

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

**PENNSYLVANIA**

**SPECIAL EDUCATION HEARING OFFICER**

DECISION

DUE PROCESS HEARING

Name of Child: D.M.

ODR #14840 13-14-KE

ODR # 14845 13-14-KE

Date of Birth:

[redacted]

Date of Hearing:

April 29, 2014

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

Pro Se

Collegium Charter School

535 James Hance Court

Exton, PA 19341

Maria Ramola, Esquire

Latsha Davis Yohe & McKenna

350 Eagleview Boulevard Suite 100

Exton, PA 19341

Date Record Closed:

May 3, 2014

Date of Decision:

May 6, 2014

Hearing Officer:

Linda M. Valentini, Psy.D., CHO

Certified Hearing Official

## Background

Student<sup>1</sup> is a Kindergarten age child whose Local Educational Agency [LEA] is a Charter School [hereinafter School]. Prior to entering Kindergarten Student received preschool Early Intervention services. The Parents<sup>2</sup> requested a Re-evaluation from the School and being in disagreement with parts of the Re-Evaluation they requested Independent Educational Evaluations in the areas of Physical Therapy [PT], Occupational Therapy [OT], and Speech/Language Therapy [S/L]. Believing its assessments in these areas were appropriate the School filed a due process hearing request to defend its evaluation. The Parents filed a separate due process hearing request seeking an order that the School provide Student with PT, OT and S/L. Because the issues were intertwined the two hearing requests were consolidated on one hearing date, and the earlier of the two Decision Due Dates was adopted.

For the reasons explained below I find for the School on both issues.

## Issues

1. Were the physical therapy, occupational therapy and speech/language assessments done by the School appropriate, and if not is Student entitled to independent evaluations in one or more of these areas at public expense?
2. In order for Student to receive a free appropriate public education must the School provide Student with physical therapy and/or occupational therapy, and/or speech/language therapy?

## Findings of Fact

Transition from Early Intervention:

1. When Student transitioned from Early Intervention to School-Aged services the School requested information from the Early Intervention provider and the Parents, and held a transition meeting for Student in spring 2013. [NT 31]
2. The transition meeting attendees reviewed an October 24, 2012 Evaluation Report from Early Intervention [ER]. [NT 32; S-1]
3. Regarding S/L, the ER notes that Student “is demonstrating age appropriate speech and language skills, no longer requiring specially designed instruction in this area”. The ER recommends that Student be exited from S/L therapy. [NT 33; S-1]

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<sup>1</sup> This decision is written without further reference to the Student’s name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

<sup>2</sup> The term “Parents” is used throughout because although mother took the lead role in working with the School she was acting on behalf of both herself and Student’s father.

4. Regarding oral motor skills, the ER notes that although Student presents with a slight cross bite occlusion that should be confirmed with the dentist<sup>3</sup>, Student demonstrates adequate range of motion of the tongue and lips upon oral motor examination and there were no concerns about Student's oral motor skills. [S-1]
5. Regarding PT, the ER notes that "muscle tone is normal throughout [Student's] body" and Student "demonstrates good trunk strength for sit-ups, push-ups and wheelbarrow and bear walking". [S-1]
6. The ER recommended continuation of PT because although Student's scores on a standardized assessment did not reflect a gross motor delay there was some scatter within skill areas. [NT 33; S-1]
7. Regarding OT, the ER noted that Student had age-appropriate fine motor skills, age-appropriate visual motor skills and age-appropriate sensory motor skills. There were no needs in the area of OT noted in the ER. [NT 34; S-1]
8. The transition meeting attendees also reviewed the Individual Family Service Plan [IFSP] dated October 29, 2012 that followed the ER. [NT 35; S-2]
9. The IFSP carried one PT goal addressing higher level strength and balance skills. [NT 35; S-2]
10. The IFSP did not include any goals for OT or S/L. [NT 35; S-2]
11. The Parents completed a Student Enrollment Form and indicated that Student was receiving PT prior to enrollment. [NT 37; S-4]
12. The Parents did not list OT or S/L concerns on the enrollment documents. [S-3, S-4]
13. On May 4, 2013 Student was given the Kindergarten Readiness Assessment administered to all children coming into Kindergarten at the School. Student received a raw score of 64 which is in the average range of 60 to 85. [NT 38-40, 56, 58-69; S-6, S-7]
14. Student's Kindergarten teacher was given a comprehensive list of the students that received Early Intervention services with some background information, notes from the transition meeting, and the transition plan. This snapshot is provided to give teachers a reference point. The information noted that Student was receiving PT. [NT 42-43; S-8]
15. Children receiving services in Early Intervention do not automatically qualify for these services when they reach school age because the eligibility criteria are different. The School conducts reevaluations that include observations of how the child is functioning in the school-age environment, assessment/testing, and consultation with parents and teachers. [NT 43]

