

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: M. K.

Date of Birth: [redacted]

ODR No. 16803-15-16-KE
CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

John C. Bogan, Esquire
Jason Fortenberry, Esquire
Frankel & Kershenbaum, LLC
1230 County Line Road
Bryn Mawr, PA 19010

Methacton School District
1001 Kriebel Mill Road
Norristown, PA 19403-1047

Christina M. Stephanos, Esquire
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331 East Butler Avenue
New Britain, PA 18901

Dates of Hearing:

October 29, 2015, December 4, 2015,
December 8, 2015, December 9, 2015

Record Closed:

January 11, 2016

Date of Decision:

January 26, 2016

Hearing Officer:

William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)¹ is an eligible resident of the District named in this matter (District), and is classified as a child with the disability of Other Health Impairment, under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Student attends high school at a private school for children with learning differences (School). Student has attended the School for two years at the District's expense, pursuant to an agreement in settlement of previous parental claims.

Student's mother and father (Parents)² filed this due process request in September 2015, asserting that the District had failed to offer Student a free appropriate public education (FAPE) as required by the IDEA, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), and Title II of the Americans with Disabilities Act, 42 U.S.C. §12131(2) (ADA)³. Parents requested that the hearing officer order the District to reimburse them for tuition that they had paid to the School for Student's education during the 2015-2016 school year.

The District denied the Parents' allegations, asserting that it had offered to provide Student with a FAPE for the 2015-2016 school year, that the School is an inappropriate placement for

¹ Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

² Parents are referenced herein in the plural; as Student's Mother conducted most of the transactions in the matter, I refer to her particularly as "Parent" in the singular.

³ Parents appear to have abandoned any ADA claim at the administrative level; although they pled this law as a source of rights, they have not referred to it subsequently in these proceedings, whether in the hearings or in their written summation. To the extent that Parents continue to assert rights under this statute, my jurisdiction is limited to at most a "derivative" authority to decide claims that are co-extensive with Parents' IDEA claims and requests for relief that can be granted under the IDEA. 22 Pa. Code §14.102(a)(2)(xxx) (expressly incorporating 34 C.F.R. §300.516, including subsection (e) of that regulation); Batchelor v. Rose Tree Media Sch. Dist., 2013 U.S. Dist. Lexis 44250 (E.D. Pa. 2013); Swope v. Central York Sch. Dist., 796 F.Supp.2d 592, 600-602 (M.D. Pa. 2011). Therefore, my decision in this matter addresses Parents' ADA claims only insofar as they are "derivative" of their IDEA claims.

Student, and that Parents failed to negotiate with the District in good faith after it had provided a re-evaluation report recommending Student's return to the District for this school year.

The due process hearing was completed in four sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I find in favor of the District and decline to order it to reimburse Parents for private school tuition.

ISSUES

1. Did the District's offer, embodied in the August 25, 2015 Individualized Education Program (IEP), constitute an offer to provide Student with a FAPE?
2. Is the School an appropriate placement for Student?
3. Considering the equities, should the hearing officer order the District to reimburse Parents for the tuition that they have paid to the School for Student's education during the 2015-2016 school year?

FINDINGS OF FACT

1. Student resides in the District and is classified as a child with the disability of Other Health Impairment under the IDEA. (NT 7, 444-445.)
2. Student is attending high school at a private school for children with learning differences. (NT 7, 621; J 27.)
3. Student is qualified to attend a District high school within the meaning of section 504, and the District receives federal funds. (NT 26.)
4. Student has a history of diagnoses including Attention Deficit Hyperactivity Disorder (ADHD), Mood Disorder and Asperger's Disorder (provisional). At home, Student has a history of displaying anger and meltdown behaviors when frustrated, rigidity in thoughts and actions, difficulty with peer relationships, inattention, disorganization, and distractibility. (J 1, 2.)
5. Student needs consistency and structure across educational environments; prompting to generalize behavioral skills from one environment to another; support for transitions; and emotional support to be available as needed. (NT 368, 375; J 8.)

