Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: K.T.

Date of Birth: [redacted]

Dates of Hearing: 5/12/2015, 5/21/2015, 6/10/2015, 6/17/2015, 6/24/2015

OPEN HEARING

ODR File No. 15934-14-15-AS

and

ODR File No. 16190-14-15-AS

Parent	Parent Attorney
Parent[s]	Pro Se

Local Education Agency	LEA Attorney
School District of Philadelphia Office of General Counsel 440 N. Broad Street, Su. 313 Philadelphia, PA 19130	Pamela Peltzman Esq. Fox Rothschild LLP 10 Sentry Parkway, Suite 200, PO Box 3001 Blue Bell, PA 19422-3001
Date Record Closed:	June 29, 2015
Date of Decision:	July17, 2015
Hearing Officer:	William Culleton Esq., CHO

INTRODUCTION

The Student[1] is an eligible resident of the respondent District, and is a rising fifth grader. (NT 12.) The District has identified Student with Specific Learning Disability, Autism and Speech or Language Impairment under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (IDEA). (NT 11-12.)

Parent seeks an order of the hearing officer to prevent the District's proposed transfer of Student to a different District elementary school setting for the 2015-2016 school year. In addition, Parent asserts various violations of the IDEA spanning a period of time beginning with the 2011-2012 school year. These include a "child find" (20 U.S.C. §1412(a)(3)) violation under the IDEA, inappropriate evaluation and identification of Student, denial of a free appropriate public education (FAPE), and failure to include Parent in the evaluation and educational planning processes. To remedy these additional claims, Parent seeks an independent educational evaluation (IEE) and review of all records by the hearing officer.

The District denies all claims and interposes two affirmative defenses. First it asserts that a settlement agreement for a previous due process matter contained a release of all claims prior to its date of execution, November 25, 2014. Second, it asserts the bar of the IDEA's statute of limitations.

In the companion matter, consolidated for hearing and decision, the District requested due process in its own right by filing separately. The District requests a decision that its evaluation was appropriate under the IDEA and that, consequently, Parent is not entitled by law to an IEE.

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[1] Student, Parents and the respondent District are named in the title page of this decision; personal references to the parties are omitted. Because the Student's mother engaged in many transactions with the School, she is referred to below as "Parent" in the singular.

The hearing was concluded in five sessions. In the first session, I heard evidence and argument regarding whether or not a settlement agreement was entered into by the parties on November 25, 2015. In the second session, I heard evidence limited to the IDEA statute of limitations defense. In the remaining sessions, I heard evidence on the allegations of substantive IDEA violations.

At the outset of the fourth session, I granted the District's motion to limit Parent's claims to those not barred by the IDEA statute of limitations. (NT 716-725.) Thus, claims based upon District actions or inactions occurring prior to March 27, 2013 (two years before the date of filing of the complaint in this matter) are barred by the IDEA statute of limitations, and these claims were not heard.

The parties waived written summations, and the record closed on receipt of the last hearing session transcript, in which I admitted exhibits into evidence and heard oral summations.[2] I have reviewed and considered all of the testimony and all exhibits admitted into evidence. I decide for the District and against the Parent on all issues.

ISSUES

1. Is the Parent contractually bound by the terms of a written settlement agreement dated November 25, 2015?

2. Is the District's proposal to transfer Student to another school an inappropriate change of placement?

3. Did the District fail to evaluate Student appropriately during the period from March 27, 2013 to the last day of hearings in this matter, June 24, 2015, and is Parent consequently entitled to an IEE?

4. Did the District fail to provide Student with a FAPE from March 27, 2013 to the last day of hearings in this matter, June 24, 2015?

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[2] Parent offered additional exhibits after the last day of hearings. (P 38, 45, 53.) I hereby admit them into evidence.

5. Did the District fail to provide Parent with an appropriate opportunity to participate in the educational planning process from March 27, 2013 to the last day of hearings in this matter, June 24, 2015?

6. Should the hearing officer order the District to retain Student in Student's present elementary school setting or enter any other equitable order regarding the proposed transfer?

FINDINGS OF FACT

1. Student is identified under the IDEA with autism and speech or language impairment. (S 103.)

2. Student experiences deficits in executive functions; task initiation; transitioning from one activity to another; reading comprehension and fluency; mathematics problem solving; writing conventions and written expression. (S 103.)

3. Student exhibits a severe stutter and some stereotypical movements. However, Student displays strengths in receptive and expressive language, as well as articulation. (S 103.)

4. Teachers report that Student can be emotionally distant and lack empathy, to a mild or moderate degree; nevertheless, Student socializes well in the school setting. Student has social relationships, engages in reciprocal conversations and plays with peers. Overall, Student functions at an average or above average level both socially and emotionally, but, due to Student's autism, social functioning is a struggle for Student. Student works well with peers in the classroom. (S 103.)

