

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: L.N.

ODR #16759 / 15-16-KE

Date of Birth:
[redacted]

Dates of Hearing:
October 6, 2015
October 28, 2015
November 18, 2015
November 20, 2015

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Representative:
Jason Fortenberry, Esquire
Frankel Kershenbaum
1230 County Line Road
Bryn Mawr, PA 19010

North Penn School District
401 E. Hancock Street
Lansdale, PA 19446

Kyle Somers, Esquire
1800 Pennbrook Parkway Suite 200
Lansdale, PA 19446

Date Record Closed:

January 5, 2016

Date of Decision:

February 2, 2016

Hearing Officer:

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

Background

Student¹ is a pre-teen aged 6th grade student residing in the District who is eligible for special education subject to the Individuals with Disabilities Education Act [IDEA] and Pennsylvania Chapter 14. Student's classifications are in some dispute, although Other Health Impairment and Specific Learning Disability are not contested. Student is also a qualified handicapped person / protected handicapped student under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), and Chapter 15 of the Pennsylvania Code. Student attended school in the District from kindergarten through second grades, and then pursuant to a settlement agreement attended a private school for children with learning differences (Private School) for 3rd through 5th grades. The District declined to grant the Parents' request to extend the agreement for the 2015-2016 school year, and offered Student a program/placement to be implemented for 6th grade in the District.

The Parents believed that the program and placement the District offered was inappropriate and kept Student at the Private School for the current school year. They asked for this hearing, seeking tuition reimbursement. They are also asking for reimbursement for the services of a behavior consultant whom they engaged to work with Student at the Private School and at home.

The parties stipulated that although the District had previously objected to exhibits J-32 and J-33 on the basis that the information contained therein constituted settlement discussions, and the objections were sustained, the District was willing to withdraw its objection and therefore both exhibits are included in the record.

For the reasons put forth below I find in favor of the Parents on the issue of tuition reimbursement and in favor of the District on the issue of reimbursement for the behavior consultant.

Issues²

1. Was the program/placement the District offered to Student for the 2015-2016 school year appropriate?
2. If the District's offered program/placement was not appropriate, is the program/placement unilaterally chosen by the Parents appropriate?
3. Are there any equitable considerations that would remove or reduce the District's obligation to fund the parentally-chosen program/placement?
4. Should the District be required to reimburse the Parents for the costs of the services of a behavior consultant?

¹ 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.

² Counsel for the parties cooperated in creating a set of joint exhibits for this hearing and this effort is commended and very much appreciated.

Findings of Fact³

The Student⁴

1. Student was born at 25 weeks gestation weighing 1 lb. 1 oz. [J-7]
2. Secondary to extreme prematurity Student suffered neurological damage, periventricular leukomalacia (“PVL”), which resulted in mild cerebral palsy and other conditions. Student has been diagnosed with a severe generalized anxiety disorder, an attention deficit disorder, and a nonverbal learning disability. [NT 15-16, 540-542; 737-738; J-7]
3. Student’s most recent neurology report indicates additional diagnoses of tics of organic origin, anxiety, and articulation disorder. [J-7]
4. During the school day, fatigue and maintaining coordination are a constant challenge for Student. When a child has a neurological impairment such as Student’s, most of the physical and cognitive activities that become automatic for neurotypical individuals such as sitting in chairs, never reach that level of automaticity. Student cannot multitask because Student needs to expend effort to recruit active cognitive resources to be able to do whatever tasks are required; substantial fatigue is the result. [NT 565-566]
5. Student’s neurological damage affects motor control; cognitive functioning, especially higher order reasoning; problem solving; executive functioning; working memory; and processing speed. Student presents complex needs that defy precise classification. [NT 304-305, 565-570, 646, 674-675]
6. For purposes of a May 2015 District re-evaluation, Student’s mother informed the District in writing that Student had been diagnosed with Autistic Spectrum Disorder (ASD); the Parents’ expert neuropsychologist evaluator discussed Student’s ASD features with the Parents, included the information in her written report, and testified about Student’s presentation in this regard at the hearing; two of Student’s neurologists set forth a Diagnostic Impression of ASD; and Student’s prematurity specialist acknowledged that Student presents with some features of ASD, as did Student’s current prescribing psychiatrist. Nevertheless, the Parents’ expert witnesses all maintained that classifying Student with an ASD would be a disservice because Student’s presentation is atypical and complex given all the challenges Student faces. [NT 545, 609-610, 679-682, 688-689, 752-753, 769, 808-809; J-2, J-5, J-28; J-37, J-38].