6. Although one private evaluator in 2013 accepted Parent's report that Student exhibited sensory defensiveness, consistent with a diagnosis of Autism, this evaluator reported a Parental reporting style on one behavior inventory that was extremely negative, evidencing highly elevated negativity. (NT 65; J 3.)
7. Student's history does not reveal any other evaluator findings of clinically significant sensory needs or anxieties specifically triggered by being in large or crowded spaces, or recommendations for sensory evaluations or sensory diets or accommodations directed at avoiding large or crowded places. There is no history of reports from teachers that sensory defensiveness, or anxiety due to presence in large or crowded places, had any effect on Student's ability to attend or participate in school. (NT 45-46, 82-83, 101, 345; J 1, J 2, J 3 pp. 23-25, J 6 p. 19, J 8 pp. 9-12, J 28, J 29.)
8. One teacher at the School opined that Student would be vulnerable to bullying at any other school. (J 28, 29.)
9. Parent did not report to the District between February 2015 and June 12, 2015 that Student's transition to [the District high school] would be affected by sensory needs or that they feared that Student would resort to school avoidance if transferred to [the District high school]. (NT 126, 486-487, 523-524, 531-532; J 6, 8, 12, 13.)
10. The District [redacted]; it classified Student as a child with the disability of Autism in an April 2013 re-evaluation, when Student was in seventh grade. The April 2013 re-evaluation report recommended placement in general education classes for all subjects with itinerant support, extra support on assignments and concepts, and an opportunity to develop a mentoring relationship. (J 2, 3.)
11. Parents placed Student in the School unilaterally for the 2013-2014 and 2014-2015 school years, at District expense pursuant to a settlement agreement. (NT 471-473, 476-477; J 3, 4.)
12. While attending the School for eighth and ninth grade, Student attained grades in most subjects of "A" and "B", and passed all subjects. These grades were supported through specially designed accommodations and modifications in testing and assignments. The School provided specially designed instruction to Student with regard to organizational skills, study skills, impulse control in social settings, social skills, writing (including one-on-one writing support), academic confidence, flexibility, attention to detail, and tidiness of clothing. (J 28, 29.)

MAY 2015 RE-EVALUATION

13. Parent contacted the District in February 2015 by letter, asking the District to continue Student's placement at the School at District expense. (NT 477-478.)
14. On February 23, 2015, the District issued a permission to re-evaluate form seeking Parents' consent to a re-evaluation pursuant to the settlement agreement. Parents signed the consent form on March 26, 2015, noting that Parents had arranged for a private evaluation. (NT 479-480, 514-516; J 5, J 32 p. 1.)
15. On March 31, 2015 and April 2, 2015, the private evaluator conducted classroom observations and testing in preparation for the private evaluation report. (J 8.)
16. Parents received the private evaluation report in May 2015. (NT 482; J 8.)
17. The District issued a re-evaluation report dated May 25, 2015. The report classified Student as a child with the disability of Other Health Impairment, also recognizing that Student exhibited "mild" Asperger's-related traits. (NT 67, 103; J 6.)
18. The report disclosed a history of emotional difficulties, diagnosis of Mood Disorder, and parental reports of anxiety and work avoidance behaviors. Parental information provided in April 2015 for this report disclosed a history of anxiety and crying, while indicating that these issues were substantially resolved through the placement at the School. It listed needs including organization, impulse control, writing and report-presentation, flexibility and personal tidiness in clothing. (J 6.)
19. Parental input for the re-evaluation included an emphasis on how Student had benefitted from placement at the School. (J 6.)
20. The re-evaluation report listed current educational needs as: impulse control; distractibility; organization; completing assignments on time; study skills and work habits; handwriting; visual processing and visual-spatial reasoning; retention of curriculum-based math concepts; and anxiety related to academic performance and social interaction. The report found little support for a diagnosis of Autism, but found support for a diagnosis of ADHD. The evaluator did not consider Student to lack age-appropriate social skills; rather, the evaluator concluded that Student's social interaction difficulties were secondary to anxiety. (NT 69-70, 72, 96; J 6.)
21. The report recommended that the IEP team consider placement at the District's high school (MDHS) for the 2015-2016 school year, in order to support Student's readiness for college or other post-secondary educational opportunities that Student desired to attend, and in order to educate Student in the least restrictive environment. (NT 105-106; J 6, J 13 p. 8.)

