

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

Pennsylvania

Special Education Hearing Officer

DECISION

Student's Name: K.R.

Date of Birth: [redacted]

ODR No. 1697-10-11-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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Dates of Hearing:

June 15, 2011, July 6, 2011, July 25, 2011,
September 6, 2011

Record Closed:

September 20, 2011

Date of Decision:

October 5, 2011

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an eligible resident of the [Redacted] School District (District), and attended the Discovery Charter School (School) for kindergarten during the 2010-2011 school year. (NT 10-14.)¹ Student is identified with Emotional Disturbance, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 *et seq.* (IDEA). *Ibid.* On April 13, 2011 the School filed a request for due process to defend its initial evaluation of Student in response to the Parents' request for an independent educational evaluation, and seeking a declaration that its proposed placement - in full time emotional support at a private school with programming to address emotional and behavioral needs - is appropriate. Parents² assert that the evaluation and proposed placement are inappropriate.

The matter was heard in four sessions and the record closed upon receipt of written summations. I conclude that the evaluation and placement were appropriate.

ISSUES³

1. Was the initial evaluation provided by the School in March 2011 appropriate?
2. Is the placement of full time emotional support at an approved private school, offered by the School in March 2011, appropriate?⁴

¹ This matter was heard on four dates as noted on the cover of this decision. On July 6, 2011, I heard evidence pertaining to both this matter and an expedited matter involving extended school year services (ESY); the application and decision regarding ESY issues were assigned a different case number: 2058-10-11-AS. However, the record of the July 6, 2011 hearing is paginated consecutively with the record in the present matter, and the record made on that date is considered as part of the record of this matter.

² Although "Parents" refers to both parents, it was primarily the Student's Mother who participated in educational planning and decision making. Student's Mother will be referred to as "Parent" in the singular.

³ Parents introduced considerable evidence suggesting that the School committed procedural violations, particularly not providing a Permission to Evaluate form within ten days after Parent requested an evaluation orally in September 2010, 22 Pa. Code §14.123(c); and failing to provide ten days' notice of the evaluation report before convening an IEP meeting, 22 Pa. Code §14.123(d). However, this due process request is brought by the School and procedural violations were not one of the issues specified by either party, (NT 56-58); Parents introduced evidence of procedural violations to diminish the weight of parents' initial agreement with the evaluation report and recommended placement that they now oppose. Therefore, I do not reach the question whether or not the School committed procedural violations.

3. Should the hearing officer order an IEE at public expense?

FINDINGS OF FACT

1. Student is diagnosed medically with Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). Student exhibited challenging and oppositional behaviors from the first day Student was taken to the School for evaluation prior to the first day of school. (NT 276-S-16.)
2. During the 2010-2011 school year, Student was placed in full time kindergarten in general education. Student frequently displayed dangerous and disruptive behaviors that impeded both Student's education and that of peers, including choking another student, pushing doors and furniture into peers and staff, walking on desks and stepping on peers' fingers, threatening to harm self, pushing, shoving and other aggressive contact with peers, leaving the classroom without permission, attempting to write on peers' work, taking peers' belongings, extended tantrums, throwing objects, deliberately breaking objects, roaming around the classroom, eloping from the classroom, running in hallways, climbing fences, jumping from playground equipment, defiant behavior and trying to elope from school property. (NT 321-325, 409-410, 446-447; S-6, 16, 21, 32, 34.)
3. Repeatedly, Student's behavior was so disruptive that instruction was interrupted for the entire class. (P-6.)
4. Repeatedly and frequently, the School requested that Parent physically attend Student during class hours in order to help School staff de-escalate Student's behaviors and calm Student when Student was agitated. (NT 1147.)
5. Parent obtained private clinical psychological evaluations, a psychiatric evaluation, and prescriptions for medication to address Student's attention deficits and oppositional behavior. These medications were prescribed in February and March, 2011, and dosages were adjusted during the weeks after prescription. Student exhibited some resistance to administration, but was taking the prescribed medications substantially as ordered by the end of March, 2011. (P-6.)
6. Student was taken to a crisis center for possible civil commitment at the advice of an intake worker for a social service agency; Student was not committed. Student began