³ The testimony of every witness, and the content of each exhibit, was reviewed and considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. The parties’ written closing arguments were likewise carefully considered.

⁴ The parties spent considerable time presenting evidence on the relative merits and drawbacks of the physical plants [the two District buildings] that were under consideration. They also spent a great deal of time presenting evidence on Student’s walking and stair ascending/descending abilities. The reader will notice that none of this evidence found its way into the Findings of Fact. Once the Parents established the two major factors that combined to form the basis of this decision – Student’s significantly high level of anxiety and the District’s failure to offer Student a one-to-one aide for regular education classes – the question of a District location and Student’s gross motor skills became moot.

7. Student has difficulty generalizing skills to new settings and has memory retrieval deficits. [NT 542; 551-553]
8. Experts' observations in the fall of 2014 and in the spring of 2015 found that in small classrooms with 8 or 9 pupils and two teachers, or even in a small group of 5 pupils, Student has trouble focusing and remaining on topic and exhibited shutting down and other behaviors suggestive of anxiety. [NT 273-276, 636-639, 650-654; J-30]
9. Student exhibits deficits in social skills relative to same age and grade peers; this first became noticeable in 2nd grade. Student has difficulty with social interactions such as initiating conversations, staying focused and remaining on-topic in conversations, asking follow-up questions, engaging in active listening skills, and offering reciprocity. [NT 80, 98, 114-15, 168, 272, 275, 378, 387-388, 551-553, 712]
10. Given Student's neurological damage, pacing is a significant consideration because, in general, Student cannot keep up with the pace of what everyone else is doing even in Student's strong areas. Student needs to have instruction delivered in a way to give Student time to try to consolidate what is being said, and where Student has enough time to be able to raise a hand and respond to a question. In a regular education classroom instruction is being delivered at the pace of the average pupil and the requirement for pacing is extremely hard to accommodate, because the rest of the children don't want to sit there for that long while the teacher is delivering instruction in a way that meets Student's needs. [NT 548-550]
11. As early as age six/seven Student was showing a significant increase in anxiety in both home and school settings. [NT 633, 707-709]
12. Student is an extremely anxious child. Student's areas of deficit are catalysts for, as well as serve to exacerbate, Student's anxiety. In turn Student's anxiety serves to exacerbate the deficits. Student's anxiety significantly impairs Student's functioning across settings. [NT 187-188, 279, 607, 638-639, 669]
13. Student is remarkably sensitive to medication. All children are different, but children who have known neurological or brain damage can be more sensitive to medication, and some children metabolize medications differently which makes them more sensitive. Student's medication sensitivity could be due to these, or other, factors. [NT 741, 748]
14. In November 2014 Student's neurologist referred Student to a psychiatrist because the medication being tried, Strattera, used to treat symptoms of ADHD was not effective in treating Student's high level of anxiety. The psychiatrist recommended adding *sertraline*, brand name Zoloft, used to treat anxiety disorders⁵ but within a week or two Student was having an adverse reaction so that medication was stopped. After a period of stopping all medication, the dosage of Strattera was increased. Then because anxiety was so overarching and influencing all areas of Student's life, the psychiatrist decided to try a low dose of another anti-anxiety medication, *citalopram*, brand name Celexa. Melatonin

⁵ Although Zoloft also is used to treat depression, Student was not depressed. [NT 740]

2.5 mg was added to aid sleep. The psychiatrist and the Parents decided to stop Strattera. Currently Student is on citalopram increased to 5 mg and melatonin 2.5 mg. [NT 739-748]