22. The report recommended placement in regular education classes for all courses. For core academic classes, it recommended Student's enrollment in classes that were "co-taught" by a regular education teacher and a special education teacher. (NT 106-107, 149-152; J 6.)
23. The report made recommendations that addressed Student's identified educational needs by recommending IEP team consideration of various supportive, coordinated and individualized placements and courses, as well as a list of accommodations and modifications. (NT 104, 108-115, 122; J 6.)
24. The recommended placements and courses included placement in an elective course, "Prep for Success", which provides explicit teaching of organizational and study skills, as well as emotional self-regulation skills; scheduling a Study Hall daily in the [the District high school] Curriculum Support Room, with access to tutorial support before and after school and during the Study Hall period; explicit instruction in strategies to address both organization and attention-deficit-based difficulties in the classroom; sessions with the [the District high school] special education support counselor to address needs related to transition to a new school, emotional needs and overall progress; and participation in a social skills group. (NT 108-110; J 6.)
25. Recommended accommodations and modifications included assessment modifications; assistive technology and an evaluation for assistive technology; allowing additional time to process visual information; outlines for note-taking; teacher-provided notes; study guides; "chunking" of lengthy assignments and directions; presentation of information in multiple formats; preferential seating; use of a daily planner; frequent check-ins and check-outs with special education teacher and counselor; and IEP team scheduling to review progress in October 2015. (J 6.)
26. The report also recommended an occupational therapy evaluation to address weaknesses in visual-spatial skills and handwriting. (J 6.)
27. Parent received the re-evaluation report on or about June 2, 2015. (J 32 p. 1.)

JUNE 2015 DRAFT IEP AND IEP MEETING

28. The District invited Parents to an IEP meeting by notice dated June 4, 2015. Student was invited also but did not attend. (NT 483-484; J 32 p. 2.)
29. Parents submitted the private evaluation report to the District on June 10, 2015. (NT 482-483, 517-519; J 13 p. 6, J 32 p. 3.)

30. The private evaluation report stated that Student had attempted to avoid going to school when in seventh grade, during the 2012-2013 school year. (J 8.)
31. The District's special education supervisor assigned a special education teacher to be Student's case manager and instructed this case manager to draft an IEP in order to have Student transition back from the School to the District's high school. This was based upon the District's re-evaluation report. (NT 140-143, 169-170, 173-174, 177, 621, 629.)
32. The District convened an IEP meeting on June 12, 2015. (NT 484; J 10.)
33. At the meeting, the District provided Parents with a draft IEP and reviewed both it and the re-evaluation report with Parents. (J 12.)
34. At the June 12, 2015 IEP meeting, Parents did not tell District officials that they were concerned that Student might display emotional outbursts or school avoidant behavior. (NT 147, 192, 220, 488, 557, 618-619, 624-628, 642-643, 656-659, 739-742; J 12, J 21.)
35. The draft IEP asserted that Student would be returning to the District for the 2015-2016 school year. (J 13 p. 6.)
36. The draft IEP recognized all of the academic, developmental and functional needs that had been identified in the District's re-evaluation report, and added the need for keyboard training. (J 13.)
37. The draft IEP offered to address all of Student's needs as identified in the re-evaluation report by providing goals and specially designed instruction substantially in accord with the recommendations of the District's re-evaluation report. (NT 169-172, 195-206, 213-214, 525-528, 122, 244-245, 375-382, 562-573, 582, 585-591, 597-604, 610, 629-630, 639-640, 650-653, 694; J 13.)
38. The draft IEP offered to place Student in itinerant learning support, with all core academic classes co-taught by special education and regular education teachers. Co-taught classes have about 20 students to either 2 or 3 teaching staff, at least one of whom is a special education teacher. (NT 148-152, 562-564; J 13.)
39. The draft IEP offered goals addressing writing conventions, organization and study skills, social skills, and emotional self-regulation with attention to anxiety. (J 13.)
40. In addition to the accommodations and modifications recommended in the re-evaluation report, the draft IEP offered two additional IEP meetings during the first academic year; a functional behavioral assessment to be completed by mid-October, 2015; direct encouragement of self advocacy; required 15 minutes of direct instruction on organization and study skills to be delivered in the Curriculum Support Room, three days per cycle;

required 15 minutes of direct instruction in mathematics facts fluency and problem-solving skills, three days per cycle; required direct instruction in the writing process; teaching Student about Student's disability and strategies to manage it; direct instruction in self-organization techniques; daily reminders to utilize study guides; and support for Parents in requesting testing accommodations for Student to take College Board standardized tests. (J 13.)