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<sup>3</sup> Or an orthodontist. [NT 190]

16. On September 5, 2013 the School's physical therapist prepared a summary of Student's present levels upon Kindergarten entry to look at functional skills as compared to the time of the transition meeting several months earlier. The physical therapist recommended continuing PT for 30 minutes per week in a group setting with one other child. [NT 210-212, 214; S-11]
17. While the reevaluation was being completed Student's PT was therefore continued upon beginning in the School pursuant to a signed 504 Service Agreement. [NT 42-46, 210-214; S-9, S-10, S-11]
18. On September 3, 2013 a physician from Great Kids checked "I do" to approve of educationally based physical therapy services and entered the diagnosis "low tone" on a form provided by the School. [P-1]
19. In Early Intervention prior to entering Kindergarten Student had not been receiving services from an occupational therapist, but at one point was receiving specialized instruction from a teacher. The documents from Early Intervention did not describe what the specialized instruction was. [NT 48, 77-78]
20. Student was referred for an OT screening which was done on September 24, 2013. The occupational therapist did not find any reason to refer Student for further OT testing because Student's skills were functional in the school setting. [NT 46-47; S-12, S-13]
21. The Parents questioned the results of the OT screening and asked what they needed to do to have Student receive a formal evaluation. The School issued Permissions to Re-Evaluate in the areas of cognition, achievement, OT skills and PT skills on October 9, 2013 [signed by Parent on October 29, 2013] and on November 18, 2013 [signed by Parent on November 19, 2013]. [NT 48-50; S-14, S-15]

Reevaluation:

22. Re-Evaluation Report [RR] was completed on December 20, 2013 and on that date Parents were invited to a meeting to be held on January 9, 2014. On January 6, 2014 the Parents signed their agreement to attend. [S-19, S-20]
23. The RR included a record review, classroom observation, parent questionnaire, written teacher input, cognitive assessment with the Woodcock Johnson – Third Edition – Tests of Cognitive Abilities Normative Update [WJ-III-COG-NU] and achievement assessment with the Wechsler Individual Achievement Test – Third Edition [WIAT-III]. All scores on the cognitive and achievement assessments were in the average range. [S-20]
24. The RR included a Physical Therapy evaluation done on December 5, 2013 by a physical therapist with a Bachelor's degree in physical therapy and a Master's degree in biomechanics who is certified to conduct physical therapy assessments and treatment. She is employed by an agency with whom the School contracts to provide PT services. To determine whether Student qualified for educationally-based PT she used the Peabody

Developmental Motor Scales 2. On Stationary Skills, Locomotor Skills and Object Manipulation Skills Student scored within the average range. [NT 209, 216-217; S-20]

25. There is a distinction between medically based PT services and school-based PT services. School-based services address the skills that a child needs to function within the school such as getting in and out of a chair, participating in PE class without adaptations, accessing recess equipment, and walking up and down the stairs. The medical model looks at refining or improving skills.<sup>4</sup> [NT 218-219]
26. The physical therapist concluded that Student was not eligible for educationally-based PT. Student was demonstrating gross motor skills within range of chronologically aged peers, as Student's gross motor quotient was 91 with a percentile rank of 27. In order to be recommended for PT services in an educational setting a child must demonstrate a need for special education and score 79 or below and in the 8<sup>th</sup> percentile or below. [NT 218, 219; S-20]
27. The RR included an Occupational Therapy evaluation done on November 25, 2013 by a Masters Level registered and licensed occupational therapist who is employed by an agency with whom the School contracts to provide OT services. The occupational therapist reviewed the Early Intervention ER and the Early Intervention IFSP. She spoke with Student's teachers and observed Student in the classroom. The teachers had no concern about Student and Student did not stand out from peers in the classroom. She utilized the Bruininks Oseretsky Test of Motor Proficiency, 2<sup>nd</sup> Edition [BOT-2] [Fine Manual Control – 2 subtests], the Beery Developmental Test of Visual-Motor Integration, 5<sup>th</sup> Edition, the Beery VMI Developmental Test of Visual Perception [portion], Handwriting Samples and Observation, and Staff Input/File Review. [NT 125-135; S-20]
28. The occupational therapist concluded that due to Student's average/above average scores and overall performance, Student does not demonstrate a need for or qualify for occupational therapy. [NT 135; S-20]
29. The occupational therapist was asked at the hearing to review concerns the Parents had expressed in emails to staff members at the School. She testified that at the time of her evaluation Student was appropriate on pencil-holding and handwriting tasks, displayed appropriate hand-strength on testing tasks, and that the Parents' concerns about some trouble opening a bag of pretzels, squeezing a plastic bottle, number reversals and hand clapping did not suggest anything that was age-inappropriate. [NT 135-141]
30. The RR recommended that Student continue within the regular education classroom full time as a student without a disability or impairment. On January 9, 2014 the School issued a Notice of Recommended Educational Placement [NOREP] indicating that because Student's cognitive and achievement scores were all within the average range, and Student was demonstrating gross motor skills that allow Student to function within the academic environment and thus no longer qualified for PT services, Student was no

