Student demonstrated an outgoing, sociable nature in this class, and in Student's day-to-day presence in the school. (NT 977-983.)
106. In October 2013, during Student's 7<sup>th</sup> grade school year, Student attempted to kick another student as that student was exiting from the school bus on the way home from school. District personnel investigated the matter and counseled both children.



There was no reported recurrence of altercations between the 2 students. (NT 89-92; J 110.)

107. On November 15, 2013, the District produced a re-evaluation report. The report included a review of records and updated assessments of social, emotional, behavioral and adaptive functioning. Speech and language reports included Student's performance in therapy sessions and scores of standardized tests for language disorders. Parental input was solicited but not obtained. To school psychologists and a school counselor performed three formal classroom observations. The evaluation incorporated the results of the independent private evaluation provided by Parents. (S 71.)
108. The reading teacher reported that, as of November 8, 2013, Student had met Student's goal for timed reading comprehension at a fifth grade level, as measured by a MAZE comprehension assessment, which uses graded materials. Student scored in the 37<sup>th</sup> percentile. The teacher recommended that the goal should be increased to a sixth grade passage. (S 71.)
109. The reading teacher reported that, as of November 7, 2013, Student had met Student's goal for words correct per minute; Student's scores ranked in the 36<sup>th</sup> percentile at instructional level 5. The goal called for 100 correct words per minute with at least 95% accuracy over three consecutive trials at a fifth grade level. The teacher recommended changing the goal to a level 6 at a higher rate of words correct per minute. (S 71.)
110. The re-evaluation report reflected, based upon assessments in late October and early November, that Student had met the speech and language goals for articulation, synonyms, "how" questions and social skills, and the report recommended changes in goals addressing these needs. The report also noted significant progress with regard to multiple meaning words. (NT 752, 788-789; S 71, 97.)
111. The re-evaluation report contains scores from standardized testing of Student's speech and language functioning in following directions, formulated sentences, recalling sentences, understanding spoken paragraphs, word definitions, sentence assembly, semantic relationships in reading comprehension. Student scored below the 10<sup>th</sup> percentile in all of these areas except formulated sentences, in which Student scored in the 16<sup>th</sup> percentile. (NT 768-780; S 71.)
112. Student's scaled score in reading comprehension was two, and Student's percentile rank was .4. This score on the speech and language test reflects Student's utilization of language, rather than Student's actual reading comprehension. The test is standardized by age; therefore, the speech language therapist delivered content at a grade level commensurate with Student's age, rather than at a lower grade level. No prompting

was permitted; however Student was allowed to look back at the passage upon which Student was being tested. (NT 768-780, 1241-1243; S 71.)

113. The re-evaluation report also reflected that Student had made some progress with regard to synonyms and grammar. (NT 781-783; S 71.)
114. Student had not met Student's goals for untimed reading comprehension, written expression, mathematics concepts and applications or functional mathematics. (S 71.)
115. Student had not reported stress or anxiety related to academics, social concerns or issues outside of school during the counseling sessions required by the IEP, and Student had demonstrated both the willingness and the ability to seek out the school counselor's help for support with Student's needs regarding anxiety, social interactions and participating in the school's academic programming. The counselor recommended changing the IEP specially designed instruction to require short "check-in" appointments once per cycle. (NT 675-697, 711-716; S 71.)
116. Teacher anecdotal reports did not reflect academic or social difficulties in any classes, including special classes and the regular education class required in the IEP. Teachers did report some difficulties with attention, organization. Behavior inventory returns by teachers indicated some elevated concerns regarding attention. One teacher reported a variety of concerns, including anxiety, depression, attention, atypicality, withdrawal, adaptability, leadership and study skills. The inventory's validity assessment suggested that this teacher's results should be viewed with caution due to inconsistencies among the answers. (S 71.)
117. An adaptive behavior scale returned by teachers indicated ratings within the moderately low range in communication, daily living skills regarding time, money and mathematics, and socialization skills regarding interacting and getting along with others. (S 71.)
118. Speech and language testing indicated relative strength with expressive language skills and judgments concerning grammatical correctness of sentences. Testing indicated overall weakness with language abilities, especially the understanding of spoken paragraphs, comprehension of orally presented directions, deriving meaning from context, understanding nonliteral language, and pragmatic language skills. Speech and language recommendations included preferential seating, frequent checks for understanding, testing in a separate area, repeated practice of novel materials, providing clues as to what Student should listen for, modeling of summarization and derivation of main idea of a story, modeling of questions to be asked when reading, modeling for how to clarify information when reading or listening, teaching the use of mental pictures for vocabulary words, and modeling of how to listen for meaning rather than providing a word for word repetition. (S 71.)