⁴ In its amended complaint, the School additionally requested an order defining the Student's pendent placement. (S-2.) I decided pendent placement in a ruling and order dated April 13, 2011; thus, this issue is moot and will not be addressed here. Furthermore, in its written summation, the School formulated the placement issue somewhat differently from my formulation during the hearing, in that it did not request approval of a specific private school that it had recommended. Therefore, I will address the placement as formulated by the School without specifically addressing the appropriateness of the specific school offered by the District. Nevertheless, that private school is the reference point for my findings of appropriateness, such that my approval of the placement assumes that it would be located in a private school with programming similar or identical to that provided in the private school originally offered by the District.

outpatient therapy with a clinical psychologist in February 2011. (NT 1219, 1225; S-6, S-16.)

7. As a result of Student's behaviors, Student was reduced to one half day kindergarten for a short period of time and was excluded from many hours of class time over the course of the year. (NT 409-410; S-16, 25; P-1, P-9, 10.)
8. Student's academic achievement is behind same age peers significantly, with notable weaknesses in reading and writing. (NT 409-410; S-16; P-6.)

EVALUATION

9. The School initiated an educational evaluation by providing a permission to evaluate form, which the Parent signed on January 4, 2011. (S-9.)
10. The evaluation was performed by a Pennsylvania certified school psychologist. The psychologist has practiced school psychology in three states for nine years. The psychologist has a Masters degree in education, and additional university credits, as well as training in applied behavior analysis. The psychologist has had experience with evaluating children with emotional and behavioral problems. (NT 63-77, 106.)
11. The psychologist reviewed school records depicting several months of Student's participation and challenging behaviors in the School's kindergarten class. (NT 99-101; S-34.)
12. The Parent filled out an eleven page background information form dated February 14, 2011. This form elicited information concerning Student's developmental history, family history, school behavior and educational performance, personality characteristics, and extracurricular activities, as well as history of physical and psychological assessments and Parents' comments about why they referred Student for evaluation. (S-14.)
13. The psychologist utilized one standardized assessment instrument to gather information on Student's cognitive functioning, because Student's behavior prevented administration of other instruments for this purpose. (NT 171-177; S-16.)
14. The psychologist received additional information from Student's Parent, the kindergarten teacher, and other school personnel. This included written input forms, a standardized adaptive behavior assessment instrument, and brief interviews with the teacher and Parent. (NT 77-81, 107-111, 204-210, 219-220, 224-225; S-9, 14, 16.)
15. The psychologist considered reports of private therapists and hospital records regarding Student's emotional difficulties. (NT 118-121, 126-128, 242-244; S-5, 8, 14.)
16. The psychologist observed Student for about five to ten hours on five occasions during the month of February 2011, in various school settings, including the classroom. (NT 81-84; P-6.)

17. The psychologist, who is also trained in behavior analysis, performed a functional behavioral assessment by report dated March 28, 2011; this was based upon observations and data gathering that occurred at the same time as the data gathering for the evaluation report. (NT 73-75; P-6.)
18. The psychologist administered a standardized psychological inventory to elicit data concerning possible emotional disturbance. The test is valid for that purpose and the psychologist determined that it was appropriate to rely upon it in conjunction with the other data received. The psychologist administered other behavior rating inventories, but the other inventories are not aimed specifically at the IDEA definition of emotional disturbance. (NT 154-160, 168-169, 235; S-16.)
19. The psychologist administered a standardized instrument to elicit information about Student's academic achievement, and also considered teacher reports of Student's achievement in the School's curriculum. (NT 172, 198-204; S-16; P-8, 14, 15.) .)
20. The psychologist did not rely upon any one test or strategy to elicit information or reach the reported conclusions. (NT 206-207, 235, 242-244; S-16.)
21. The psychologist found no evidence of learning disability or other disability that could have accounted for the Student's inability to learn or form age-appropriate relationships, inappropriate behavior or unhappy emotional state. The psychologist ruled out social maladjustment as a cause of Student's behavior, based upon professional judgment. (NT 93, 168-196, 230; S-14, 16.)
22. The psychologist applied the IDEA criteria for finding emotional disturbance and concluded that the proper educational classification was emotional disturbance. (NT 177-196; S-16.)
23. The ER was provided to the Parent on or about March 25, 2011. It identified Student with Emotional Disturbance. The psychologist found that Student met four of five criteria for Emotional Disturbance under the IDEA. (NT 84-105, 119-120, 197-198; S-16.)
24. The psychologist considered whether or not it would be appropriate to maintain Student in the School with supplementary aids and services and determined that such a placement would not be appropriate for Student. (NT 144-154, 240-242.)