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<sup>4</sup> Or treating an underlying medical or physical condition.

longer eligible for a Section 504 Service agreement and the attendant modifications and accommodations. [S-20, S-21]

31. The Parents signed the NOREP as approved on January 9, 2014. [S-21]
32. At the January 9, 2014 meeting the Parents indicated concerns about speech articulation and requested a screening. The screening was done on January 13, 2014. [NT 51-52, 165-173; S-22, S-23]
33. The Speech/Language screening was done by a Masters Level certified speech/language pathologist employed by the School and included observation and conversation, the Clinical Evaluation of Language Fundamentals Screening Test – 4<sup>th</sup> Edition, and the Bowen Articulation screening tool which addresses all the phonemes in the English language. She screened for both receptive and expressive language as well as for articulation in order to do a thorough screening. [NT 167, 186; S-23]
34. On the S/L assessment Student demonstrated age-appropriate developmental articulation errors that did not affect speech intelligibility. These developmental errors were also cited by the grandparent in her testimony. It was noted Student was not stimulative for correct pronunciation of the /l/ sound, meaning that Student was not motorically ready to start working on that sound. The /l/ sound is still developing and not considered delayed until seven years old based on the gold standard for speech pathology, the Iowa-Nebraska norms which are the most widely used norms. [NT 170-171, 187, 194; S-23]
35. The speech/language therapist did not recommend a further S/L evaluation as Student demonstrated age-appropriate skills in all areas of speech and language – articulation, expressive and receptive language, pragmatic skills, voice and fluency. She did not find that Student qualified for S/L therapy. She did recommend re-screening in 6 months to determine if intervention was needed at that time. [NT 173, 185; S-23]
36. On February 28, 2014 the School issued a NOREP denying the request for further S/L evaluation. [S-25]
37. On March 10, 2014 the Parents disagreed with the NOREP and indicated they were requesting a due process hearing. At the hearing the Parents clarified that they disagreed only with the speech, occupational therapy and physical therapy components of the RR. [NT 52, 90-92; S-25]

#### Functioning in the School Environment:

38. Student's Kindergarten teacher holds a Master's degree in education and is certified in regular education and special education. In the classroom there is also a full time teaching assistant with a Bachelor's degree but no teaching certification [NT 97]
39. The Kindergarten teacher has had Student in her classroom since August 2013. In addition to classroom time, the Kindergarten teacher is also with Student on the playground every day for the whole recess time and walks Student with the class to lunch

and to specials. On the occasional day when the teaching assistant is not present she also spends lunchtime with her class. [NT 97-99]