119. The re-evaluation report recommended education in an environment with low student to teacher ratio, opportunities for direct instruction, sensory breaks, assistive technology, strategies for self-regulation and monitoring, direct instruction of social skills, and opportunities for engagement with typically developing peers. The report recommended continuing explicit instruction in reading comprehension strategies, mathematical problem-solving and written expression tasks. It also recommended continued speech and language services and continued occupational therapy services. (S 71.)
120. On November 20, 2013, the IEP team revised Student's IEP to update present levels, revise goals and revise specially designed instruction. The team revised the occupational therapy goals in order to address more challenging fine motor skills in classroom-based written work. Part of the goal included a new requirement of self-editing with regard to capitalization and punctuation. Speech goals were revised in order to address needs with regard to indirect references, sarcasm and interpreting social situations. New goals also addressed summarizing oral and written paragraphs and using context clues to determine meanings of unknown vocabulary words. A new specially designed instruction was added, which provided for short check-in appointments with the guidance counselor to monitor any school-based anxiety. Shared adult support for general education and specials with attention to bullying remained. The team also determined that Student would take state testing through the Pennsylvania Alternate System of Assessment (PASA). (NT 512, 814-816; S 72.)
121. As a result of the November 2013 three-evaluation and the discussion during the November 20, 2013 IEP meeting, teachers discussed utilizing new techniques for teaching reading comprehension. (NT 552-555.)
122. On December 5, 2013, Parents requested due process by filing a complaint notice. (S 89.)
123. On December 12, 2013, in preparation for an IEP meeting the next day, the reading teacher reported that Student had met Student's goal for a MAZE comprehension passage, scoring over and 12 correct in three consecutive sessions with a level 5 text. The teacher reported that Student was functioning at the 35<sup>th</sup> percentile at a fifth grade level. The teacher recommended that the goal be changed to a MAZE comprehension score of 20 correct, with passages at a sixth grade level. (S 85.)
124. On December 12, 2013, the reading teacher also reported that Student had met Student's goal for reading fluency. At a fifth grade level, Student had not scored at an average rate of 100 correct words per minute over three consecutive trials, as called for in the goal. The average rate was 96%. Nevertheless, the teacher recommended changing the goal to a sixth grade level, 95 correct words per minute. (S 85.)

125. On December 13, 2013, the District offered Parents a revised IEP at the annual IEP review meeting, in which Parents participated by telephone. The revisions included new updated present levels of academic and functional performance, a post-secondary transition plan and a new mathematics goal that called for performance at a sixth grade level a fifth grade level. The functional mathematics goal was also changed to call for performance at an independent level. (NT 892-894; S 85, 88, 89.)
126. In the December 2013 IEP, two reading goals and the mathematics goal were revised to increase Student's expected performance in reading fluency, reading comprehension and mathematics to a sixth grade level. The functional mathematics goal was revised to expect independent performance. The IEP increased the expectation for the written expression goal to 3.5 points scored out of six on a writing rubric, but kept the sixth to eighth grade assessment level. The occupational therapy goal looked for an increased number of rubric points added the requirement of accurate copying. One speech goal called for identification of new story characteristics; the speech language therapist planned to use an assistive technology device in order to teach these characteristics through both visual and tactile means. The team revised the social skills goal to address the development of inferencing skills in the identification and solution of social problems. (NT 518-519, 801; S 85.)
127. The December 2013 IEP included new specially designed instruction for teaching core subjects and reading, as well as for occupational therapy. Shared adult support for general education and specials with attention to bullying remained. (NT 519-523; S 85.)
128. In January 2014, Student was involved in an altercation with a peer [redacted]. [B]oth children were counseled. Parent was notified, and spoke to Student when Student returned from school. No subsequent altercation between the 2 students was reported. (NT 95-97; J 110.)
129. Student uses text messages to communicate with peers, and has engaged in socially inappropriate texting, included including repeated texting within short periods without response, and inappropriate statements made in the texts. (NT 98-99, 316-320, 330-331.)
130. In January 2014, Student became extremely upset when Student's mother asked Student about a mathematics worksheet in which a number of answers were not completed. Student became physically threatening to Student's mother and Student's father intervened by removing Student from the premises and going for a ride, and a long talk, in the car. (NT 100-103.)
131. By February 2014, Student had made slow progress toward meeting Student's IEP mathematics concepts and applications goal. Student had reached the goal or exceeded