5. Student attends a District elementary school that is several miles distant from Student's neighborhood and the District has been providing transportation to Student. For Student's first grade year, Student rode on a special "desegregation" school bus from Student's neighborhood that allowed children from that neighborhood to enroll in distant schools pursuant to a desegregation plan and policy. Parent understood that this transportation service was scheduled to end at the end of that year. (NT 788-792, 854-855, 881; S 1, 23.)

6. In October 2011, the District's re-evaluation report classified Student with Specific Learning Disability and Speech or Language Impairment. District personnel did not suspect that Student's difficulties in school were due to autism. (NT 629; S 18, 19.)

7. On June 14, 2012, the District sent notice to Parent that Student was no longer eligible to attend the current school because the Student was not a resident of the current school's established boundaries. (NT 790-792; S 162.)

8. There were no extenuating circumstances that would justify Student remaining at the current school, as defined in District policy. (NT 803-805.)

9. After the school year ended in June 2013, the District all bus service to the current school, and Parent transported Student privately for Student's third grade year. (NT 854-861, 972-973; S 1, 47.)

10. Prior to the 2013-2014 school year, the District and school principal decided and proposed to Parent that Student should be transferred to another school due to overcrowding at Student's current school, and the fact that Student was a resident of another neighborhood. This was consistent with School District policy. After discussions with Parent, the District agreed to allow Student to remain at the current school for one more year, the 2013-2014 school year. (NT 788-794, 797-799; S 1, 32, 34, 149.)

11. Parent opposed and continues to oppose transferring Student for several reasons: Parent believes that the current school is providing good services to Student and that a transfer to any other school would not result in provision of the best education for Student. Parent is concerned that it would be unsafe to require Student to attend Student's neighborhood school, due to unsafe conditions in the neighborhood. Parent believes that the neighborhood school, and all other proposed receiving schools, are low performing schools that would not be able to provide Student with the services that Student needs. Parent is concerned that it would harm Student to lose the social relationships at the current school and that Student does not have the social skills to develop new friends at a new school. (S 1.)

12. The District notified Parent that Student would be transferred to Student's neighborhood school for fourth grade, the 2014-2015 school year. Parent acknowledged this and indicated an intention to prepare for Student's transfer to another school at the end of Student's third grade year. (S 1, 54.)

13. In July 2014, Parent retained counsel and requested due process, and after successive amendments to the complaint, in August 2014 obtained an order from the hearing officer that the Student's pendent placement was the current school location. The hearing officer's order specified that the District was not required to provide transportation during the pendency period. (S 2, 57.)

14. Parent's attorney entered into discussions with District counsel regarding settlement of the pending due process matter and Parent consulted with her attorney repeatedly and at length about the settlement proposals of the District and whether or not to settle the matter. (S 60, 70, 74, 89, 94, 95, 96, 97, 106; P 9, 12, 13, 14, 16, 20, 21, 29, 33.)

15. During settlement negotiations between Parent's attorney and the District's attorney, the District indicated in September 2014 that it would provide Student with taxi cab transportation to the current school as a good faith gesture pending finalization of a settlement; however, it also made clear that continued transportation of Student for the 2014-2015 school year was conditional upon reaching a settlement agreement including with a waiver of all prior claims. (NT 858; S 63,158.)

16. In September 2014, Parent's attorney asked the hearing officer to enter a conditional dismissal of the pending due process matter, subject to reinstatement within 60 days. (S 71.)

17. In September 2014, the District proposed changes in the IEP in response to some of Parent's concerns and requests, as expressed by Parent and by Parent's attorney. It was agreed at the meeting that Parent's attorney would negotiate with the District's attorney regarding transportation issues. (NT 894-901.)

18. In September 2014, District personnel developed a proposed transition plan for Student's transfer to another school. (S 164.)

19. In October 2014, Parent's attorney provided a psychoeducational evaluation of Student to the District's attorney. This evaluation was for the purpose of eligibility for behavioral health services from the local behavioral health agency. It diagnosed Student with autism and added diagnoses of depressive disorder and anxiety disorder, based upon parental report and clinical observation of the Student. (S 73.)

20. In November 2014, Parent's counsel indicated that Parent would sign the settlement agreement after certain changes were made to the draft settlement agreement. The changes were made and subsequently Parent signed the settlement agreement as amended. This signature was sent to the District's counsel. (S 97.)

21. In November 2014, the Parent and District entered into a settlement agreement for the purpose of resolving the pending due process matter. The 60 day reinstatement period expired and the pending due process matter was closed finally. (S 159; P 71, 22.)

22. Parent's attorney communicated the conditional nature of the transportation to Parent while persuading Parent to sign the November 2014 settlement agreement; Parent was reluctant to sign and wanted to return to a due process hearing, but knowingly and voluntarily signed a settlement agreement in order to assure continued transportation of Student to the current school for the remainder of the 2014-2015 school year. (P 9, 14, 29, 30.)