15. The private evaluator was struck by Student's anxious, repetitive and somewhat unrealistic questioning, being worried about things that were clearly not Student's fault, such as a pencil mark on the testing table. The anxiety had an obsessive quality to it. The private evaluator noted that it is very rare for a child to have such a poor sense of what the child has done and such poor self-monitoring that the child would not realize that the child hadn't caused something. [NT 538-540]
16. The private evaluator observed Student in her office and in the Private School and identified three broad categories in which Student's anxiety was manifest. One manifestation was behavioral mannerisms, such as hair twirling and lip biting. Another manifestation was repetitive persistent questioning, such as "What are we going to do next? Should I do this? Have I done this? Can I do this? Did I do this right?" A third manifestation was Student's appearing internally preoccupied such that when Student wasn't outwardly questioning Student was gazing into the middle distance and likely anxiously ruminating. [NT 546, 575]
17. Student has not made any significant progress on reducing anxiety since November 2014 when the new psychiatrist started seeing Student and new medication was prescribed. Student's anxiety is uniformly present but flares up depending on stress or transitions or when Student is ill. [NT 779-780]
18. Any school setting that involves more noise, more chaos, more unpredictability, and more to have to cope with would increase Student's anxiety. Student requires a very high degree of predictability. [NT 547, 607]

Results of Evaluations:

19. In November 2014 Student received cognitive testing from a private evaluator using the Wechsler Intelligence Scale for Children – 5th Edition (WISC-V). Student's Full-Scale IQ was not calculated because of the discrepancy among the index scales. Student received a Verbal Comprehension Index of 100, a Visual Spatial Index of 92, a Fluid Reasoning Index of 72, a Working Memory Index of 85, and a Processing Speed Index of 69. [J-2]
20. Student's academic achievement was assessed by the private evaluator in November 2014 through the Wechsler Individual Achievement Test - Third Edition (WIAT III). Student's scores were as follows: Word Reading 101, Reading Comprehension 95, Oral Reading Fluency 112, Oral Reading Accuracy 109, Oral Reading Rate 111, Sentence Building 81, Essay Composition 70, Essay Composition Grammar and Mechanics 77, Essay Composition Word Count 75, Essay Composition Theme Development and Text Organization 72, Spelling 89, Numerical Operations 76, Math Problem Solving 75, Math

Fluency Addition 63, Math Fluency Subtraction 66, Math Fluency Multiplication 81. [J-2]

21. The District completed a reevaluation in May 2015. District personnel evaluated Student at the Private School at the Parents' request. [NT 290]
22. For the May 2015 District re-evaluation, the District psychologist administered the Test of Written Language - Fourth Edition (TOWL-4). Student received a spontaneous writing composite score of 84. [J-7]
23. The District psychologist administered the Key Math 3 to assess Student's math skills. Scores were as follows: Basic Concepts 78, Operations 71, Applications 73, and Total Test 74. [J-7]
24. The District psychologist administered the Woodcock Reading Mastery Test - Third Edition to assess Student's reading skills. Student's scores were as follows: Basic Skills 111, Word Identification 105, Word Attack 112, Reading Comprehension 113, Word Comprehension 107, and Passage Comprehension 106. [J-7]
25. The District psychologist gave the Multidimensional Anxiety Scale for Children - Second Edition to the Parents and to Student. This instrument is a measure designed to assess a variety of dimensions related to anxiety in children and adolescents. The ratings were as follows: Physical Symptoms Total - Parent rating elevated, Student rating very elevated; Tense/ Restless - Parent rating very elevated, Student rating very elevated; Panic - Parent rating high average, Student rating elevated; Social Anxiety Total - Parent rating average, Student rating slightly elevated; Humiliation and Rejection - Parent rating average, Student rating average; Performance Fears - Parent rating average, Student rating elevated; Obsessions and Compulsions - Parent rating very elevated, Student rating very elevated; Harm Avoidance - Parent rating high average, Student rating high average; Separation Anxiety/ Phobias - Parent rating average, Student rating high average; General Anxiety Disorder Index- Parent rating very elevated; Student rating very elevated; Total for the test - Parent rating elevated, Student rating very elevated. [J-7]
26. The District psychologist gave the Autism Spectrum Rating Scales to Student's Parents and classroom teachers. The Total Score fell within the average range for the Parents, the elevated range for two teachers, and the slightly elevated range for one teacher. [J-7]
27. The District psychologist gave the Behavior Assessment System for Children - Second Edition to the Parents and to three of Student's teachers. Notable scores pertinent to this decision were: Anxiety - Parent rating clinically significant, two teacher ratings clinically significant, one teacher rating at risk; Attention Problems - Parent rating at risk, two teacher ratings at risk, one teacher rating clinically significant; Atypicality - Parent rating average, one teacher rating at risk, two teacher ratings clinically significant; Withdrawal - Parent rating average, three teacher ratings at risk. [J-7]