40. The Kindergarten teacher has had no problem interacting with Student because of speech issues, she has not observed Student having trouble interacting with peers because of speech, the teaching assistant has not come to her with concerns about interacting with Student or Student interacting with peers because of speech, and she has not seen any changes in Student's speech since the beginning of the year. [NT 100-101, 110]
41. At the time of the referral for an S/L screening the Kindergarten teacher reported no concerns about Student with regard to speech. [NT 101]
42. The Kindergarten teacher has not observed Student having any difficulty moving about the classroom or going up and down the stairs. Student has occasionally bumped into a peer but not any more than any other child in the class. [NT 101-103]
43. The Kindergarten teacher has not observed Student having any difficulty keeping up with peers on the playground. She has never observed Student tripping or falling on the playground. [NT 104]
44. The Kindergarten teacher has not heard Student complain of tiredness any more than the other children, who are all tired around naptime, and Student has not complained about being tired from handwriting or from cutting activities. [NT 103-104, 111]
45. Student is fidgety on the carpet in the classroom but not more so than the other children. [NT 105]
46. The Parents expressed concerns about Student writing numbers backwards. The Kindergarten teacher testified that this is developmentally normal, that her other pupils do this as well and that she would not be concerned about it unless it persisted into mid-1<sup>st</sup> grade. [NT 106-109; S-16]
47. The Kindergarten teacher did not have to make any classroom accommodations for Student because of physical needs even though Student was receiving PT until after the RR was issued. [NT 109]
48. Student's physical education [PE] teacher is working on her Master's degree in health education. She holds certification as a teacher of health and physical education K through 12. [NT 115]
49. The PE teacher sees Student every day for 20 minutes in PE class. The Kindergarten teaching assistant is in the PE class as well. [NT 115-117]
50. The PE teacher works briefly with all the children one-to-one as needed but not for an extended amount of time. [NT 124]

51. The PE teacher has worked with children who have accommodations, modifications and/or adaptations in PE, and has implemented 504 Service Plans in this regard. [NT-117]
52. The PE teacher has never observed Student not being able to keep up with peers in the class. [NT 118]
53. Student has never expressed to the PE teacher or to the teaching assistant any complaints about pain or discomfort in class. [NT 117-118]
54. In PE the children do a lot of locomotive movements, bilateral movements, and balance exercises. Some of the exercises require strength to accomplish and some of the activities engage Student's core muscles. [NT 118-119]
55. Student can gallop. Student can do jumping jacks on the level with the way other peers are doing them. Student can crawl on a ladder on all fours. Kindergarten children cannot really skip well yet and are not expected to do this well. [NT 123]
56. The PE teacher has not seen any problems with Student in terms of balance or any of the activities that would engage the core muscles. Student has not had any trouble participating in the activities or keeping up with classmates doing these activities. [NT 119-120]
57. Student needed no special accommodations to participate in PE. [NT 120-121]
58. The PE teacher has seen no negative changes in Student's ability to access the PE curriculum since PT was discontinued in January, and has never had any concerns about Student's ability to access the curriculum since the beginning of the school year. The PE teacher has not received any concerns from any of the other teachers about gross motor or physical problems with Student. [NT 121-122]

Private Evaluations:

59. On April 2, 2014 a speech/language therapist from a private practice conducted an S/L evaluation. The evaluation was done after the Parents had filed for due process on March 24, 2014 and after the School had filed its request on March 28, 2014. The author of the report did not testify at the hearing. [P-3]
60. The speech/language therapist who had performed the screening on behalf of the School in January 2014 was asked to review the private S/L report. [NT 173; P-3]
61. The private evaluator reported a moderate delay in articulation skills characterized by substitution and distortion errors, distortions of S, Z, and the "Cha" sound [as in "check"] and the "sh" sound [as in ship] characterized by tongue protrusion. The report does not note if these delays were age appropriate or age inappropriate. [NT 182; P-3]