the goal three times, but had not done so consecutively; thus, Student had not shown mastery of that goal. (NT 930; S 102.)

132. In March 2014, the District reading specialist assessed Student's reading skills, including reading comprehension. Based on standardized testing, the specialist concluded that Student was at an instructional level of fourth grade for word recognition and at an instructional level of second grade approaching third grade for reading comprehension. (NT 603-611; J 137.)
133. These lower scores reflect in part that Student performs poorly when required to read independently, because Student is still dependent upon prompting and structure for reading comprehension instruction and assessment. In addition, Student's cognitive deficits in memory make the tests utilized by the reading specialist particularly difficult for Student. (NT 1378-1383.)
134. In 2014, the District's mathematics specialist tested Student with the single diagnostic survey of essential mathematics. Student's scores showed that Student was achieving at approximately a 3.5 grade level in basic concepts, 3.4 grade level in operations and a 4.0 level in applications. Overall, the evaluator concluded that Student was achieving at approximately a grade level equivalent of 3.5. The evaluator concluded that Student was appropriately placed in special education mathematics class. The evaluator recommended that Student received practice and instruction on Pennsylvania standards eligible content. (NT 943-944; J 138.)
135. In writing, Student became less prompt dependent in utilizing a graphic organizer in order to produce five paragraphs; however, Student continues to need a lot of prompting and structure in writing. (NT 1303-1304, 1341, 1378.)
136. The IEP team has not discussed creating goals for reducing Student's need for prompting and structure in writing. (NT 1344.)
137. Student's special education mathematics teacher, in consideration of the mathematics specialist's findings, intended to continue instructing and progress monitoring Student at a fifth grade level, because Student's lower grade equivalent performance on the assessment was due to gaps in knowledge and skills, Student's long-term memory deficits and Student's need for review and repetition of skills, even skills that Student had mastered. The teacher considered possible alternative interventions, and concluded that those being utilized with Student were appropriately individualized for Student, and would provide a better opportunity for meaningful benefit. (NT 944-946, 960-964; S 92.)
138. In the summer of 2013, Student attended a District program to develop social skills for one week, 3 hours per day. (NT 110-112; S 57.)

## DISCUSSION AND CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer).<sup>5</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>6</sup> that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

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

In this matter, Parents requested due process and the burden of proof is allocated to Parents. Parents bear the burden of persuasion that the District failed to comply with its obligations under the IDEA. If Parents fail to produce a preponderance of evidence in support of Parents’ claims, or if the evidence is in “equipoise”, then Parents cannot prevail.

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<sup>5</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact.

<sup>6</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

## PROVISION OF FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is 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 benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“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, 247 (3d Cir. 1999). In order to 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. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program 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 (3<sup>rd</sup> Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a “basic floor of opportunity” for the child. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time at which it was made, and the reasonableness of the school district’s offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

#### LEAST RESTRICTIVE ENVIRONMENT

The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled, “to the maximum extent appropriate ... .” 20 U.S.C. §1412(a)(5)(A). The United States Court of Appeals for the Third Circuit has construed this language to prohibit local educational agencies from placing a child with disabilities outside of a regular classroom, if educating the child in the regular education classroom, with supplementary aids and support services, can be achieved “satisfactorily.” Oberti v. Board of Ed. Of Bor. Of



Clementon Sch. Dist., 995 F.2d 1204, 1207 (3d Cir. 1993). Each public agency must assure that a continuum of alternative placements is available, including special classes, resource rooms, supplementary services and special schools. 34 C.F.R. §300.115.<sup>7</sup> The Court noted a “tension” within the IDEA between the strong congressional policy in favor of inclusion, and the law’s mandate that educational services be tailored to meet the unique educational needs of the child. Oberti, 995 F.2d above at 1214.