PLACEMENT

25. At a meeting on March 25, 2011, the IEP team agreed to an IEP that placed Student in Full Time Emotional Support, and offered to place the Student in a private school at the School's expense in order to provide that placement. (S-19, 20, 25.)
26. The School performed a functional behavior assessment in February and March 2011, created a behavior intervention plan, assigned a mentor teacher and assigned a one to one

aide to Student. The School's special education teacher consulted with the Student's kindergarten teacher to assist in implementing interventions designed to respond to the Student's behaviors. Interventions included small group instruction in the general education classroom, one to one tutoring by a special education teacher and outside the classroom in hallways and separate rooms, permission to move about the classroom as desired, use of manipulatives and the computer, behavior system and rewards, special tasks such as being the teacher's helper, and preferential seating. (NT 258, 314-320, 372, 651, 713-714, 739, 1185; S-16, 21, 25, 33; P-10.)

27. School personnel attempted to modify Student's behavior by providing Student with a personal chair to sit in during circle time, providing gifts for good behavior, a system of stickers earned for good behavior, allowing coloring activity, walks with favored staff outside the classroom, and food treats as rewards for good behavior. (P-1.)
28. School personnel addressed Student's behavior also by providing balance equipment; providing a daily report of behavior to Parent; providing a favored teacher as a mentor; and providing therapeutic support staff on a daily basis. (P-3.)
29. A "quiet place" was set aside in the Student's classroom for Student to go into when frustrated. Student also was directed to a "therapeutic support room" with sensory items when Student was angry or acting out. (P-4 p. 27.)
30. School personnel kept some records of the Student's challenging behaviors. (S-32, 34.)
31. The School attempted to provide some training for its staff in dealing with challenging behaviors, particularly Student's behaviors. (NT 317-318; S-33.)
32. The School does not have staff who are adequately trained in behavior support. It has no separate behavior support class. It does not have staff trained to provide explicit social skills training, as recommended in the evaluation report. It would not be able to provide an educational program with the integrated, school-wide behavioral interventions, emotional support, and social skills training that Student needs. (NT 149-150, 240-242, 268-270, 277-278, 295-312, 707-708; S-16.)
33. Student's Mother participated in reviewing available private emotional support programs and visited two schools with School personnel. (NT 431-437; S-25.)
34. The School offered to transport the Student to a private school and to transport the Parent to that school for any appropriate meetings or observations. (NT 381, 384, 390-391.)
35. The private placement initially preferred by School personnel and the Parent would offer a full time kindergarten program within a school wide emotional support program. The educational program would be at the Student's developmental level, kindergarten, and would include academic curriculum. Such a placement would address Student's needs. (NT 385-389, 393-398, 405-407, 431-437, 707-708.)
36. The School offered to provide the above placement to Student during the summer of 2011 as an ESY placement. (NT 388-389, 418-420; S-22, 23.)

37. Student's Mother approved the offer of private educational placement for the regular school year by signing the NOREP dated March 25, 2011. (S-20.)
38. By letter dated April 11, 2011, Parent notified the School of a parental disagreement with the identification category, emotional disturbance, assigned to the Student in the Evaluation Report. Parent requested an independent educational evaluation and an IEP meeting. Parent did not refuse provision of special education services; rather, Parent expressed a desire for special education services, but disagreed with the evaluation report and offer of placement conveyed in the IEP and NOREP. (S-20, 24.)
39. The interventions attempted by the School failed to modify Student's behavior sufficiently to reduce the risks to Student's safety and that of peers, or to eliminate the interference with Student's education and that of peers caused by the Student's behaviors. (NT 314-320; S-20.)
40. Student's behavior has improved moderately since medication was prescribed, but medication has not sufficiently reduced Student's challenging behaviors that impede Student's learning and that of others. (NT 210-211, 216; S-16 p15.)
41. Student's Oppositional Defiant Disorder is improving, but is not in remission. (NT 853.)