28. The District psychologist gave the Conners 3 to the Parents and the teachers to assess Student's symptoms of Attention Deficit Hyperactivity Disorder. Scores relative to this decision were: Inattention - Parent rating high average, two teacher ratings high average, one teacher rating very elevated; Hyperactivity - Parent rating very elevated, two teacher ratings very elevated, one teacher rating elevated; Executive Functioning - Parent rating average, one teacher rating very elevated, one teacher rating high average, one teacher rating average; Learning Problems - Parent rating elevated, two teacher ratings very elevated, one teacher rating high average; Relations - Parent and all teachers' ratings were very elevated. [J-7]
29. The District psychologist provided the Behavior Rating Inventory of Executive Function to the Parents and three teachers. Areas for which at least two teachers rated Student in the clinically significant range were: Inhibit, Shift, Working Memory, Organization of Materials, and Monitor. [J-7]
30. The District's speech language pathologist administered the Expressive Vocabulary Test - Second Edition. Student's Pragmatic Language Usage Index was 87 which is within the below average range. The District's speech language pathologist also provided the Clinical Evaluation of Language Fundamentals - Fifth Edition Observational Rating Scales to Student's Parents and three teachers. In the area of Listening, the raters listed the following as behaviors of concern: trouble paying attention, trouble following spoken directions, trouble looking at people when talking or listening. In the area of Speaking, the raters listed the following behaviors of concern: trouble answering questions as quickly as other students, trouble thinking of the right word to say, trouble having a conversation with someone, trouble talking with a group of people. [J-2]
31. The District speech and language pathologist provided the Pragmatic Language Checklist to Student's Parents and teachers. The following skills were identified as area of need: attention appropriately maintaining somebody else's topic across turns, changing /shifting topics appropriately, waiting for turn to speak, using responses when listening, discriminating between relevant and irrelevant details, getting to the point, responding in an appropriate amount of time, expressing feelings, joining into play appropriately, using appropriate response time, using eye contact, and understanding facial and body gestures. [J-2]
32. The District speech pathologist provided the Social Inference Checklist to three teachers. Two of three teachers' responses indicated Student was unable to make social inferences from facial expressions and emotions, modify communication to show emotional support for others, and learn social behavioral rules from observing others as well as personal experience. [J-2]
33. The District speech and language pathologist administered the Social Language Developmental Test – Elementary to Student. Student showed definite patterns of strengths and weakness. Weaknesses included: providing multiple logical inferential interpretations of a photo and using pleasing language in specific situations to support peers. Student also had difficulty in the area of flexible thinking. [J-2]

34. The District's occupational therapist assessed Student through observations and through reports of significant adults. She also administered the Beery Buktenica Developmental Test of Visual Motor Integration wherein Student earned a standard score of 77. On the Beery VMI Supplemental Developmental Test of Visual Perception Student earned a standard score of 62, and on the Beery VMI Supplemental Developmental Test of Motor Coordination Student earned a standard score of 45. [J-2]
35. The District's occupational therapist noted that Student would require “a lot of” sensory input to remain focused and will require teacher direction to assist with refocusing, remaining engaged in the task, and following directions. The occupational therapist also noted Student would benefit from frequent movement breaks and fidget items at the desk. The occupational therapist found no direct school-based needs were identified but consultative occupational therapy was recommended to provide sensory strategies as needed and to monitor visual motor perception and motor coordination needs if they arise. [J-2]
36. The District's physical therapist assessed Student with a variety of observations and tools. She noted that Student is slower in walking and in physical motor skills than peers, demonstrates difficulty in stair access, moving through uneven terrain in the educational environment, and physical education activities. She recommended Student receive direct PT 45 minutes a week and 30 minutes a month consult with teachers and related staff upon receipt of a physical therapy prescription updated annually. [J-2]
37. The District's 2015 re-evaluation found Student eligible for special education under the classifications of Autism, Other Health Impairment, Speech and Language Impairment, and Specific Learning Disability (Mathematics and Written Expression). [J-7]