41. The draft IEP offered related services in the forms of an "emotional support"/"special education" counselor, one 23-minute session per cycle; and group counseling one 30-minute session per cycle. The draft IEP specifically required the school counselor to monitor Student's transition back to MDHS and to communicate with teachers weekly regarding this transition. (NT 220-227, 675-678; J 13)
42. The emotional support counselor services offered in the IEP were specially designed to provide clinical and psychoeducational counseling through a professional of the local behavioral health agency who was located full time at the [the District high school]. (NT 220-225, 227, 674-678.)
43. The draft IEP offered to provide progress updates weekly to Parents in the form of email messages. (J 13.)
44. The draft IEP offered to refer Student for occupational therapy screening in the beginning of the school year. (J 13.)
45. The draft IEP offered a transition plan to Student, consisting of visits to the [the District high school] building during the summer as needed, to review schedule; an orientation program at the start of the year, to meet teachers; regular check-ins with the school counselor and during the first two months of school to address any concerns or difficulties; scheduled intervention by the Emotional Support/Special Education counselor; and assigning of a Peer Buddy. (NT 195-206, 602-603, 694; J 13)
46. On June 18, 2015, Parents signed an enrollment and financial contract with the School, encumbering a deposit of \$3000.00 of funds that had been held on deposit with the school, and agreeing to pay the full tuition in the amount of \$40,400.00. On these papers, Parent noted ongoing negotiations with the District for "a new contract". (NT 494-498, 515-516; J 27.)
47. On June 19, 2015, Parents sent written parental concerns to the District for inclusion in the finalized IEP. The District had requested this information prior to the IEP meeting. Parents had disclosed many of the written concerns during the IEP meeting. Parents listed their concerns as social anxiety; learning ability; the anticipated detrimental effect of large class sizes, including very loud and crowded settings; having many different teachers throughout

the school day, which Parents were concerned would disrupt the structure that the Student needs; and that the District did not classify Student with Autism, leading Parents to fear that this would cause a removal of appropriate services for Student's Autism-related traits. (NT 155, 490-492; J 12, J 32 p. 5.)

48. On June 19, 2015, the District sent a Notice Of Recommended Educational Placement (NOREP) to Parents, with a finalized IEP, that increased the number of special education guidance counselor sessions to two 23-minute sessions per cycle, and otherwise contained the offers set forth in the draft IEP. (J 14, J 15.)
49. The District's school psychologist reviewed the private evaluation report subsequent to the District' offer of a final IEP and NOREP. The private report identified substantially the same educational needs that the District re-evaluation had identified, with the exception of some academic achievement deficits that the District's testing did not corroborate. The private evaluation made similar recommendations for intervention. While the private evaluator found the School to be an appropriate placement for Student, the evaluator did not recommend against transitioning Student back to the District. (NT 77, 91-92, 125, 169-172, 182-183, 195-200, 213-214, 383-384, 400-401, 405-408, 424-427, 611-615, 681, 743-745, 846; J 8, 12.)
50. One of the private evaluator's recommendations was to have Student walk through any new school building with support, in order to become better oriented spatially in any such building. This recommendation was substantially the same as the District's offer as part of its transition plan for Student. (J 8.)
51. On July 29, 2015, the District sent a NOREP to Parents denying their request for placement of Student at the School and tuition reimbursement by the District. (J 17, J 32 p. 6.)
52. On August 18, 2015, Parents sent a 10-day notice letter indicating that they were planning to enroll Student in the School unilaterally for the 2015-2016 school year, and seek tuition reimbursement from the District. (J 18.)
53. On August 21, 2015, the District sent Parents an invitation to an IEP meeting scheduled for August 25, 2015, to discuss possible changes to the offered IEP. Student was invited also, but did not attend. (J 19.)
54. On August 25, 2015, the District convened an IEP meeting with Parents in attendance. Parents at that time informed the District that they feared that Student would become school avoidant if re-enrolled at [the District high school]. Parents reiterated and further explained their fear that Student would not be able to function in large classes, hallways or the school cafeteria. (NT 158-159, 507; J 20.)