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.⁵ 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 evidence⁶ that the material (that is, important or essential) facts that the party asserts are true. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

⁵ 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).

⁶ 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. Dispute Resolution Manual §810.

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

In the present matter, based upon the above rules, the burden of persuasion rests upon the School, which initiated the due process proceeding. If the School fails to produce a preponderance of the evidence in support of its evaluation and placement determination, or if the evidence is in “equipoise”, the School cannot prevail under the IDEA.

APPROPRIATENESS OF EVALUATION

The hearing officer must determine whether or not the District’s evaluation was appropriate. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3). In making this determination, the hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311. If the District’s evaluation was appropriate, the Parent is not entitled to an independent educational evaluation at public expense. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3).

The IDEA obligates a local educational agency to conduct a “full and individual initial evaluation” 20 U.S.C. §1414(a)(1)(A). The Act sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to “determine the educational needs of such child” 20 U.S.C. §1414(a)(1)(C)(i). In 20 U.S.C. §1414(b)(1)(A)(ii) and (B), the Act requires utilization of assessment tools and strategies aimed

at enabling the child to participate in the “general education curriculum” and “determining an appropriate educational program” for the child. The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally” 20 U.S.C. §1414(b)(3)(A)(ii).

The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs” 34 C.F.R. §300.304(c)(6). Evaluation procedures must be sufficient to “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1). Brett S. v. West Chester Area School District, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes “social and emotional status” 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must “include those tailored to assess specific areas of educational need” 34 C.F.R. §300.304(c)(2). The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally” 20 U.S.C. §1414(b)(3)(A)(ii). Selected instruments should “assess the relative contribution of cognitive and behavioral factors” 20 U.S.C. §1414(b)(2)(C).

The IDEA requires the local educational agency to conform to specified procedures in order to be deemed appropriate. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U. S. Dist. Lexis 20646 (W.D. Texas 2002).

These procedures must include the use of “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information” 20 U.S.C.

§1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency may not use “any single measure or assessment” as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2). The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

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

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

As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2).

APPROPRIATENESS OF MARCH 2011 EVALUATION

Here, the District complied with the above legal requirements. The evaluation was sufficiently comprehensive and individualized to yield an appropriate determination as to the Student's educational classification and service needs. (FF 21-24.) It yielded adequate information to allow Parents and the School to determine what educational program Student would need, including data on strategies to attempt in an effort to support Student in the general education environment. (FF 26-29.) It yielded sufficient data to enable the Parent and School to assess Student's present levels of cognitive, academic, developmental, and behavioral functioning. (FF 21-24.) It addressed all areas of suspected disability – learning disability and emotional disturbance - adequately. (FF 21-24.)

The evaluator utilized a variety of tools and strategies to gather relevant information, including an instrument tailored to address emotional disturbance. (FF 11-19.) The evaluation did not rely upon any single measure or assessment. (FF 20.) For the primary area of suspected disability, emotional disturbance, the evaluator utilized an instrument that was tailored specifically to elicit relevant data. (FF 18.)

The School employed a certified school psychologist who was very qualified to design the evaluation and to administer the psychological testing instruments selected for the evaluation, and to compile the report and make recommendations. (FF 10.) Other qualified District professionals contributed parts of the report.⁷ (FF 11, 14, 19.)

⁷ I find the District witnesses to be credible, based upon demeanor and consistency with the documentary and testimonial record.

The credible⁸ testimony of the School's qualified and experienced evaluator proved with preponderant evidentiary weight that the evaluator utilized valid and reliable instruments that were valid for purpose for which they were used. (FF 13, 14, 18, 19.) There is no contrary, credible or persuasive evidence. Parents' expert witness sought to call into question the validity of one instrument used in this assessment – the one that was tailored to address emotional disturbance. This criticism was based upon an assertion, without any documentary corroboration, that the instrument was not designed for the purpose for which it was used. I accord this assertion little weight, as discussed below. Thus, I conclude, based upon preponderant evidence of record, that all instruments employed in the evaluation were valid and reliable for the purpose for which they were used and were administered in accordance with the publisher's instructions.