Student's Educational Programs

38. Student attended School in the District for Kindergarten, 1st and 2nd grades. Although they had received advice about putting Student in a small school, the Parents wanted to try public education. For fourteen years prior to leaving her employment to be able to address Student's many needs more fully mother was a public school kindergarten teacher with a master's degree in elementary education. [NT 29, 698-699, 701, 703-704]
39. Although they had not been contemplating removing Student from the District, a private evaluator recommended that the Parents place Student in a smaller school setting, or alternatively home-school Student because of Student's very elevated level of anxiety. The Parents placed Student in the Private School. [NT 721-725; J-22]
40. On April 18, 2013 the Parents and the District entered into a settlement agreement in lieu of FAPE that funded Student's placement in Private School for 3rd grade. The agreement required the Parents to make an annual request if they wanted the agreement extended. [NT 29-30; J-1]

41. The Parents requested and received an extension for 4th grade. On March 17, 2014 they and the District entered into another extension of the agreement, for 5th grade, the 2014-2015 school year. [NT 725-726; J-1]
42. In February 2015 the Parents requested that the agreement be extended for the 2015-2016 school year. By letter dated February 24, 2015 the District denied their request, stating that the District, “will not be extending the current agreement” and stated the intention to make a free appropriate public education available to Student. [NT 31, 788, 844-845; J-3]
43. The District also proposed that an evaluation be conducted “to gather up-to-date information regarding [Student’s] current levels of functioning and needs” and enclosed a Permission to Re-Evaluate [PTRE] form with the letter. [J-3]
44. When it issued its denial letter the District had not seen Student in several years and had not yet re-evaluated Student. The decision not to extend the agreement and to offer Student a placement in the District was made prior to the proposed re-evaluation. [NT 32-35]
45. The Parents signed the PTRE on March 3, 2015 and returned it to the District. [NT 34-35,788; J-4]
46. The District’s evaluation was completed by a certified school psychologist with input from Parents, teachers, occupational therapist, speech/language therapist and physical therapist. [NT 256; J-7]
47. Following the completion of the re-evaluation the IEP team met on May 20, 2015. The District brought a draft IEP template that contained only demographic information and the Present Levels section that had been sent to the Parents the previous day. The team worked on the goals and the specially designed instruction of the IEP and that information was then typed into the IEP document. The Parents did not express concerns about any of the proposed classifications, including autism. The Parents expressed concerns about the placement options that were considered, specifically transitioning Student back into the District. [NT 35-36, 69-70, 80, 128-130, 133, 143-145, 164-165, 195-196, 312, 800-802, 813; J-9, J-11]
48. By the end of the IEP team meeting all but the section on Placement had been filled out. The decision on placement was made by a member of the IEP team, the District’s Assistant Director for Special Education. Although the District initially considered a learning support program, ultimately the District offered a placement in a special education autistic support program at the supplemental level (more than 20% but less than 80% of the school day) to be delivered in a combination of physical settings including an autistic support classroom, a learning support classroom, as well as regular education settings. [NT 36-38, 46-47, 55-58, 61-63, 165, 169, 227; J-11, J-12]

49. The placement particulars, although not firmly established, were that at times Student would be in the special education autistic support classroom to work on executive functioning skills and assistive technology. Social skills training would be built into the program and would also be facilitated in the autistic support classroom by the speech pathologist. Student would be in a special education learning support classroom for language arts and math, and in regular education settings for social studies, science and specials which are art, music, library and physical education. The science regular education class has about 20 students; the specials classes have about 19 students. The autistic support case manager would facilitate the delivery of Student's entire program. [NT 55-58, 60-62, 174, 178-179]
50. There is not a Related Service of a one-to-one aide when Student is in regular education settings. None of the Specially Designed Instructions [SDIs] include a co-taught regular education class. None of the regular education classrooms include an assistant to the general education teacher in the classroom. [NT 156, 178, 192; J-10, J-11, J-12]
51. Student's Listening skills were variable and Student scored at the very bottom of the low average range in the private evaluator's relatively quiet office setting. Given Student's neurological deficits that make multitasking not an option, in a regular classroom setting where there is higher level language, more complexity, and other distractions and noises Student's Listening skills would be expected to deteriorate and Student can be expected to fall apart as a function of Student's impaired neurological functioning and Student's very high levels of anxiety that were evident even in a special education setting in a class of six. [NT 559-561]
52. Placement in regular education classes would profoundly adversely affect Student's ability to learn. There would be too many distractions and Student's brain becomes overloaded when there is a great deal of environmental stimulation. [NT 757]
53. Although Student would be exposed to typical peers in the regular education setting, given Student's level of anxiety, learning issues, and how Student's brain functions, Student would not be able to profit from peers' neurotypical behavior in a way that would help Student's development. [NT 758]
54. The District planned to offer all Student's related services on different days during the regular education science or social studies block, necessitating Student to make up instruction and make up work in that subject. [NT 62, 176, 190-192; J-16]
55. The District issued a copy of the IEP to the Parents on June 1, 2015 along with a Notice of Recommended Educational Placement (NOREP). The Parents signed the NOREP on June 4, 2015 and checked the box indicating that they were requesting an informal meeting. The meeting did not take place. [NT 49-50, 76; J-10, J-11, J-12]
56. The Parents through their counsel's educational consultant provided notice of their intent to keep Student at Private School on July 2nd. Although they did not use the words "we intend to keep Student at Private School" their intent was crystal clear. They laid out