55. At the August IEP meeting, the District officials explained the elements of the transition plan for Student and that it would address Parents' concerns. (NT 159-163, 191-192 195-200.)
56. As a result of this IEP team meeting, the District revised the offered IEP to add specially designed instruction in social skills, consisting of direct instruction every other day per cycle for 20 minutes during counseling and the Prep for Success course. In addition, related services were increased to provide for an additional 23-minute session per cycle. Thus, the offer in total was three hours of individual counseling and one of group counseling per cycle. (NT 157-158; J 21.)
57. The District administrative, instructional and clinical staff assigned to implement Student's IEP are qualified and experienced in delivering services to children with Student's disabilities. (NT 42-44, 78-81,163-165, 168, 176-180, 184, 195-206, 545-553, 562-569, 574-576, 658, 670-673, 733-736; J 7, 23.)
58. The District's special education services at the school to which Student would have been assigned are organized in order to provide well-coordinated services through staff who collaborate, with the ability to intervene quickly as needed. (NT 179-182, 187-188, 195-206, 553, 562-569, 574, 582-584, 680, 748-761.)
59. On August 27, 2015, the District sent a NOREP to Parents denying their request for placement at the School and denying tuition reimbursement for the 2015-2016 school year. (J 22.)
60. On August 27, 2015, Parents returned the NOREP marked disapproved. Parents asserted that the proposed placement was inappropriate and that the proposed transition programming was insufficient to allow Student to benefit from the curriculum. Parents requested mediation. (J 17.)
61. Student has developed friendships, takes the railroad to [a nearby city] to meet friends, and attends school-wide social functions hosted by the School for its students and their families. Student belongs to a [specialty interest] association and attends its regional gatherings. Student also attends a yearly statewide leadership conference at a local state university. (NT 510.)
62. Student has little insight into Student's disabilities and emotional state. (NT 328, 348; J 8.)
63. Student demonstrates significantly age-appropriate social skills at the School, in a supported setting with peers, some of whom have social skills deficits. Student needs opportunities to practice the same skills with typical peers in a different setting. (NT 95-96, 118-119.)

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.⁴ 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 evidence⁵ 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 this matter, the Parents requested due process and the burden of persuasion is allocated to the Parents. Therefore, Parents bear the burden of proving by a preponderance of the evidence that the Parents’ claims are true. If the Parents fail to produce a preponderance of evidence in support of their claims, or if the evidence is in “equipoise”, then the Parents cannot prevail.

⁴ 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).

⁵ 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.

TUITION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three-part test to determine whether or not a school district is obligated to fund a private placement when parents unilaterally remove a child and enroll the child in a private school. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program and placement legally appropriate under the IDEA? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007). This three-part test is referred to as the "Burlington-Carter" test for tuition reimbursement claims under the IDEA.

FREE APPROPRIATE PUBLIC EDUCATION

The first part of the Burlington-Carter test, legal appropriateness of the offered program and placement, refers to whether or not the District has offered to provide Student with a FAPE prior to the parents' unilateral placement in a private school. 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). FAPE is "special education and related services", at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9).

Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an 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 (3d 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 a 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).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a “basic floor of opportunity” for the child. Mary

Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

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

THE DISTRICT OFFERED AN APPROPRIATE PLACEMENT AND IEP IN JUNE 2015

I conclude by a preponderance of the evidence that the District offered an appropriate IEP to Student on June 12, 2015. The IEP was based upon a comprehensive psychoeducational re-evaluation that identified Student's educational needs appropriately. The IEP was the product of an IEP team meeting in which Parents had an opportunity to participate and inform the IEP team of their concerns. Based upon what the District and the IEP team knew at the time, it was appropriate to offer Student a placement at [the District high school]. The IEP addressed Student's academic, social, behavioral and developmental needs. The IEP offered appropriate, measurable goals addressing these needs, as well as an array of specially designed instructional techniques and accommodations to support Student's access to the curriculum. It offered an appropriate transition plan. The District stood ready to implement this IEP through organized programs and qualified staff.