23. In the 2014-2015 school year, Student was placed in Supplemental Learning Support, the same placement that had been in place for Student in first through third grades. Student was taught by two regular education teachers for all subjects, except that a special education teacher provided "push-in" learning support services to Student and a small group of peers, for reading comprehension, writing and mathematics. Student seemed to benefit from these services, requiring additional supports occasionally in mathematics. (NT 824-825, S 21, 28, 43, 104.)

24. Teachers reported providing Student with preferential seating, rereading directions, extra time and the opportunity to reread passages for comprehension, reminders and prompts. (S 103.)

25. Teachers reported that Student was reading on grade level in fourth grade, and a little behind in mathematics. (S 103.)

26. Student made academic progress in the current school in reading, mathematics and writing. Student has made progress in developing social skills and relationships at the current school, and demonstrated some social skills with meeting new peers. (NT 732-742, 752-754, 767-768, 770, 775, 777-784, 829-837, 842-845; S1, 28, 29, 43, 44, 51, 52, 101, 163; P 36.)

27. In August 2014, Parent through counsel provided a private reading evaluation to the District that concluded that Student was diagnosed with double-deficit dyslexia. In September 2014, Parent through counsel transmitted to the District a private evaluation that diagnosed Student with autism. (S 58, 73.)

28. In November 2014, the District provided a re-evaluation report. The report adopted the primary classification of autism, and rejected the diagnosis of double-deficit dyslexia. It recommended various interventions to support Student's educational, emotional and social progress. These included explicit teaching of organizational and executive functioning skills, reading comprehension strategies, mathematics procedures and self-monitoring in problem solving, writing conventions and combining sentences, and social skills. (S 103.)

29. The District convened an IEP team meeting on November 25, 2014. Parents participated along with the Parent's attorney and the District's attorney. Parent did not indicate disagreement with the settlement agreement. Parent signed the resulting NOREP without indicating disagreement with the settlement agreement, although Parent noted "concerns" about the school location and transportation offered in the November 2014 IEP. (NT 827-828; S 105, 107, 146A.)

30. In January 2015 the District proposed four schools to which it proposed that Student be transferred. These schools were comparable to the Student's current school according to District demographic and performance data. (NT 1011-1018; S 150 - 153; P 27.)

31. In January 2015, Parent communicated with District personnel about visiting the schools to which the District proposed that Student be transferred. Parent referenced her attorney as still representing her. (NT 905-906, 926; P 26.)

32. The remainder of the IEP team recommended an IEP retaining the placement of supplemental learning support, and provision of speech and language support as a related service. (S 146A.)

33. The proposed IEP was to be provided at a new school, which is not in Student's neighborhood, and is comparable in size, demographics and safety to Student's current school, except that the percentage of economically disadvantaged students is significantly higher at the proposed school. The student body at the proposed school is approximately one half the size of the Student's current school. Almost ten percent of the students at the proposed school have IEPs. Out of school suspensions and serious incidents are not significantly higher. PSAA scores are comparable for fourth and fifth grade, although lower overall in reading and higher overall in mathematics. (NT 587-593; S 146, 150, 152.)

34. The proposed IEP offered goals to address reading comprehension, word reading and fluency, writing conventions and written expression, mathematics procedures and problem solving, social conversation skills and stuttering. (S 146A.)

35. The proposed IEP offered specially designed instruction and modifications including pre- and post-reading, simplified directions, small group testing, cues, prompts, prefix, suffix and root word chart, peer editing, reading of mathematics and science tests, extra time, calculator, teacher modeling and demonstration, permitting Student to mark test books, and specialized speech therapy techniques for controlling stuttering, as well as explicit teaching of social conversation skills. In addition, the draft offered modified assignments and tests, provision of leadership opportunities in class, social stories, homework checking, "to do" lists, and explicit teaching addressing Student's transition to another school. (S 146A.)

36. In December 2014, the District offered a plan to transition Student to another elementary school (School). In deference to Parent's concerns about a neighborhood school placement, the proposed new school would not be in Student's neighborhood. (S 158, 146B.)

37. The proposed transition plan established the following goals: facilitate new friendships and increase social skills; monitor academic improvement; and coordinate relevant staff of the sending and receiving schools. These goals were to be accomplished by utilizing appropriate social stories in speech therapy; establishing "pen pal" relationships; communication among learning support teachers at both settings to share successful techniques; and an advance visit to receiving school. (S 146C.)

38. Student's performance in the current school and Student's social skills as demonstrated in the current skill indicate that Student is likely to be able to transition to a new school with the transition plan and offered IEP in place. Student's diagnosis alone does not make successful transition unlikely. (NT 742-743, 837-840, 911-912, 952, 1018-1023, 1028.)

39. In January 2015, Parent indicated her disagreement with the schools proposed by the District. In January and February 2015, Parent asked her attorney to reinstate the due process complaint that had been closed with finality 60 days after issuance in September. The attorney indicated that Parent should follow the terms of the settlement agreement, and when Parent insisted upon not doing so and instead reinstating the due process proceeding, Parent's attorney resigned. (P 31.)