62. The private evaluator reported her results in standard scores, but the usual practice when scoring an articulation assessment such as the Goldman-Fristoe is to use percentile ranks because articulation skills do not develop on the bell-shaped curve. [NT 180; P-3]
63. The School's speech/language therapist explained that although the Goldman-Fristoe Test of Articulation is an objective standardized instrument it requires some subjectivity in scoring. For articulation, there are three types of errors, the first two, substitutions - switching a sound for another sound, and omissions - leaving off a sound, are scored in a very straightforward manner, either right or wrong. The third error type is a distortion, and these types of errors are not 100 percent auditorily accurate so that depending on the scorer, there is some subjectivity depending on what the scorer hears. [NT 175; P-3]
64. The School's speech/language therapist disagreed with how the private evaluator scored the Goldman-Fristoe. She believes that the private evaluator was referencing the placement of Student's tongue being an interdental placement [where a little bit of the tongue is seen between the teeth], which was also seen in January 2014 but was not auditorily judged to be a distortion as the tongue placement was not affecting the integrity of the sounds. The speech/language therapist testified that although an evaluator uses his/her eyes to see how a person's mouth is moving, the judgment about an error is made on the basis of what is heard, and best practice when scoring is to tape the session and then go back and check to make sure that what was seen at the time of the screening or the time of the assessment is matching up to what was actually heard auditorily. [NT 177-179, 188-189]
65. S and Z or frontal distortions are age appropriate for a 6 year old. The School's evaluator disagreed with the private evaluator's conclusion that Student's tongue protrusion caused the "Ch" and "Sh" distortions. The witness would not have scored these four sounds as errors pursuant to the Goldman-Fristoe in the way that the private evaluator did. [NT 179-180, 187]
66. It is improbable, highly unlikely, that a child would not make certain errors in a previous evaluation and then make errors on the same sounds in a subsequent evaluation, that is that a child's articulation would regress. [NT 189]
67. In April the private evaluator found that Student was stimulable for the /l/ sound in contrast to the School's evaluator who found that this was not the case in January. The time between the January 13<sup>th</sup> finding and the April 2<sup>nd</sup> finding could be due to maturation over that period. In her report the School's evaluator had recommended re-screening in six months to account for such an occurrence. [NT 180-181; P-3]
68. The private evaluator noted that the sound errors she reported in her evaluation affected Student's intelligibility. The School evaluator found Student to be 100% intelligible. [NT 183; P-3]
69. The School evaluator reviewed the goals listed on the private S/L evaluation and disagreed with them. Aside from those listed as "HEP" [home exercise program] which

are not appropriate for the educational environment, she disagreed with the goal for /l/ in the initial, medial and final positions of words because errors in /l/ are age appropriate, and with producing the S sound with correct tongue placement in isolation and in consonant-vowel syllables because she did not find it to be an error at all, and with producing the Z sound with correct tongue placement in isolation and consonant-vowel syllables because Z sounds [along with S sounds] are not age-inappropriate until age 8 years. [NT 183-184, 187; P-3]

70. Notably, the private PT evaluation of April 9, 2014 states that Student “receives” speech therapy at the private practice twice a week whereas Student’s mother testified that Student is not receiving any therapies at this time. [NT 249, 251, 255; P-2]
71. On April 9, 2014, a physical therapist from the same private practice conducted a PT evaluation, again after both parties had filed for due process. The author of the report did not testify at the hearing. [P-2]
72. The physical therapist who had performed the screening on behalf of the School in December 2013 was asked to review the private PT report. [NT 219-220; P-2]
73. The private report notes that although not formally assessed range of motion appeared within normal limits, consistent with the School PT evaluator’s findings. [NT 222; P-3]
74. The private evaluator noted Student’s strength was decreased as Student was unable to complete push-ups but the private report was unclear regarding how Student’s ability to do push-ups was assessed, whether from a raised plank or from the floor. Student’s ability to do pushups from the floor had been assessed by the School’s evaluator in December, and Student could do four sequential pushups. [NT 222-223; P-2]
75. The private report’s notation “DS” stands for dorsiflexion but in parentheses it says “knee” plus the PT symbol for extension; dorsiflexion is in the ankle and the extension is in the knee. [NT 223-224]
76. The School evaluator agreed with the private evaluator that Student’s tone is on the lower side of normal but this does not affect Student’s functional capacity in school. [NT 226]
77. The private evaluator noted decreased strength in the trunk as tested with sit-ups and Superman holds. The School’s evaluator testified that checking sit-ups is part of a standardized assessment using the Peabody Developmental Motor Skills test but that children in kindergarten do not do sit-ups in gym and checking a Superman hold is just done as a baseline which is tracked if a child does not have the postural strength and endurance to sit up during class time which is not a concern for Student in class at this time. [NT 226-227]
78. In terms of gait analysis, in a school setting the evaluator looks to see if a child can walk independently, has arm swing, and has average step length. In an outpatient or clinical/medical setting things such as “heel strike” and “foot flat” are part of a more

detailed assessment; the gait analysis noted in the private evaluation does not raise any concerns about Student accessing the educational setting. [NT 229]