Children with disabilities may not be removed from the regular educational environment unless “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A). In determining placement, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs ... .” 34 C.F.R. §300.116(d). Removal is not permitted if the sole reason is “needed modifications in the general education curriculum.” 34 C.F.R. §300.116(e).

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

Addressing the first part of the Oberti analysis, the court must consider three things. First, it must determine whether or not the agency has given “serious consideration” to utilizing

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<sup>7</sup> This continuum assumes a mandate to educate the child in “the school that he or she would attend if nondisabled.” 34 C.F.R. § 300.116(c). State regulations require school districts to ensure that “children with disabilities have access to the general curriculum ... .” 22 Pa. Code § 14.102(a)(ii).

the full continuum of placements and supplementary aids and services. Id. at 1216. Next, the court must compare and contrast the educational benefits that the child can receive in the regular education and segregated settings, particularly considering the benefits of learning social and communication skills in the general education context. Ibid. Finally, the court must consider the degree to which the child’s behavior in the regular education setting is so disruptive that the child is not benefitting and that the behavior is interfering with the education of the other children in the general education setting. Id. at 1217. The Court emphasized that if supplementary aids and services would prevent these negative consequences, the determination of a negative effect on peers would not warrant removal from the regular education environment. Ibid.

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

#### APPLICATION OF STANDARDS TO THE FACTS OF RECORD

As the above discussion demonstrates, the District was under an obligation during the relevant time to provide a placement and program that were reasonably calculated to provide meaningful educational benefit, and a placement in the least restrictive environment that would permit it to provide such benefit. I conclude that the District met these standards.

As discussed above, the IDEA and section 504 require that the District’s offer and delivery of services be “reasonably calculated” to lead to meaningful benefit. I conclude, by a

preponderance of the evidence, that the District met this requirement. I have reviewed the District's compliance with the IDEA and section 504 for a period of time from June 18, 2012 to January 23, 2014 – about eighteen months. During this time period, Student was placed in supplemental autistic support. This was consistent with Student's IDEA classification as a student with autism. I conclude that the level of support was appropriate.

At the beginning of the relevant period, Student's time spent in regular education settings was slightly above 60% for the school day; this percentage was reduced eventually to approximately 50%. Student was assigned to two special education classes per day for reading, and Student was assigned to special education classes for mathematics and writing. The IEP was revised to provide for further special education services during the Student's advisory period, including classes explicitly teaching social skills, and support by the special education teacher for academic subjects, including assignments and homework.

Student was assigned to a regular education classroom for one academic subject, during most of the relevant period. Student was instructed in science and history during this regular education class period. An assignment for a health class in seventh grade was reversed after Parents objected, and the necessary curricular content was taught to Student during Student's advisory period. For science and history, the curriculum was modified for Student, emphasizing instruction of vocabulary and facts. Delivery of this instruction was also modified to shorten assignments and homework; advisory support was provided. During sixth grade, the IEP provided for shared adult support<sup>8</sup> in the regular education classroom, but this was discontinued when it was found to be unnecessary. The record is preponderant that Student learned facts

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<sup>8</sup> This was the term for the presence of an educational paraprofessional to monitor a group of students, including Student, and intervene as needed.

about both science and history, and that Student derived meaningful benefit from working academically with same age peers.

The IEP team also assigned Student to the regular education setting for special classes, such as art and physical education, as well as for social times such as lunch. For lunch and physical education periods, the District provided Student with shared adult support. This support was deemed unnecessary for other general education settings. The evidence is preponderant that this level of support was appropriate for Student.

During the relevant period, the IEP team created or revised the IEP nine times. Each IEP or revised IEP contained all of the elements that the IDEA requires. Each IEP contained detailed, data-based present levels of academic and functional performance. The present levels were derived from current, comprehensive evaluation reports or re-evaluation reports that addressed all of Student's educational needs and functioning deficits.

The IEP goals addressed all of Student's academic, social and functional needs. The goals proceeded from baselines and were measurable. For the most part, IEP goals were established for a level of performance that was reasonably and slightly above Student's present levels of performance, as set forth in the IEP's<sup>9</sup>. As Student made progress toward meeting the goals, or as Student met the goals, the goals were adjusted reasonably to look for higher levels of performance.