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.[3] 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[4] that the moving party is entitled to the relief requested in the Complaint Notice. 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 the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent's claims, or if the evidence is in "equipoise", the Parent cannot prevail.

ADDITIONAL PROCEDURAL HISTORY: STUDENT'S CURRENT SCHOOL LOCATION AND THE DISTRICT'S PROPOSAL TO TRANSFER STUDENT

Student currently attends a school building that is not within Student's neighborhood, but is located miles away in a different neighborhood. This arrangement originally was provided to

[3] 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 (which in this matter is the hearing officer).

[4] 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.

Student at the Parent's request, in part due to Parent's desire to have Student benefit from the services and environment provided in the current school location, and in part due to her fears for Student's safety if Student should attend District schools in Student's neighborhood.

Student's siblings had been enrolled in the same school outside their neighborhood pursuant to desegregation busing policies that originated years ago and are now discontinued. From September 2011 until June 2012, Student rode a special "desegregation" bus with Student's siblings from Student's neighborhood to the present school location. (S 103.)

Before the 2013-2014 school year, the District and the principal of Student's school decided to move Student to another school, and so notified Parent. This decision was based upon the fact that the current school had become (and continues to be) overcrowded. The District's stated intention is to provide priority to residents of that school's neighborhood, while referring non-neighborhood children, including Student, to other schools.

Parent immediately opposed the decision to transfer Student, primarily for three reasons. First, Parent is understandably and correctly concerned with the potential danger that Student might encounter when travelling to and from school in Student's own neighborhood; due to Student's disabilities, Student is particularly vulnerable to bullying and even criminal assault. Second, Parent is concerned about the ability of a new school to address Student's needs that arise from Student's disabilities; Student requires small group instruction for academics, as well as supplemental aids and services for inclusion in regular education classrooms. Third, Parent is concerned about Student's emotional reaction to transitioning to a new school setting, due to Student's disabilities, which affect Student's ability both to make transitions and to understand that the proposed transfer is not Student's fault.

After appealing unsuccessfully to District administrators to withdraw the proposal to transfer Student in 2013, Parent and Student's father, in April 2014, filed for due process, contesting the proposed transfer; subsequently, Parents retained an attorney, who filed two amended due process complaint-notices, in May and July 2014. In addition to contesting the proposed transfer, the amended complaints raised many of the issues that Parent has asserted in the present matter. In August 2014, the hearing officer assigned to that matter ruled that Student's current location was Student's "pendent placement" for the duration of the proceedings. Cf. Pardini v. Allegheny County Intermediate Unit, 420 F.3d 181, 190 (3d Cir. 2005)(pendency analysis discussed).

WAS THERE A SETTLEMENT AGREEMENT IN NOVEMBER 2014?

Although the question is not free of doubt, those courts which have decided the issue conclude that an administrative hearing officer for special education in the Commonwealth of Pennsylvania has jurisdiction to decide whether or not a valid settlement agreement exists between two parties. A.S. v. Office for Dispute Resolution Quakertown Cmty., 88 A.3d 256, 262-265 (Pa. Cmwlth. 2014)(reversing hearing officer's contrary determination and remanding for a finding as to the existence of a settlement agreement); I.K. v. School Dist. of Haverford Twp., 2011 U.S. Dist. LEXIS 28866 (E.D. Pa. 2011)(remanding similarly); see J.K. v. Council Rock Sch. Dist., 833 F. Supp. 2d 436, 450 (E.D. Pa. 2011)(upholding jurisdiction but reversing interpretation of agreement terms as extra-jurisdictional enforcement of agreement). Thus, I conclude that I have jurisdiction to determine the issue that the parties pose, which is whether or not the November 25, 2014 settlement agreement was a valid agreement of the parties.

Although I have jurisdiction as described above, I do not have jurisdiction to take the next step urged by the District, which is to decline to hear claims barred by the release provision that they assert is set forth in the November 25, 2014 settlement agreement document. This would require me to interpret, and thus to enforce the contract. J.K. v. Council Rock Sch. Dist., 833 F. Supp. 2d above at 450. Only the courts have jurisdiction to do that. Ibid.

I take up this question because the parties have made it clear that they want an administrative determination of the existence or non-existence of a valid contract of settlement, even though my jurisdiction does not permit me to follow such agreement if it exists. The parties fully litigated this limited question and I conclude that it is equitable in this matter to provide my analysis of the facts regarding this question.

In reaching this question, I am mindful of the general law of contracts in the Commonwealth of Pennsylvania, under which a valid contract exists between two parties if the evidence shows that there was an offer, acceptance and consideration. A.S. v. Office for Dispute Resolution Quakertown Cmty., 88 A.3d above at 265-266.