The parents were consulted in the course of the evaluation and offered an opportunity to provide input to the evaluation. (FF 12, 14.) The report included review of existing evaluation data provided by the parents and teachers, as well as classroom observations. (FF 15.) The evaluator reviewed any information and reports supplied by Parents, and Parents participated in the determination of eligibility, though the record indicates that they had minimal understanding of the psychological and educational issues considered in rendering an identification and determining the appropriate services to be provided⁹. (FF 12, 15, 25, 35, 37, 38.)

⁸ I find this witness credible based upon demeanor, consistency with the record and the way the witness answered questions. The witness was careful about the limits of the data, precise to the limits of the witness' memory, and offered an analysis that was grounded in the relevant legal criteria.

⁹ While I conclude that Parents did participate, as the IDEA requires, I do not ignore the considerable evidence suggesting procedural irregularities that, if true, could have detracted from the Parents' ability to participate meaningfully in the determination. I conclude that the evidence is preponderant that they did participate, nevertheless, because the record showed that the School personnel were open to Parents' participation and made that clear to Parents, and that the School personnel spent substantial amounts of time explaining the results and recommendations of the evaluation to parents.

The evaluator reviewed information on Student's achievement in the School's curriculum, through input forms and teacher interviews; there were no state evaluations. (FF 19.) This information was supplemented with several observations by the evaluator. (FF 16, 17.) The evaluator utilized instruments that addressed Student's adaptive, emotional and social functioning, and the evaluator assessed the relative contribution of cognitive and behavioral factors to the Student's challenging behaviors. (FF 13, 14, 18, 19, 21, 22.) All of these strategies derived information relevant to Student's functional, developmental, and academic functioning.

Parent argues that the psychologist's observations were unreliable for purposes of identifying an emotional disturbance because they did not occur when the Student was in a classroom setting, or because any observations of the Student in a classroom setting occurred after Student became aware of the psychologist's desire to test Student. Parents also argue that there was not sufficient cognitive testing.

The psychologist, whom I found to be credible and reliable, testified that the Student's behavior prevented sufficient classroom observations and cognitive testing, despite multiple attempts. Thus, the psychologist adjusted the approach and obtained the best observations and standardized testing possible. The psychologist testified that the observations yielded useful information; and I accept this judgment after reading the extensive reports of these observations – observations that corroborated teachers' reports concerning the Student's oppositional and defiant behavior. (FF 2.) Likewise, a review of the psychologist's report shows that the psychologist utilized achievement and adaptive behavior instruments whose subtests provided multiple standardized scores from which a qualified and experienced evaluator could derive supportable conclusions, in conjunction with teacher reports of achievement in the classroom.

(FF 8, 13, 14.) Thus, I conclude that the psychologist adequately supported the conclusions in the report, and its educational identification of an emotional disturbance.

Parents sought to attack the psychologist's reliance upon the Emotional Disturbance Decision Tree, a standardized behavior rating scale that elicited responses from Parent and a teacher on behaviors that may fulfill the criteria set forth in the regulations defining emotional disturbance for educational purposes under the IDEA. While the psychologist testified that this instrument is valid and reliable for that purpose, the Parent's expert dismissed the instrument because, as the expert characterized it, the instrument is only valid when social maladjustment and challenging behaviors are co-existent.