79. In terms of stair analysis when Student received PT in the School prior to January 2014 Student worked extensively on stairs, worked on walking without holding a railing. When Student was discharged, Student could walk up and down without a rail with an alternating pattern which is age-appropriate. [NT 230-231]
80. In the December assessment there was nothing age-inappropriate with regard to coordination skills. [NT 231-232]
81. Although the private report says Student stands through left half kneel with hands on knee, in the School evaluation Student could do that transition with no hands down indicating intact strength and balance. [NT 233; P-2]
82. Although the private PT evaluator wrote that Student presents concerns of keeping up with peers, tripping, and core weakness, none of this was observed by the School PT in the school setting. In the physical therapy sessions that the School physical therapist did with Student once a week, and then in the School evaluation in December of 2013, the witness noticed no bilateral body coordination issues with Student. [NT 233-237]
83. The private evaluator concluded that Student will benefit from skilled physical therapy to improve strength, range of motion, coordination, and endurance to allow Student to keep up with peers and decrease tripping. The School PT evaluator does not believe Student needs those services.[NT 237; P-2]
84. Although the private evaluator recommended physical therapy twice a week for eight weeks, the School's PT evaluator does not agree this is necessary for Student to participate in school. [NT 239; P-2]
85. PT goals proposed by the private evaluator are to improve active dorsiflexion and prevent tripping, improve upper extremity and core strength to hang on a trapeze swing, and to perform five consecutive jumping jacks without errors to increase participation with peers. The School evaluator has not seen or heard reports of a problem with tripping, trapeze-hanging is not done in the school and jumping jacks are not a required part of the Kindergarten curriculum<sup>5</sup>. [NT 241-242; P-2]
86. On April 22, 2014 an occupational therapist from the same private practice conducted an OT evaluation, after both parties had filed for due process and one week prior to the hearing<sup>6</sup>. The author of the report did not testify at the hearing. [P-4]

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<sup>5</sup> Although the PE teacher does introduce these. See FF 55.

<sup>6</sup> The School did not receive a complete copy of this evaluation until the night before the hearing. Marked as P-4, it was admitted over the School's objection because the School's occupational therapist had a chance to review it for a few hours prior to her testimony. [NT 12-14]

87. The occupational therapist who had evaluated Student in November 2013 for the RR was asked to review the private OT report. [NT 141; P-4]
88. The private occupational therapist utilized the BOT-2, the same test that was used for the RR. The private evaluator noted that on this instrument Student scored a scaled score of 11 on Fine Motor Precision, a scaled score of 12 on Fine Motor Integration, and a scaled score of 17 on Manual Dexterity. The Average Range for scaled scores on this instrument is from 11 to 14. [P-4]
89. Under the Assessment section of the private OT evaluation there was nothing that was developmentally inappropriate, Strength and Range of Motion were within functional limits, Muscular Status was not tested, Sensory Processing carried the phrase “no concerns noted”, Activities of Daily Living carried the phrase “no concerns noted”, Handwriting revealed nothing out of the ordinary for Student’s age. [NT 141-147]
90. Surprisingly the private OT evaluator then checked concerns that Student demonstrated “weakness”, “delayed visual motor skills” and “delayed visual perception” and also noted “inconsistent with form, space and line placement for letters”. These concerns are not supported in her Summary and are contradictory to the assessment results. In the body of the report it was noted that Strength was “within functional limits”, the Summary of Assessment states that Student “presents with visual motor skills to use scissors, copy images, [has] cooperative hand use to complete manipulative tasks”, and can “complete visual perceptual skills [simple shapes, mazes]” and while there is no notation one way or another for upper and lower letter formation, “G” for “good” is checked under “spacing of letters”. [NT 142-142; P-4]
91. The occupational therapist who had evaluated Student in November 2013 for the RR could not find a basis in the private OT report for the recommendation for OT once a week for 12 weeks nor could she find any justification for the four OT goals provided by the private OT evaluator either in the private OT evaluation itself or in the OT testing she herself had done for the RR. [NT 156-158, 161]

### Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case both the Parents and the School asked for a hearing and thus each bore the burden of proof on the issue[s] raised in their complaints. As the evidence was not equally balanced in either case the Schaffer analysis was not applied.