In this matter, the record is preponderant that all three elements of a valid contract were present. Parent's attorney negotiated with the attorney for the District for months, and did so with Parent's knowledge and at least tacit assent. The attorney repeatedly demanded changes in the draft agreement from which the two attorneys were working, at Parent's repeated insistence. At last, all terms were worked out between the parties and, with the advice and consultation of counsel, Parent signed the settlement agreement.[5]

[5] At the hearing, Parent made much of the fact that she signed only the signature sheet for the agreement, not the entire document. However, this nonetheless was conveyed with the entire document to counsel for the District, and Parent knew that this was done. The evidence is not preponderant that Parent did not know of the terms of the document; nowhere does Parent even assert that she did not know that the agreement was conditional upon her waiver of

An offer must be definite and its existence is an objective, rather than a subjective determination. Even if a person makes a written offer not intending to do so, the writing is an offer if objectively the opposite party was reasonably justified in treating it as an offer. On this record, the evidence is preponderant that Parent's counsel provided an offer in settlement to the attorney for the District.

Parent argues that the offer was null and void because she had not authorized her attorney to make it. In Pennsylvania, an attorney's offer to settle cannot bind the client where the client has not authorized the attorney to make the offer. Here, the evidence does not prove preponderantly that Parent withheld authorization to make the offer. Parent repeatedly asserted in testimony that she had told the attorney during the negotiations that she did not want to settle, and that she wanted to reopen the due process hearing. However, she did not deny ultimately agreeing to the settlement. In fact she repeatedly and candidly admitted that she ultimately decided to sign the agreement because she wanted to receive what became part of the consideration for the agreement: the District's provision of taxicab transportation of Student from Student's neighborhood to the current school location, for the remainder of the 2014-2015 school year. It is uncontested that Parent signed the settlement agreement, and did so deliberately. On this record, there can be no question that Parent ultimately authorized counsel to make the offer to settle, despite her preference to reinstate the due process proceeding and go to hearing.

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preexisting claims. Thus, in giving weight to the manner in which Parent's attorney obtained her signature, I do not find preponderant evidence that the document sent to District counsel was unauthorized by Parent.

There also is no question that the offer thus made by Parent's attorney was accepted. Within days, the District affixed its signature upon the document that embodied the Parent's offer in settlement.[6]

Nor is there any question that consideration was exchanged to seal the agreement. In addition to the mutual promises made in the document itself, Parent received – even before signing the agreement – a benefit of substantial monetary value: the District provided Student with taxicab transportation from Student's neighborhood to the current school location for much of the 2014-2015 school year. In addition, the District allowed Student to remain in the current school location for the remainder of the school year, providing Student and Parent with a second year in which it delayed its decision to transfer Student to another school location. In addition, the District complied with various terms of the agreement, providing a list of schools for Parent to visit in order to plan for Student's transition in the 2015-2016 school year, performing evaluations and convening an IEP meeting in order to entertain revisions of Student's IEP. In return, the District had the signed agreement, upon which it could assert the defense of waiver of all claims should Parent attempt to reiterate the claims that were asserted in the 2014 due process amended complaints. Thus, the parties did exchange valuable considerations.

Parent seeks to avoid the agreement thus entered into by asserting that she signed the settlement agreement under duress. She asserts that she repeatedly told her attorney that she wanted to stop negotiating and reinstate the due process complaint. She asserts that the attorney repeatedly

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[6] Nor is there a question of mistake of fact here, although Parent introduced evidence to show that she never understood that the previous due process matter could not be reinstated after the expiration of the 60 day reinstatement period in the order of conditional dismissal. Mistake of fact must be mutual, but there was at most unilateral mistake here, and probably no mistake at all. The record shows that the District was under no misapprehension of the circumstances of the case or of the terms or effect of the settlement agreement that they signed. See, A.S. v. Office for Dispute Resolution Quakertown Cmty., 88 A.3d 256, 262-265 (Pa. Cmwlth. 2014); Jupiter v. United States, 2014 U.S. Dist. LEXIS 179735 (M.D. Pa. 2014).

declined to do so. Parent states that she signed the agreement only because her attorney told her that, if she reinstated the due process complaint, the District would immediately cease providing Student with transportation to the current school location, for the rest of the school year.

As a result, Parent would have been required either to drive Student the long distance to the current school location, or to pay privately for transportation. At the time, Parent says, she was unable to do either of these things: she was recovering from surgery and could not drive, and she was out of work and could not pay for private transportation. This set of circumstances, she argues, constituted duress that prevented her from willingly settling her claims, and rendered the settlement agreement of November 25, 2014 invalid.

Under Pennsylvania law, duress sufficient to prevent contractual assent is defined as that degree of restraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness. Degenhardt v. Dillon Co., 543 Pa. 146, 153-154, 669 A.2d 946 (Pa. 1996). Moreover, where a person is free to consult with counsel, the only form of duress that the law recognizes is the threat of bodily harm. Ibid.