The May 2015 re-evaluation report was reasonably calculated to identify Student's educational needs comprehensively. It was based upon a thorough review of prior educational and clinical records, parental input, teacher reports and input, cognitive testing, achievement testing, consideration of previous curriculum-based assessments and local assessments, classroom observation, and five behavior inventories. The latter included, in addition to a broad-based behavior inventory designed to screen for the full range of emotional difficulties, additional behavior inventories directed to Student's executive functioning, reported Autism spectrum disorder, reported depression and reported anxiety. These inventories elicited information from Parents, teachers, and Student.

The evaluator's conclusions addressed academic, behavioral, social and developmental needs affecting Student's ability to benefit from educational services.⁶ Most of the evaluator's observations and conclusions were corroborated by a contemporaneous evaluation performed by a private neuropsychologist. Therefore, the evidence is preponderant that this re-evaluation was a comprehensive and appropriate basis for development of Student's IEP in June.

Parents had an opportunity to express their concerns about Student's transition back to MDHS at the IEP team meeting on June 12, 2015. The District's proposed plan was provided at the meeting in draft form, and both the evaluation and the plan were explained by the knowledgeable educators present at the meeting. While Parents at the hearing suggested that the meeting was not long enough to discuss parental concerns, the evidence does not support this suggestion. Rather, a preponderance of the evidence shows that Parents never brought up any

⁶ Parents argue that the District's re-evaluator erred by not classifying Student as a child with Autism. I do not agree that this made the re-evaluation inappropriate. The school psychologist who made the classification explained that the evidence for Autism was weak, and that for attention problems was strong; furthermore, the Other Health Impairment classification given in the re-evaluation encompasses the symptoms of Autism that were reported in Student's history. Moreover, the re-evaluation addressed all of Student's needs, as did the subsequent offered IEP. Under these circumstances, the change in classification does not prove that the re-evaluation and IEP were inappropriate.

concerns about school avoidance or the adequacy of the proposed transition plan. There was no evidence that the District impeded Parents' ability to bring up this concern at the June meeting.

I conclude that it was reasonable for the District to offer placement at [the District high school], based upon what the District knew about Student's needs at the time. Based upon the District's re-evaluator's visit to the School, review of records, testing, teacher input, and parental input, the District knew that Student wanted to go to college, was functioning cognitively in the average range for most functions, and was able to achieve in the average range on grade level academically. It knew that the Student had a history of unhappiness at school two years previously, with some school avoidance behavior; yet, Student was not demonstrating any such behavioral concerns at the time of the re-evaluation. It knew that Student needed substantial support in the regular education setting, based on Student's visual-spatial, attention and behavioral needs. It knew the Student needed behavioral, social and emotional support, and that Student needed a transition plan for return from the private setting to [the District high school]. The District reasonably concluded that its staff were both qualified and organized to provide programming that would be appropriate to meet these needs.

Parents argue that the District pre-determined placement in the District for the 2015-2016 school year. However, the evidence is not preponderant in this respect. The only evidence tending to raise an inference of predetermination is credible testimony that the District's assigned supervisor of special education directed the assigned case-manager to prepare an IEP for the purpose of returning Student to the District. However, the preponderance of the evidence shows that this direction was given after the District received its psychologist's appropriate re-evaluation report, and that this direction to the case manager was based upon that re-evaluation report. That report unequivocally recommended Student's return to the District. Because the District's draft IEP

and placement offer was based upon the appropriate re-evaluation report, the evidence does not prove preponderantly that the District pre-determined placement.

The evidence is preponderant that the draft IEP offered at the June IEP meeting was appropriate. Its present levels included all educational needs listed in the re-evaluation report. The IEP addressed these needs through measurable goals addressing academic, organizational, social and emotional regulation skills, as well as direct, specially designed instruction in mathematics, writing, organization, social skills, and study skills. It offered modifications and accommodations that addressed Student's cognitive weaknesses in visual-spatial functioning, organization, attention, emotional self-regulation, and self-advocacy. It offered scheduled and as-needed access to a specialized Emotional Support Counselor, available full time at [the District high school], who could provide psycho-educational and clinical interventions as needed to address Student's anxieties and fears. It offered assistive technology and assessment for further use of technology, as well as a functional behavioral assessment. It offered direct support to Parents for College Board accommodation planning and frequent communication with Parents regarding Student's transition to [the District high school]. I conclude that the District offered to address all of Student's educational needs in a plausible array of services that were reasonably calculated to provide Student with meaningful educational benefit.