numerous reasons why Student should stay at Private School, stated they were “seeking support” from the District for that placement, and asked the District for an amicable resolution via a settlement agreement to avoid the need to file a due process complaint. [NT 77-78, 816-818; J-13, J-17, J-33]

Private School

57. Private School is an independent private school for children with learning differences. Private School is accredited through the Pennsylvania Association of Independent Schools, PAIS, which is the Pennsylvania chapter of the national accrediting body, which credits most independent schools. The School has 53 students, and provides an academic curriculum for students in kindergarten through eighth grade. Class sizes can range from two to seven students with a four to one student teacher ratio. [NT 431-433]
58. Private School provides Student with a small structured environment with small classes, a minimum of physical transitions, a slower pace of instruction, integrated related services and immediate intervention to support Student’s attention to task, emotional regulation, coping skills, and organization. [NT 433-435; 439; 440; 442; 444; 450; 458-460]
59. In the fall of 5th grade the Parents had significant concerns about increasing severe anxiety, repetitive questioning and repetitive behaviors. The Parents were also concerned about the occupational therapy (OT) services Student was receiving at the Private School and about Student’s progress in math and deficits in social skills. They pursued private testing to determine whether Private School continued to be an appropriate placement and to receive some guidance regarding the coming school year as well as the next several years. [NT 98-99, 536, 727, 783, 794, 824-825, 841; J-24]
60. It is not unexpected for a child with Student’s profile to do better in the early grades when expectations are very concrete and very specific and the requirements for higher order reasoning are low. More difficulties are encountered as the child progresses through the grades where there is increased need for conceptual understanding, inferencing, and problem solving. [NT 582]
61. Student has made educational progress while at the Private School. A comparison of Student’s academic testing conducted by the private evaluator in November 2014 with testing done by the same evaluator in July 2012 shows Student made good progress in word reading, and reading fluency, and was holding Student’s own in reading comprehension; was making some progress⁶ in math problem solving, some progress in numerical operations; and was making some progress in spelling, and quite a bit of improvement in sentence building. [NT 612-619]
62. Based on consultation with the private evaluator and Student’s former prematurity specialist the Parents and the Private School worked out some changes for the 2015-2016 school year to address the Parents’ concerns. [NT 636, 641-645, 667-668, 795-796; J-39]

⁶ Where Student made “some progress” the progress was reflected in the grade equivalent scores, not on the standard scores. This means that Student did not make the same progress as same-age peers but did make progress relative to Student’s self. [NT 614-617]

63. The Private School implemented changes this year in the lower school regarding reducing the number of transitions from room to room, for example by providing some formerly pull-out services in a room adjacent to the classroom. The Private School also changed the math program, as well as implementing a social skills program and hiring someone to implement it. [NT 795-796, 837-839]

Behavior Consultant

64. The Parents provide Student with private social skills therapy by funding a behavioral specialist, who works on social skills with Student at school for one hour one day a week at recess and lunchtime, and at home for one hour one day a week. [NT 374; 381; 412]

Legal Basis and Discussion

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]. 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 (3rd Cir. 2012). In this case the Parents asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

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); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). All witnesses appeared to be testifying honestly and to the best of their recollections. There were no instances of conflicting testimony where a credibility determination was needed to establish a fact.

Parental Participation/Predetermination: Parents are members of the team(s) that develop IEPs for their child, make placement decisions about their child, and make decisions about their child's IDEA eligibility. 34 C.F.R. §300.322; .306; .501 Parent participation specifically is of central importance in the IDEA as the Supreme Court noted in its first IDEA case:

"It seems to us no exaggeration to say that Congress places every bit as much emphasis

upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process.”