A preponderance of the evidence supported the validity of the methodologies used for progress monitoring. Student's special education teachers testified that the MAZE method of measuring reading comprehension was valid for its purpose; there was no evidence that it is

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<sup>9</sup> The first social skills goal did not meet this standard; the evidence was preponderant that this goal was based upon Parent input as to Student's social needs; however, it addressed issues that Student had mastered in the school setting, and therefore did not project growth over the IEP year. Nevertheless, the record also is preponderant that, as soon as the District became aware that this goal was not addressing behaviors that Student needed to learn, the District rewrote the goal to address other, needed social skills. I find no evidence of a denial of FAPE in this regard.

invalid. Moreover, the IEP team supplemented this measurement with a goal that measured Student's ability to identify the principal parts of the story, including the main idea and details; this goal was measured by utilizing the assessment portions of a different reading program that was not being used for instructional purposes.<sup>10</sup>

The special education teachers who taught mathematics to Student in sixth and seventh grade, whom I found to be both credible and reliable, described the instructional program for Student in detail. I conclude that this evidence, corroborated by the documentary record, shows by a preponderance of the evidence that the program addressed Student's needs appropriately with regard to mathematics. In sixth grade Student was taught by a Masters level special education teacher with over 20 years' experience; the evidence is preponderant that this teacher appropriately instructed Student in Student's age-appropriate curriculum, modifying that curriculum to address Student's skill gaps in areas such as whole number operations and measurement. In seventh grade, another experienced special education teacher devised a modified scope and sequence of skills and concepts for Student, aligning her instruction appropriately with state and district curriculum at Student's seventh grade level. In both years, the IEP team devised goals for mathematics concepts and applications that addressed Student's needs. The record is preponderant that the progress monitoring on these goals was appropriate and valid.

The evidence also shows that the District addressed Student's needs in written expression appropriately. In sixth grade, Student received instruction in written expression in a small group, special education setting. Student's IEPs addressed Student's needs appropriately and provided

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<sup>10</sup> On cross examination, one teacher expressed a lack of knowledge as to whether scientific literature supported the validity of using this program's assessment methods in order to measure the skills set forth in the goal; nevertheless, there was no evidence in this record supporting the proposition that it was inappropriate to monitor progress in the way chosen by Student's teachers.

appropriate supports by teaching Student to utilize graphic organizers. In seventh grade, Student's teacher utilized a published written expression program that provided a scope and sequence, appropriately addressing Student's need for a great deal of structure and repetition, as well as prompting, in learning to plan Student's writing of paragraphs.

The District provided appropriate related services to Student in support of Student's academic needs. Related services included speech and language therapy, occupational therapy, a physical therapy consult, and shared adult assistance in some general education settings.

Addressing Student's profound cognitive deficits with regard to the utilization of language, Student's IEPs provided 52 one half hour sessions of speech and language therapy per IEP year. Half of the sessions were on a one to one instruction basis, and half of the sessions were on a group basis. This level of service continued throughout the relevant period. The evidence was preponderant that this was an appropriate level of services.

The speech and language therapist credibly testified that her therapy first addressed Student's articulation difficulty with the letter /s/. Student met Student's goal for articulation during the relevant period, and the goal was discontinued. The therapist next addressed Student's language needs by instructing according to an IEP goal calling for Student to learn to recognize synonyms, and to learn that words can have multiple meanings; Student in this way also developed Student's vocabulary. In addition Student's goals included the goal of learning to respond appropriately to "how" questions. During the relevant period, Student met all or most of these goals.

The therapist also addressed Student's needs with regard to pragmatic social speech. Student's goals included utilizing appropriate listening skills during conversation, and increasing Student's ability to engage in conversational volleys. Nearly all of the credible witnesses in this

matter testified either that Student's social and conversational skills in school improved during the relevant period, or that Student's conversational skills and social gregariousness emulated the skills of typical students.

The evidence shows that the District provided appropriate occupational therapy services to Student, whose needs in fine motor coordination – specifically writing, both in print and cursive – impeded Student's progress in written expression. The occupational therapist credibly testified that she addressed Student's ability to write legibly by focusing upon Student's ability to write both uppercase and lowercase letters in smaller areas of space on paper, utilizing guides on the paper, and gradually removing these supports. Next, the therapist taught Student to write in cursive, so that Student would be able to take notes in a classroom setting. The evidence of record and progress monitoring provided by the vocational therapist showed some progress in these areas.