I conclude that the facts of this matter do not meet this very narrow definition of duress. Parent was free to consult with counsel, and did so at great length,[7] during the negotiation of the settlement agreement; this alone precludes her claim of duress. Moreover, Parent's circumstances that made the threatened withdrawal of transportation did not constitute duress.

[7] Parent argues that her attorney himself exerted such restraint or danger upon her as to constitute duress; however, the issue before me is only whether or not the District did so. Likewise, Parent argues that her attorney never told her that the 60 day order would become a permanent dismissal after the expiration of the 60 day reinstatement period. As to all of these claims regarding her attorney, Parent can pursue remedies in another forum, as I made clear in pre-hearing rulings. I do not have jurisdiction over Parent's claims against her attorney for allegedly pressuring her into making an agreement or failing to advise her of the consequences of a 60 day order.

Parent clearly is a person of more than ordinary firmness, as demonstrated by her dogged and wholehearted effort to put on her case in this matter, despite a lack of legal training. She also is an educated and skilled professional, with some support from Student's father, who attended nearly all of the proceedings in this case without testifying, just to provide support to Parent. While the withdrawal of free transportation would have created a significant problem for Parent to solve, the evidence is not preponderant that there were no other viable alternatives to signing away all of Parent's existing claims. The weight of the evidence is not preponderant that Parent's will was or reasonably would have been overridden to the extent that she was forced into an agreement to waive her claims.

This is particularly clear upon consideration that Student was not entitled to the transportation that the District provided. The desegregation bus service was no longer operating, and Student was not attending Student's neighborhood school, to which Student might have made some claim for transportation. The record contains absolutely no evidence that Student needed transportation as a related service in order to benefit from special education that could only have been provided at the current school location. The District's provision of free transportation was simply a good will gesture in order to improve the parties' relationship and encourage mutual, collaborative problem solving among the parties – something which is encouraged by the IDEA and state educational policy. That the District conditioned this largess upon good faith negotiation of a settlement agreement does not create the "duress" which legally invalidates an otherwise valid agreement. See, Degenhardt v. Dillon Co., 543 Pa. 146, 669 A.2d 946 (Pa. 1996)(economic hardship does not amount to duress as defined in Pennsylvania).

In sum, I conclude that, on this record, there was a valid settlement agreement between the parties.

DUTY TO OFFER A FAPE, INCLUDING AN APPROPRIATE PLACEMENT

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 (3rd 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 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

However, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity" – it is not required to provide the "optimal level of services." 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). An IEP is not required to incorporate every program that parents desire for their child. Ridley Sch. Dist. v. M.R., 680 F.3d 269 (3d Cir. 2012).

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 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).

Pursuant to its obligation to offer and provide Student with a FAPE, the District must provide Student with an appropriate placement. See, P.V. v. Sch. Dist., 2013 U.S. Dist. LEXIS 21913 (E.D. Pa. 2013)(defining placement as an interest protected under the IDEA); R.B.v. Mastery Charter Sch., 762 F. Supp. 2d 745 (E.D. Pa. 2010)(describing change of placement as fundamental change in educational program that ensures provision of a FAPE). Placement is part of the selection of services that delivers a FAPE through the IEP. P.V. v. Sch. Dist., 2013 U.S. Dist. LEXIS, above. A "placement" is not the same as a "place" or location of the services; rather, "placement" is the level and type of services to be provided to Student, wherever those services are provided. Id. at 19. However, if the location of the services has a substantial impact on the quality of the services,

there is authority that suggests that location can be a factor in determining whether or not the placement in the location in question is part of an IEP that is reasonably calculated to provide meaningful educational benefit. R.B. v. Mastery Charter Sch., 762 F. Supp. 2d 745, 763 (E.D. Pa. 2010).

Parent argues that the District, in proposing to transfer Student to another location with the same placement of supplemental learning support, threatens to harm Student and thus deny Student a FAPE. Parent argues that the proposed new schools are unable to provide the services that Student needs to address Student's individual educational needs. Parent also argues that the District has failed to recognize that Student is diagnosed with autism, and that this diagnosis alone means that Student is unable to transition to a new school setting and social group. I conclude that the preponderance of the evidence demonstrates that the proposed new schools are capable of delivering the services in the Student's most recently offered IEP, and that Student is reasonably likely to transition to a new school without such harm as would constitute a denial of a FAPE.

The District introduced credible evidence from its administrative officials, especially the testimony of its director of special education, that the District has proposed to transfer Student to an appropriate alternative school. The Director testified to her search of District records showing that the proposed school is comparable demographically to the current school. Its data on incidents of dangerous behavior are relatively low and not significantly higher than the same data for the current school. Its student population is about half of that of the current school, which is greatly overcrowded. It offers all of the learning support services that are promised in the Student's proposed IEP, and its principal has substantial experience with providing services to children on the autistic spectrum. The proposed new school is not located in Student's neighborhood, thus

addressing Parent's concerns about Student's vulnerability in Student's home neighborhood, where there is more violence in the streets.