Charter Schools: The Individuals with Disabilities Education Act (IDEA) requires states to provide a "free appropriate public education" to all students who qualify for special education services.<sup>7</sup> Pennsylvania implements IDEA by way of 22 Pa. Code Chapter 14. However, under the enabling Act 22 of June 12, 1997 Pennsylvania charter schools were to be autonomous "independent public schools" free from certain regulations. Thus Pennsylvania charter schools had an exemption from the special education aspects of 22 Pa. Code Chapter 14 and were simply required to comply with federal law. Accordingly, from June 12, 1997, to June 8, 2001, Pennsylvania charter schools were governed in the area of special education under the Federal Laws. On June 8, 2001, the Charter School Services and Programs for Children with Disabilities Law,<sup>8</sup> was adopted and became effective on June 9, 2001 to specify how the Commonwealth of Pennsylvania would meet its obligations to ensure that charter schools comply with the IDEA and its implementing regulations.<sup>9</sup> Effective June 9, 2001, 22 Pa. Code §711.1 et seq., along with federal regulations, governs special education in Pennsylvania Charter Schools. *See also, R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F.Supp.2d 745 (E.D.Pa.2010)

Evaluations: When a child's parents disagree with the LEA's evaluation and request an Independent Educational Evaluation at public expense the LEA must either file a due process complaint to request a hearing to show that its evaluation is appropriate or ensure that an independent evaluation is provided to parents at public expense. 34 C.F.R §300.502. Both federal law and state standards govern whether or not the School's evaluation was appropriate. The IDEA sets forth two purposes of the required evaluation: to determine whether or not a student is a student with a disability as defined in the law, and to "determine the educational needs of such student ...." 20 U.S.C. §1414(a)(1)(C)(i). The IDEA regulations prescribe in detail the procedures to be used in order to fulfill these purposes. 34 C.F.R. §§300.301 to 300.311. Courts have approved evaluations based upon compliance with these procedures alone. *See, e.g., Eric H. v. Judson Independent School District*, 2002 U.S. Dist. Lexis 20646 (W.D. Texas 2002).

The general standards for an appropriate evaluation are found at 34 C.F.R. §§300.304—300.306. The School is required to 1) "use a variety of assessment tools"; 2) "gather relevant functional, developmental and academic information about the child, including information from the parent"; 3) "Use technically sound instruments" to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using "any single measure or assessment as the sole criterion" for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be "sufficiently comprehensive to identify all of the child's special education and related service needs" and provide "relevant information that directly assists" in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). An initial evaluation must also include, if appropriate: 1) A review of existing evaluation data, if any; 2) local and state assessments; 3) classroom-based and teacher observations and assessments; 4) a determination of additional data necessary to determine whether the child has

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<sup>7</sup> 20 U.S.C. §1412.

<sup>8</sup> 22 Pa. Code §711.1 et seq

<sup>9</sup> 34 CFR Part 300, and Section 504 and its implementing regulations in 34 CFR Part 104

an IDEA-defined disability, the child's educational needs, present levels of academic achievement and related developmental needs, whether the child needs specially-designed instruction and whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(1),(2).

Once the assessments are completed, the qualified School professionals and the child's parents determine whether he/she is a "child with a disability" and his/her educational needs. 34 C.F.R. §300.306(a). In making such determinations, the School is required to: 1) "Draw upon information from a variety of sources," including those required to be part of the assessments, and assure that all such information is "documented and carefully considered." 34 C.F.R. §300.306 (c)(1). The School must also provide a copy of the evaluation report and documentation of the eligibility determination to the Parents at no cost. 34 C.F.R. §300.306(a)(2). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs . . ." 34 C.F.R. §300.304(c)(6).

Standards for a Free Appropriate Public Education: Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §711.1 *et seq.* and 34 C.F.R. §300.300, *et seq.*, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA). A FAPE is "an educational instruction specially designed . . . to meet the unique needs of a child with a disability,' coupled with any additional 'related services' that are 'required to assist a child with a disability to benefit from [that instruction].'" *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007) (citing 20 U.S.C. § 1401(29)); see also 20 U.S.C. §§ 1401(9), (26)(A). Under the interpretation of the IDEA statute established by the *Rowley* case and other relevant cases, LEA is not required to provide an eligible student with services designed to provide the best possible education to maximize educational benefits or to maximize the child's potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *K.C. v. Nazareth Area School District*, 806 F. Supp. 2d 806 (E.D. Pa. 2011) the federal court directly addressed the purposes of supportive services, explicitly stating that "[LEAs] are not required to develop and implement individualized educational plans which provide medically rehabilitative services. An individualized educational plan (IEP) is based on an educational model. Evaluations and resultant IEPs must be reasonably calculated to provide a meaningful educational benefit. The role of physical therapy in educational programming is to facilitate classroom learning" citing *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181 (3d Cir. 2005) (recognizing that an IEP is based on an educational model); *Polk*, 853 F.2d at 176 (stating that the role of PT in educational programming is to facilitate classroom learning).