The District addressed Student's needs for instruction in social skills appropriately. Student came to the District with considerable, apparent social skills. All District witnesses agreed that Student was friendly and outgoing towards adults and towards peers in school. Student displayed a good sense of humor. Student was able to converse with peers, and was able to form friendships with peers. Student utilized these skills with both special education students and with typical students. Initially, the Student's IEP team did not perceive a need for explicit training in social skills.

In sixth grade, however Parents advocated for both explicit training and supports to assist Student with regard to social relationships. The IEP team provided explicit training the form of a social skills class, delivered twice per cycle. The speech and language pathologist also addressed social skills-related language issues. The IEP team provided supports in the form of shared adult

support<sup>11</sup> in physical education and in lunch periods, as well as scheduled appointments with the school counselor, who also saw Student without appointments when Student initiated such meetings. The District also appropriately accommodated Student so that Student could participate in the middle school [sports] team, dressing and practicing with the team, and playing in preliminary matches before actual game time. Thus, the evidence is preponderant that the District addressed Student's needs in the area of social skills.

## PARENTS' CONCERNS

Parents requested due process because they were deeply concerned about the appropriateness of Student's placement in middle school, as well as the appropriateness of the delivery of academic instruction to Student. I find every evidence in the record that Parents were sincere in their concerns, knowledgeable about Student's needs, and thoughtful in their frequent attempts to advocate for what they considered to be appropriate services. Nevertheless, I conclude that Parents – who are not educators by profession or experience -- did not take into account certain key considerations that factored into the District's educators' teaching strategies.

District educators and the District school psychologist credibly explained that Student did not present a clear-cut profile of disability. All agreed, and Parents' expert school psychologist also agreed, that Student's cognitive ability was very low, when considered as a whole. Student's overall intelligence quotient (IQ) was at a level indicating that Student could be diagnosed medically with intellectual disability. The Parents' expert actually reached this diagnosis after administering an inventory addressing Student's functional levels, and

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<sup>11</sup> Specially designed instruction in the IEPs required that adult monitors watch for signs of bullying and intervene as needed.



recommended educational classification with intellectual disability. Student's achievement levels, again taken as a whole, were consistent with such a diagnosis.

Nevertheless, the District school psychologist, who also has clinical qualifications, disagreed with the diagnosis of intellectual disability, considering the evidence of functional limitation to be insufficient to render the diagnosis. Therefore, the District chose the educational label of autism in preference to that of intellectual disability. Consistent with this judgment, District witnesses credibly demonstrated that, in certain areas, Student's cognitive abilities and functioning exceeded the levels that would be expected in a child with intellectual disability. Neither Student's cognitive abilities nor Student's performance in various skills presented a "flat" profile that would be consistent with intellectual disability. Thus, Student demonstrated an ability to learn and perform skills at a higher level than that which would be expected of a child with intellectual disability.

In addition to the above considerations, the District's teachers noted repeatedly and credibly that, from a pedagogical point of view, it was important to provide Student with academic challenges and subject matters that were as close to being age appropriate as possible. District witnesses repeatedly noted that the Student demonstrated a lack of motivation to take on academic challenges. This was especially true with regard to reading comprehension and writing; these were two of the areas most challenging to Student because of Student's cognitive difficulty with learning abstract concepts and skills.

In addition to these concerns, District witnesses credibly demonstrated that the Student's difficulties with language processing and memory made it necessary to provide Student with both structure and prompting in order to make learning possible. All witnesses agreed that Student repeatedly demonstrated a propensity to learn a skill to mastery, yet forget that skill – or

forget to use it - completely thereafter. Student needed prompting to retrieve the mastered skill from memory. The witnesses demonstrated this in considerable detail with regard to the teaching of reading comprehension skills and writing skills. Student often was capable of utilizing comprehension techniques such as re-reading, underlining, visualization and questioning – yet, when faced with a new text, would not utilize such techniques without being directed to do so by the teacher. Likewise, Student required repeated prompting to utilize graphic organizers for writing, and to improve the content of Student’s writing when Student had completed a draft.