The District also showed that it has offered an appropriate transition plan to help Student to make the move to a new school. This includes coordination among the sending and receiving schools' counselors and teachers, including sharing of information on special education techniques that are effective currently. It also includes explicit teaching of Student in social skills needed to develop new friendships and the initiation of "pen pal" relationships with peers at the new school. The director assured Parent that she would personally ensure that the transition plan is carried out.

Parent failed to show by a preponderance of the evidence that the proposed new school is low-performing or otherwise deficient. While Parent introduced a document purporting to be a year-old list of under-performing schools, the proposed school's name was marked as no longer being on the list. Parent attempted to introduce uncorroborated hearsay statements from other lists to disparage the proposed school, but the documentary evidence and the testimony of that school's principal outweighed Parent's evidence decisively. The principal proved that the proposed school is not a poor-performing school, and that its staff are qualified and experienced to deliver the services in Student's proposed IEP.

The District's witnesses also credibly showed that Student, although diagnosed with autism and demonstrating some weaknesses associated with that diagnosis and with Student's Speech or Language Impairment, is functioning well in elementary school. Student is functioning on grade level academically, and has made meaningful progress. Socially, Student interacts well with peers, engages in play with them and holds conversations. Stereotypical movements are not prominent. Student works well with peers in the classroom.

Parent introduced the report of a psychological evaluation from the local behavioral health agency, conducted to establish eligibility for health services. It diagnosed Student with autism and noted prominent features of anxiety, depression, social awkwardness, and communication deficits. The report was introduced without testimony and thus without the opportunity for cross-examination. It was not for educational purposes, and the evaluator did not evaluate Student's functioning in school; rather, the report was based primarily upon parent report and clinical observation of Student in interaction with the evaluator. For these reasons I give reduced weight to this report, and I find that the weight of the evidence of the District's credible witnesses is preponderant that Student's challenges, needs and behavioral manifestations of autism are not severe, and do not render the proposal of a transfer to another school inappropriate under the FAPE standard of the IDEA.

APPROPRIATE EVALUATION

I conclude on this record that the District's re-evaluations, effective during the relevant period of two years prior to the date of filing of the amended complaint in this matter, were appropriate. I have reviewed the reports in question and I conclude that the reports are comprehensive in their inquiry into Student's suspected disabilities. I also conclude that the evaluations complied with the procedural requirements of the IDEA.

The IDEA regulations prescribe in detail the procedures to be used in order to fulfill this requirement. 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). These procedures must include the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information … ." 20 U.S.C.

§1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency may not use "any single measure or assessment" as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2).

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(ii), (iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

I conclude that the District's most recent evaluation reports in October 2011 and November 2014, comply with these procedural requirements. Parent did not introduce any evidence to the contrary; therefore, the District's introduction of the reports themselves as well as the testimony of its school psychologist provides preponderant evidence of its compliance with the IDEA evaluation procedures.

Parent argues that the Student has always exhibited symptoms of autism, and that the District should have classified Student with that disability. Parent's evidence is the private behavioral health evaluation discussed above. For the reasons stated above, this report carries reduced evidentiary weight. The testimony of the District's school psychologist, which was subject to cross-examination, was credible and reliable, consistent with the record and persuasive. Thus, the psychologist's explanation of the District's classification decision, based upon what it knew at the times of all past re-evaluations, is preponderant as to the appropriateness of its classifications of Student with disabilities other than autism. The psychologist pointed out that even she, as a trained observer and diagnostician, did not immediately see reason to suspect autism when observing Student, and she could see why Student's teachers did not suspect autism in previous years. Such evidence is preponderant in favor of the District when balanced against the behavioral health evaluation that I have given reduced weight.

Similarly, Parent introduced a report of a reading specialist, evaluating Student and finding deficits in reading, but also concluding that Student exhibited double deficit dyslexia. The District's psychologist testified subject to cross-examination and rebutted the latter conclusion. Again, I accord greater weight to the psychologist's opinion, because it was subject to cross-examination, and because the private specialist's findings were simply implausible in the context of the record as a whole. Never had any entity diagnosed Student with dyslexia. For years, Student's word reading was considered good, but slow because of stuttering. Never is there a serious indication of dyslexia in Student's history.

Another reason to credit the District's classification, and its omission to change the classification, is that Student did well in school. The evidence from Student's teachers, and the evidentiary evidence of academic progress in IEPs and in other District documentation,

demonstrated without contradiction that Student made meaningful progress during the relevant period. Student's educational needs thus were being met by the supports and interventions provided by the Student's teachers pursuant to the IEP. Parent repeatedly wrote that she believed that Student made good progress at the current school.

Even though the District did not provide the classification of autism before 2014, it identified Student under the IDEA and addressed Student's educational needs successfully. This is the function of an evaluation, and its success with this Student demonstrates that it was appropriate for the purposes for which it is required under the IDEA.