I fail to see the logic in this assertion. The Student scored in the 99th percentile for the presence of the traits this instrument tests for. Under the Parents' expert's characterization, this would mean that the Student exhibits both traits; thus, it is hard to see how the test fails to indicate the presence of one of these traits. The Parents' expert also criticized the scores as being inconsistent with the Parent's reports to the School's psychologist and the Parents' expert regarding Student's behavior at home. Assuming that inconsistency, it does not negate the validity of the test or its use in this matter, for four reasons. First, it is not unusual for behavior inventories to show results that are inconsistent with other evidence; in this case, the psychologist testified that the results were consistent with anecdotal reports of the Parent as to behavioral problems at home. (FF 12, 14.) Second, the Parents' reports of improved behavior at home do not negate the identification; the regulation does not require the traits of emotional disturbance to be demonstrated over more than one environment, and demonstration at school is sufficient. Third, the regulation does not require – as the Parents' expert erroneously stated – the demonstration of both emotional disturbance and social maladjustment, but merely allows that

both can co-exist. Fourth, due to numerous deficiencies in the data available to the Parents' experts, and their obvious misinterpretation of the legal criteria for finding emotional disturbance, I do not give substantial weight to their testimony.¹⁰

Parents argue that somehow, the School's psychologist had inadequate data because the conclusions are based entirely upon the reports by school officials as to Student's behaviors in school. This is incorrect: the psychologist's own observations corroborated those reports, and there were numerous prior consistent statements in the documented record from both teachers¹¹ and the Parent, including parental reports to clinical treatment providers. (FF 1-8, 11-15.) Thus, a preponderance of the evidence proves that the psychologist's data was a sufficient and reliable basis for the psychologist's conclusions.

Parents argue that the Student's behavior has improved, and that a private school placement would be inappropriate and unnecessary because of that improvement. Indeed, there was some testimony that the Student had improved, although it was couched always in moderate language indicating that this was a beginning of improvement, not a complete improvement, and that it was unrealistic to expect more than gradual improvement. In fact, when I asked the clinician who testified to this improvement whether or not the Student was in remission of symptoms of Oppositional Defiant Disorder, the clinician stated that Student was not in remission. (FF 41.) This means that Student is still demonstrating clinically significant symptoms – that is, oppositional and defiant behaviors. Consistent with this clinical opinion,

¹⁰ Parent also asserts that the Student's behaviors (describing the legal criteria for emotional disturbance) did not occur over a long period of time as required by the regulation. I conclude that the behaviors of importance did occur over a long period, based upon a preponderance of the evidence.

¹¹ The general education teacher testified. I found the testimony to be truthful and generally reliable, although I noted some flaws that reduced the weight that I accorded to the testimony. It appeared that the teacher's characterizations of the Student's behaviors may have exaggerated the specific incidents, though the overall effect on the classroom appears to be well corroborated by other School witnesses. When confronted on cross examination, the witness appeared to recede somewhat from positions previously taken. In sum, I accord somewhat reduced weight to this testimony, but I continue to give it weight on the overall effect of the Student's behavior in the classroom, and on the extensive efforts of this teacher and the School to modify Student's behavior.

school witnesses testified that the dangerous and disruptive behaviors continued through the end of the school year, including one incident in which Student placed a potentially dangerous choke hold on a peer while pulling the peer down to the ground from behind; the peer was hurt and went to the nurse. (FF 1, 2.) Given the evidence of a lengthy history of such behaviors due to a diagnosis (Oppositional Defiant Disorder) that is not in remission, and the evidence of recent, serious and similar behavior, I conclude that the preponderance of the evidence proves that the Student continues to exhibit an emotional disturbance in educational, IDEA defined terms.

Parent argues that the Student's behaviors were caused by "inept" though well-intentioned attempts to control Student's behaviors. I reject this argument. This argument is based upon an expert's investigation in which the expert never saw the School, never saw Student in a classroom, never obtained or considered input from the Student's teachers, and relied solely or at least predominantly upon Parents' reports of behavior at home and in the community during the summer when school was not in session. These parental reports to Parents' own experts were provided during the course of these proceedings and were vulnerable to being skewed in light of the hardened positions of the parties in litigation. Parents provided no prior consistent reports to corroborate the depiction of Student's behavior at home. In these circumstances, I conclude that the Parents' experts' conclusions as to the etiology of the Student's challenging behaviors were not supported by reliable factual data; thus, I accord them little weight.

I conclude that the March 2011 evaluation was appropriate. It was a sufficient basis to determine eligibility, identified Student's educational needs in detail, and was appropriate to serve as a basis for development of an IEP providing meaningful educational benefit in the least restrictive appropriate setting.