I conclude that this preponderant evidence shows that the IEP teams and the District’s teachers reasonably chose two teaching strategies under the circumstances. First, they chose to utilize curricular materials at a higher grade level than Student’s measured independent levels of functioning in reading, writing and mathematics. Second, they chose to challenge Student to master skills at these higher curricular levels, while maintaining supports such as structured, sequential and explicit teaching and prompting. Thus, the IEP team and the teachers chose not to adopt the strategy preferred by Parents, which is to start Student at second and third grade curricular levels, and teach skills and information sequentially, requiring mastery at every point in the sequence before proceeding forward.

In reaching this conclusion, I do not choose between two teaching strategies. It is enough that I conclude that the District’s educators defended their pedagogical choices reasonably and credibly. I find that the educators did so. Thus, the weight of the evidence in this case is preponderant that the District’s educators chose strategies, placements, goals and specially designed instruction that were reasonably calculated to provide Student with an opportunity for

meaningful educational benefit. Parents failed to introduce preponderant evidence to the contrary.

Parents argue that the District educators' choices did not produce meaningful educational benefit for this Student. I find that the record is preponderant to the contrary. Progress monitoring and teachers' descriptions of Student's performance in school showed preponderantly that Student progressed significantly within the special education curricula that the District was teaching. Student expressed pride and some satisfaction in Student's academic progress. This was meaningful progress.

Student learned reading strategies and demonstrated both fluency and comprehension at a slightly higher level within second grade than Student was demonstrating when Student came to the District. The record shows that this measure of progress refers to Student's ability to read independently. All agreed that this is the goal for any learner.

This level of progress seems demonstratively small for a period of time of eighteen months. However, Student was able to progress in academics at a much higher level when provided with supports to overcome Student's cognitive disabilities. The IDEA requires a hearing officer to assess the meaningfulness of progress in light of the cognitive ability of the student. Here, there was a great deal of highly persuasive evidence showing that Student's potential for learning abstract concepts and skills – and thus for learning to read independently with comprehension, as well as to apply mathematics skills to real-life problems, as well as to write well designed, rich paragraphs – is very low. Student's cognitive deficits reasonably could be expected to result in a very slow learning pace when the standard is independent learning. Therefore, given Student's considerable progress with supports, I conclude, based upon the

preponderant evidence, that Student's received meaningful educational benefit despite Student's very slow pace of learning to perform independently.

Parents argue that the Student experienced severe anxiety to the point of having mild depression and thoughts of self-harm—as well as behaviors at home that sometimes rose to the level of physical threats to Student's Mother. They seem to argue that this level of anxiety proves that the level of curricula at school was too high, because Student's anxiety was caused by the challenges of school. However, the record does not support this argument. Rather, the record shows that the Student was very happy and not at all anxious in school. All witnesses who saw Student in school testified credibly that Student enjoyed school and socialized freely there. Moreover, there was considerable evidence that suggested that the source of Student's anxiety was maturation into adolescence, which was leading to Student being more secretive and entering into escalating conflicts with Parents.

While I do not presume to render an opinion on the cause of Student's anxiety, I do weigh the evidence in this record and find it insufficient to prove that the Student's anxiety was caused by a too-challenging environment in school, or a lack of appropriate support for Student's emotional and social needs at school. Therefore, the evidence does not prove a failure to provide a FAPE based upon the Student's anxiety and behavioral difficulties at home.

## CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. I conclude that all of the witnesses were credible. Parents presented as sincere and reasonable, given their lack of knowledge of educational principles and techniques. The teachers, although tested in cross examination, similarly seemed credible and reasonable. I found Parents' expert to

be credible and reliable as a highly credentialed psychologist, but she was limited in her knowledge of curriculum and her knowledge of Student's programming and presentation in the school setting. Moreover, she offered very little criticism of the District's programming, perhaps because she did not profess to be an expert in educational principles and techniques.

### **CONCLUSION**

In sum, I conclude that the District provided a FAPE in the least restrictive appropriate environment to Student. Therefore, I decline to enter a prospective or retrospective order against the District.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the Parents' requests for relief are hereby **DENIED** and **DISMISSED**. It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

*William F. Culleton, Jr. Esq.*

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

May 19, 2014