The IEP offered an appropriate transition plan, consisting of individualized and gradual re-entry into the physical space of [the District high school], as well as day-to-day support in the form of programmed access to educators, scheduled sessions with a clinically licensed counselor capable of providing both psychoeducational and therapeutic interventions, and daily support from a peer assigned for that purpose.

Parent testified as to her fear that Student would refuse to go back to [the District high school]. Parent's fears, grounded in Parent's knowledge of her child, were seconded credibly by Parents' private evaluator's testimony. Yet, the District offered a number of precautions and supports to address this possibility, and Parents' expert could not say that these were reasonably likely to prove inadequate to help Student transition back to the public high school. The record is preponderant that these precautions and supports were appropriate to meet this concern. Therefore, I conclude that the Parent's fears do not render unreasonable the District's otherwise appropriate offer.

The record was preponderant that the District was fully capable of delivering the services as described. Its educators and clinical counselor demonstrated education, training and experience that fully qualified them to deliver these services. Credible testimony showed that the [the District high school] was organized in a way reasonably calculated to deliver the offered services with fidelity and with attention to any need for immediate intervention.

IEP REVISIONS AFTER JUNE 2015

Six days after the June IEP meeting and one day before Parents sent written "parent input" for purposes of finalizing the June IEP – and one day before receiving the final IEP and NOREP, Parents committed themselves to paying the School's full tuition for 2015-2016, and expressly encumbered an account credit held by the school to pay a non-refundable deposit of \$3000.00. A day later, Parents sent their written input to the District, in which they did not raise the concern about school avoidance. Thus, at the time that Parents committed to pay the 2015-2016 tuition at the School, they had not directly raised their concerns about school avoidance with the District.

Nevertheless, the evidence shows that, some time after the June IEP meeting, the Parents did convey more explicitly their fears that Student would refuse to go to school, thus sabotaging the offered services and Student's own wellbeing. In response, the District increased the hours of counseling by the Emotional Support counselor. Its staff credibly testified that [the District high school] has a system to deal with school refusal, which emphasizes interventions designed to discover and address the underlying causes, rather than simply relying upon punitive measures. Taking all of this evidence into consideration⁷, I conclude, by a preponderance of the evidence, that the District's revisions subsequent to June 2015 were appropriate to address the Parents' school avoidance concerns, as more clearly conveyed subsequent to the June 2015 IEP meeting.⁸

SECOND AND THIRD TESTS UNDER THE BURLINGTON-CARTER ANALYSIS

As discussed above, it is not necessary to address the appropriateness of the private placement or the equities when a school district has offered a FAPE to the parents and they have chosen to place the child unilaterally. In that case, the school district has fulfilled its responsibilities and there is no cause for considering tuition reimbursement. I find this to be the case in the present matter. As the District has offered to provide a FAPE to Student, the Parents' request for tuition reimbursement is denied without consideration of the appropriateness of the School or the equities.

⁷ Although this system of services for absenteeism is not part of the offered IEPs, I take note of it as it shows the District's ability to deliver its offered services to Student, even in the face of school refusal, should that occur. Parents may argue that they cannot be expected to have considered these services as they were not within the four corners of the IEP, and thus not actually "offered"; however, this "four corners" analysis must be tempered by the fact that Parents had committed themselves already to paying the School's full tuition with deposit. Thus, they acted before they had even clearly raised the issue of school refusal, and cannot now be heard to suggest that notice of the District's school-refusal services would have made any difference in their calculations.

⁸ The District introduced a re-evaluation report and IEP revision as late as October 2015, to show its continuing offer of services. While I reviewed these exhibits, I take no inference from them, as they were developed solely to complete the required paperwork attendant upon the District's review of the private evaluation report delivered to the District on June 10, 2015, and they offered no additional services.