Board of Educ. v. Rowley, 553 IDELR 656 (U.S. 1982) (establishing a two part FAPE standard consisting of an IEP reasonably designed to confer educational benefit and compliance with parent participation and other IDEA procedural safeguards).

The District’s letter in response to the Parents’ request to extend the settlement agreement strongly suggests, but does not conclusively prove, that the District predetermined that the Student would return to a placement in a District building. This letter, certainly, is a more direct indication of intent than that in the case of *Berry v. Las Virgenes Sch. Dist.*, 54 IDELR 73 (9th Cir. 2010), where a comment by the assistant superintendent at the start of an IEP team meeting that the team would discuss the student’s transition back to public school showed there was a predetermined placement. It is also a more definitive signal of intent than that in *L.M. by M.M. and R.M. v. Downingtown Area Sch. Dist.*, 65 IDELR 124 (E.D. Pa. 2015) where the hearing officer and the reviewing court found that the District had not predetermined a child’s placement when it indicated that it would *try* to bring the child back into the District. *Cooper v. District of Columbia*, 115 LRP 75 (D.D.C. 12/30/14) however, provides an alternate view in a case where the parent had "substantial input" on the student's IEP, "While [the parent] objects to [the student's] ultimate placement, her disagreement does not constitute exclusion from the decision-making process."

In the instant matter I find that although the Parents had a considerable amount of participation and input into creating the IEP delineating the proposed *program*, they were excluded from the final decision-making about the proposed *placement*. It is of concern that while the team spent about three hours writing the IEP in what seemed to be a truly collaborative fashion, the most important team decision – whether Student remained in Private School or returned back to the District – was not reached at the meeting or in any other fashion by the IEP team, but was made, by her own admission, by the District’s Assistant Director for Special Education. Whether the District committed a procedural violation *per se* is a close call; I decline to reach that conclusion at this time since I am deciding the case in the Parents’ favor on other grounds.

Tuition Reimbursement: An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress. Parents who believe that a district’s proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement. Before becoming a matter of statute, the right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985). “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” Then, in 1997, a dozen years after *Burlington*, the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i) In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(ii) Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii).

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court’s test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district’s proposed program was appropriate; 2) if not, whether the parents’ unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement. This three-part test is referenced as the “Burlington-Carter” test for tuition reimbursement claims under the IDEA. The second and third tests need be determined only if the first is resolved against the school district.

The Court of Appeals for the Third Circuit has made it clear that the private school selected by parents is not held to the same special education standards as a public school:

A parent’s decision to unilaterally place a child in a private placement is proper if the placement “is appropriate, i.e., it provides significant learning and confers meaningful benefit...” *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The “parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA.” *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir.1999). In fact, the Supreme Court has ruled that a private school placement may be proper and confer meaningful benefit despite the private school’s failure to provide an IEP or meet state educational standards. Placement does not need to meet state education standards in order to be adequate. *Carter*; *See also Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 430 n.6 (3d Cir. 2013); *Lauren W. v. DeFlaminis*.

Whether an IEP is reasonably calculated to provide meaningful educational benefit is judged “prospectively as of the time of its drafting.” *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167, 186 (2d Cir. 2012) (“At the time the parents must choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents.”); *See also Jalen Z. v. School District of Philadelphia*, No 13-4654, 2015 U.S. Dist. LEXIS 64384, *31 (E.D. Pa. May 15, 2015).

The IDEA does not promise perfect solutions to the vexing problems posed by the existence of disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an

appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential. In this case the District produced a comprehensive re-evaluation, and to its credit the IEP team crafted an excellent program for Student with appropriate goals, and appropriate SDI's and appropriate related services. In fact, other than whether or not the provision of Cognitive Behavior Therapy in school was appropriate, the Parents' experts had minimal criticisms of the proposed IEP. Nevertheless, I find that the District failed to offer Student FAPE for only two reasons.

First of all, I am astonished that the District, with full knowledge of Student's array of needs, did not offer a one-to-one aide to accompany and assist Student in the regular education classes where Student was to spend 60% of the school day. I carefully considered the option selected in *T.Y., K.Y. v. N.Y. City Board of Education*, that is, finding the IEP largely appropriate but ordering the District to add a one-to-one aide to accompany Student to all regular education settings. The lack of one-to-one support in regular education is, in my judgment the "fatal flaw" in the District's proposed program, as it leaves Student vulnerable for the majority of Student's day.