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision

incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). “The court is mindful that when dealing with credibility determinations, courts generally rely on the hearing officer's determination given that he or she observed all of the witnesses' live testimonies. A hearing officer's finding of credibility should only be disregarded if there is nontestimonial evidence of record that would justify a contrary finding”. *K.C. v. Nazareth School District*.

Because of the number of witnesses and the confined space in the hearing room the hearing officer decided to sequester the School's witnesses. The LEA representative was present throughout, but she testified first. The Parents were both present for the entirety of the hearing, and Student's four grandparents were permitted to stay as well although they all did not remain in the room the entire time. Although I had no questions about the sincerity of any of the witnesses, I assigned more or less weight to each individual's testimony in accord with their knowledge of the facts they presented regarding Student's educational needs. Student's mother and Student's grandmother testified with regard to their observations of Student at home and in the community, and their sincere belief in their positions was permeated with their deep love and concern for this child. Student's teachers testified forthrightly and without hesitation and their testimony about their observations was credited with considerable weight since they see Student on a daily basis, the Kindergarten teacher being with Student a large part of the day including outdoor playtime. The occupational therapist, the physical therapist and the speech/language therapist each provided a detailed summary of their findings with additional explanations as requested. Each of these therapists also provided thorough reviews of the recently privately obtained evaluations, and confidently and in a highly professional manner pointed out the similarities and differences between their own reports and the private reports. Without undue criticism of the private evaluators, these witnesses explained exactly why the recommendations for treatment the private evaluators made were inappropriate either because the recommendations contradicted the findings in the private reports themselves, or because they were not appropriate under the educational model.

### Discussion and Conclusions

Student is very fortunate to have parents and grandparents who care passionately about ensuring the best possible outcome for the child. Due to the family's vigilance Student received Early Intervention programming that prepared Student to enter Kindergarten equipped with the motor and language skills necessary to access the curriculum. By the time Student transitioned from Early Intervention Student was successfully exited from S/L services and OT services. Student entered Kindergarten with a recommendation for PT still in place and the School provided this service under a Section 504 service agreement during the time it observed Student as it gathered data needed to perform an appropriate re-evaluation.

The School evaluated Student using the educational model by appropriately credentialed supportive services professionals in the fields of OT, PT and S/L. Student was found to no longer be in need of PT, nor to have lost the gains made in Early Intervention S/L and OT. The School's

re-evaluation and its component parts was administered in accord with each of the requirements set forth in the IDEA, and the School met its burden of proof by demonstrating that its evaluations were appropriate under the law. As the School's evaluations were appropriate, Student is not entitled to independent evaluations at public expense.

As is the case with some children, and as may be the case with Student, underlying medical issues are addressed in a clinical/medical setting. This clinical treatment goes beyond what is required for the child to access his or her educational program. It is not surprising that parents such as Student's, wanting the very best for their child, find the distinction between "educationally necessary" and "medically necessary" treatment fuzzy and frustrating and believe that school districts and charter schools should provide treatment to address all the child's needs, both educational and medical/clinical. However, the relevant federal and state statutes and a long line of case law provide the basis for the School's correct position in this regard.

Although it was their burden to prove that Student required OT, PT and S/L therapy, the Parents did not provide expert testimony to support their independent evaluators' conclusions that Student requires these supportive services to access the educational program. Moreover the School's witnesses provided credible testimony questioning the methodology and conclusions of the private practice's evaluators, while explaining in detail, and subject to cross-examination by the Parents and the hearing officer, their conclusions that Student is not in need of PT, OT or S/L therapy to access the curriculum and obtain meaningful educational benefit. The testimony of Student's Kindergarten teacher and PE teacher was particularly useful in providing a picture of Student's functioning in the educational environment, and their testimony supported the evaluation findings. Taken as a whole the record strongly supports the School's position that PT, OT and S/L therapy are not educationally necessary for Student to receive an appropriate program and access the general education curriculum and environment and therefore the Parents' request must be denied.

#### Order

It is hereby ordered that:

1. The evaluations conducted by the School were appropriate and therefore the Parents are not entitled to independent evaluations at public expense.
2. Student does not currently require occupational therapy, physical therapy or speech/language therapy to access the educational curriculum or the educational environment.

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

May 6, 2014

Date

*Linda M. Valentini, Psy.D., CHO*

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