SECTION 504 CLAIMS

Although compliance with the IDEA does not always prove compliance with section 504, I conclude that the District's offer of a FAPE to Student complied with its obligations under both laws. The record is more than preponderant that the District's offer provided reasonable accommodations and thus provided Student with equal access to the District's curriculum, services and learning opportunities. Consequently, no separate analysis is necessary pursuant to section 504.

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). In this matter, I heard testimony from Parent, two psychologists, teachers and the licensed therapist assigned full time to [the District high school]. While I found all witnesses to be credible, I assigned differing weight to their assertions under oath.

Parent testified at length about the events leading up to this due process hearing. Much of Parent's testimony was devoted to Student's educational history that provided reasons for Parent's palpable distrust of the District when dealing with Student's educational needs. I drew no inferences from this material, because it was irrelevant to the issues set forth above, which are specific as to time.

In relevant part, Parent's testimony addressed the crucial issue discussed above: what did the District know before it offered a program and placement at [the District high school]? In

particular, Parent sought to prove that the District knew about her concern that Student would refuse to go to school if transferred back to [the District high school]. On this issue, I assign reduced weight to Parent's testimony, for three reasons. First, Parent could not substantiate the assertion that the District knew about her concern at the June IEP meeting; the documentary record indicates that this was not discussed, and, when pressed, Parent admitted an imprecise memory as to when she conveyed this concern. Second, more than one credible District witness testified that this subject was not discussed at the June IEP meeting. Third, the record as a whole shows that this concern was conveyed indirectly⁹ in June and brought up again orally in an August IEP meeting - long after Parents had decided to commit themselves to sending Student to the School for the 2015-2016 school year. Therefore I assign reduced weight to Parent's testimony regarding the District's notice of her concerns about school avoidance.

Despite three errors in the private evaluator/neuropsychologist's report, I found this witness' testimony to be credible and reliable. However, as noted above, nowhere in her lengthy testimony did this expert opine that the District's offer of FAPE was inappropriate. The expert credibly and reliably testified that she lacked sufficient data about [the District high school] and its staff and services. Thus, this witness' testimony did not add at all to the non-preponderant weight of evidence supporting Parents' assertion that the District offered inappropriate services to Student.

While I had concerns about the testimony of the District's psychologist, on balance, I concluded that it was both credible and reliable for the basic proposition that the District's re-

⁹ Two days before the scheduled IEP meeting, Parents provided their private expert's report to the District, and the District's case manager testified that he reviewed it. That report, on its first page, indicated that Student had attempted to avoid going to school when in seventh grade. Thus, indirectly, the District was put on notice of this concern; however, the record as a whole does not show that Parents presented this concern directly and explicitly - or in a way indicating that it was fundamental - prior to or during the June IEP meeting.

evaluation report had been sufficiently comprehensive to identify all of Student's educational needs. This witness' extensive criticism of Parent's expert added nothing to her credibility; rather it called her own reliability into question, because it seemed to exaggerate the importance of the Parent's expert's errors. However, putting aside this diversion, I found that the District psychologist's actual evaluation of Student was well founded and appropriate, given the information available to her. Therefore, I gave weight to her depiction of Student's needs and her recommendations.

Again on balance, I found the District's case-manager/special education teacher's testimony to be credible. Cross examination revealed contradictions, which gave me pause; nevertheless, the witness' testimony about what the District knew at the June IEP meeting, and his thorough and expert depiction of the services available, along with his demeanor throughout his lengthy testimony, convinced me that the contradictions elicited were not so grave as to vitiate his otherwise credible testimony. Therefore I gave his assertions weight.

Similarly, I found the other District witnesses to be credible, based upon demeanor, corroboration of their assertions in the record, and the witness' demonstrated expertise and knowledge of their programming at [the District high school].

CONCLUSION

I conclude that the District has complied with its obligations under both the IDEA and section 504 by offering to provide Student with a FAPE in its June 2015 IEP, and that it continued to comply with its obligations by revising its offer appropriately as new parental concerns were conveyed to it. Therefore, Parents are not entitled to tuition reimbursement as they have requested.

ORDER

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

William F. Culleton, Jr. Esq.

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

January 26, 2016