I ultimately chose not to exercise the option chosen in *T.Y., K.Y.*, however, because the Parents provided overwhelmingly persuasive evidence that Student's currently extraordinarily high level of anxiety makes placement in a large District building inappropriate at this time. The expert witnesses' testimony, and that of the mother, provided a graphic picture of the intense anxiety that currently holds Student in its grip. Even in the small setting of Private School Student's anxiety permeates Student's day and interferes with functioning on various levels. To this child's credit, demonstrable academic progress is being made in the Private School despite the many handicaps with which Student is burdened, not the least of which is Student's chronic and intense anxiety.

Above I addressed the District's having given the appearance of predetermination. However, I also caution the Parents that there are strong indications in the record that they are planning for Student to remain at Private School, or move on to another private school, in the next several years, possibly into high school. While they are certainly entitled to place their child wherever they wish at their own expense, the fact that they prevailed in this hearing and secured public funding does not guarantee that they will prevail in the future. They must remain open to the District's offers of placements in public educational settings. It is hoped that with vigilant medication management, maturation, and increased use of coping mechanisms Student's anxiety will decrease to a level that permits better functioning and a return to an appropriate District environment.

On a final note, I want to make clear that although I do not find the District's proposed program/placement appropriate for the reasons explained above, I also cannot agree with the Parents that the District should be faulted for proposing an autistic support program. The Mother informed the District in writing that Student had been diagnosed with Autistic Spectrum Disorder [J-5]; the Parents' expert evaluating psychologist discussed Student's ASD features with the Parents, included the information in her written report, and testified about Student's

presentation in this regard [NT 609; J-2]; two neurologists set forth a Diagnostic Impression of ASD [J-28; J-37]. The District's classification of Student as a child with autism, and its proposal to provide Student with an autistic support program, was not ill-reasoned, as it flowed from the information available. In order to decide this case, I am not required to determine whether or not Student has ASD through a careful weighing of the evidence, although I do note that, on the surface, the evidence appears to be in equipoise and therefore under *Schaffer* the Parents would not prevail on that point.

Behavior Consultant

The Parents have chosen to provide an hour of behavioral therapy at home and an hour at school weekly. This is a therapeutic service that addresses social skills and other deficits. With the Private School's consent and cooperation the Parents are entitled to procure private therapy for Student and have a portion of it delivered during school hours. The District is under no obligation to fund this private treatment.⁷

Section 504: Notwithstanding language which, by its plain terms, proscribes discriminatory conduct by recipients of federal funds, in the context of education the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled student with a free, appropriate public education (FAPE). *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009)

Conclusion

This case presented a difficult decision as neither the District's proposed program/placement nor the Private School's program/placement are without problematic features. The District clearly conducted a comprehensive evaluation and put a great deal of thought into the offered IEP but missed a very large piece of the mosaic of Student's needs when it proposed to have Student attend regular education academic and specials classes without the one-to-one support of a trained adult. Although this is the fatal flaw of the proposed program and placement and renders the IEP inappropriate, the larger issue is that given Student's current extraordinarily high level of anxiety, which overlays all Student's other neurological deficits, the size and stimulation of a neighborhood school building is not appropriate for Student at this time. Although it is not perfect, Private School provides student with the small specialized environment Student needs at this stage of Student's educational career, and Student has made academic progress in that setting. Accordingly I find in favor of the Parents with regard to the issue of tuition reimbursement. I find in favor of the District on the issue of reimbursement for the private behavior consultant. The Parents' claims under Section 504 are fully satisfied under the IDEA.

⁷ Notably in the detailed Legal Analysis section of their written closing argument the Parents did not address the issue of the behavior consultant.

Order

It is hereby ordered that:

1. The program/placement the District offered to Student for the 2015-2016 school year was not appropriate for Student.
2. The program/placement unilaterally chosen by the Parents is appropriate for Student.
3. There are no equitable considerations that would remove or reduce the District's obligation to fund the parentally-chosen program/placement. The District shall pay the full amount (not reduced by the conditional financial aid) of Student's tuition to Private School for the 2015-2016 school year.
4. The District is not required to reimburse the Parents for the costs of the private behavior consultant.

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

February 2, 2016
Date

Linda M. Valentini, Psy.D., CHO

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