PROVISION OF A FAPE TO STUDENT

As discussed above, the District was obligated to provide Student with a FAPE during the relevant period. I conclude that the District complied with this duty, for all of the reasons set forth above. The District provided an appropriate placement. It evaluated Student sufficiently to identify Student's needs. It provided IEPs whose provisions resulted in the meaningful educational benefit. Student made meaningful progress. On this record, the District did not fail to provide Student with a FAPE during the relevant period.

PARENTAL PARTICIPATION IN EDUCATIONAL PLANNING

I conclude that the District did not fail to provide Parent with access to educational planning. On the contrary, Parent made many requests and inquiries of District personnel, and the exhibits contain numerous instances in which these officials responded to Parent's requests. In particular, Parent requested continuation of Student in the current school with transportation every year. In the 2011-2012 school year, the District provided Student with bus transportation and

allowed Student to be enrolled in Parent's school of choice. In the 2012-2013 school year, The District again responded to Parent's concerns and allowed Student to remain. Although the record is unclear, the record supports a finding that the District again provided transportation. For the 2013-2014 school year, again, the District allowed Student to remain at the current school, although there was no longer a school bus going to the school.

Witnesses unanimously and credibly reported that Parent never raised a concern about the content of Student's special education program until Parent retained a lawyer. Nevertheless, the District again responded to the lawyer's requests, scheduling IEP meetings, conducting a re-evaluation, and proposing numerous drafts of the Student's IEP with revisions requested by Parent.

This record rebuts Parent's claim of exclusion from the IEP process. Her claim must be denied.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I have indicated my credibility findings above; however, it is necessary to address some additional issues of credibility.

I found the District witnesses to be credible and reliable, based upon the manner in which they responded to questioning, and the consistency of their testimony with the documentary record.

I found the assessment of Parent's testimony to be more difficult with regard to Parent, who provided the bulk of the evidence in favor of her own claims. I was struck during the hearing

by two seemingly contradictory observations. My first observation was Parent's obvious desire to collaborate with and give credit to the professional recommendations of the Student's assigned educators. Her questioning was in most instances respectful and even appreciative of these educators' services. Her presentation was apparently sincere and intended to be reasonable.

At the same time, the record shows beyond cavil that Parent was willing to renege on previous agreements and deny obvious facts when necessary to advocate for Student's receipt of the best possible education[8]. For example, in December 2011, Parent wrote to the school principal that she understood that the arrangement for Student to receive bussing to the current school was only for one year. (S 23 p. 3.) At the end of the next year, instead of working with educators to plan a careful transition for Student to another school, Parent again campaigned for Student to remain at the current school with transportation; she was successful, and the record is preponderant that she was told that the 2012-2013 school year would be the last for Student at the current school. Yet in June 2013, she wrote to the principal that she was offended that she had not been given time to look for other alternatives for Student. (S 30 p. 2.)

In August 2013, accepting an offered compromise to postpone Student's transfer yet another year, Parent again acknowledged that the Student would have to transfer after the 2013-2014 school year. (S 1 p. 9.) Yet, at the end of the year, Parent again pressed for another year, eventually filing for due process and obtaining a pendency ruling to accomplish that goal.

This record clearly shows a Parent who, with the best of intentions for her child's sake, was unreliable as a collaborator with school officials, and whose memory and willingness to

[8] It must be emphasized that the law does not give Student the right to the best possible education; rather, as discussed above, the IDEA only guarantees meaningful educational benefit. Rather than a right to the Cadillac of educations, the IDEA gives the right only to a sub-compact car.

acknowledge her own agreements affected the reliability of her statements. This pattern continues with the expansion of the issues that Parent has brought to due process. Parent had not raised evaluation and FAPE issues during the relevant period, until she retained a lawyer who started to raise these issues on her behalf. Once again she changed her position from an assertion that Student had made progress and the school had provided educational benefit (the argument used to seek Student's remaining at the current school), (S 1), to an assertion in this due process proceeding that the school had failed to provide a FAPE.

One can readily empathize with a parent who goes to such lengths to ensure her child a good education. However, this history leads me to hesitate about the reliability of what Parent says. Therefore, while I accord weight to her statements under oath in this proceeding, I reduce the weight of that testimony in light of Parent's history of actions regarding this matter, as explained above.

CONCLUSION

I conclude that the record preponderantly demonstrates that the Parent entered into a written settlement agreement. It also proves that the District offered Parent an appropriate placement, conducted appropriate re-evaluations during the relevant period, and provided Student with a FAPE during that period. Therefore, no remedial relief is appropriate and the Parent's claims must be dismissed. In the companion matter, number 16190, the District's request for relief is granted.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Parent's requests for relief (Number 15934) are hereby DENIED and DISMISSED. The District's request for relief in the companion matter (Number 16190) is granted and the Parent is not entitled to an IEE.

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., CHO
HEARING OFFICER

July 17, 2015