APPROPRIATENESS OF PROGRAMS OFFERED BY SCHOOL

I conclude that the program and placement offered by the School is appropriate. It addresses all of the educational needs identified in the evaluation report and is at no cost to Parents. (FF 25, 26, 34.) Its purpose is to help Student to learn the behavioral and social skills needed to be able to remain accessible to learning, skills which the Student lacked during the 2010-2011 school year. (FF 32, 35.) The program also aims to remediate the Student's academic deficits, which are necessarily caused – at least in part – by Student's loss of many hours of schooling due to Student's disruptive and dangerous behaviors. (FF 35.)

Parents argue that the Student should not be placed with other students who exhibit inappropriate behaviors, because Student will learn worse behaviors from Student's peers in such a placement. I find no evidence in the record to support this fear. The program is recommended by experienced educational professionals; I found that the principal who testified on July 6 was highly knowledgeable about the program being recommended and had investigated it thoroughly. Parents introduced the testimony of the Student's behavior specialist, who expressed the opinion that the private school would be harmful to Student, but I find that this witness had inadequate knowledge of the private school and was basing this opinion upon hearsay reports of other, unidentified social service professionals. I cannot give such testimony weight: the exact nature of the hearsay is unknown, the identities of the informants are unknown, there is no suggestion that the witness and the informants have any educational expertise, and the hearsay is uncorroborated.

Parents argue that the Student will remain in the private setting throughout Student's educational career. While I agree that this is a valid concern and would not be at all desirable as

an outcome for this or any student, there is no evidence that this will occur, and there is no evidence that this is at all intended. Indeed, the credible testimony of the School's principal contradicts this argument. (FF 35.)

Least Restrictive Environment

Parents argue that the School violated the IDEA requirement to provide a FAPE in the least restrictive environment. The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled, "to the maximum extent appropriate" 20 U.S.C. §1412(a)(5)(A). The United States Court of Appeals for the Third Circuit has construed this language to prohibit local educational agencies from placing a child with disabilities outside of a regular classroom, if educating the child in the regular education classroom, with supplementary aids and support services, can be achieved "satisfactorily." Oberti v. Board of Ed. Of Bor. Of Clementon Sch. Dist., 995 F.2d 1204, 1207 (3d Cir. 1993). Each public agency must assure that a continuum of alternative placements is available, including special classes, resource rooms, supplementary services and special schools. 34 C.F.R. §300.115. The Court noted a "tension" within the IDEA between the strong congressional policy in favor of inclusion, and the law's mandate that educational services be tailored to meet the unique educational needs of the child. Oberti, 995 F.2d above at 1214. I conclude that exclusion from regular education in this matter is the only satisfactory and appropriate way to meet Student's educational needs.

Children with disabilities may not be removed from the regular educational environment unless "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C.

§1412(a)(5)(A). In determining placement, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs" 34 C.F.R. §300.116(d). Removal is not permitted if the sole reason is "needed modifications in the general education curriculum." 34 C.F.R. §300.116(e).

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

Addressing the first part of the Oberti analysis, the court must consider three things. First, it must determine whether or not the agency has given "serious consideration" to utilizing the full continuum of placements and supplementary aids and services, such as resource rooms, itinerant special education services, and related services such as speech and language services, training the teacher and behavior modification programs. Id. at 1216. Next, the court must compare and contrast the educational benefits that the child can receive in the regular education and segregated settings, particularly considering the benefits of learning social skills in the general education context. Ibid. Finally, the court must consider the degree to which the child's behavior in the regular education setting is so disruptive that the child is not benefitting and that the behavior is interfering with the education of the other children in the general education setting. Id. at 1217. The Court emphasized that if supplementary aids and services would

prevent these negative consequences, the determination of a negative effect on peers would not warrant removal from the regular education environment. Ibid.

Applying the Oberti analysis to the present matter, I find by a preponderance of evidence and conclude that the School selected the least restrictive environment appropriate to provide meaningful educational benefit to the Student while addressing the Student's serious emotional and behavioral needs. I conclude that the Student cannot at this time be educated satisfactorily in the general education setting.

As to the first consideration, I find by a preponderance of the evidence that the School gave serious consideration to the full continuum of least restrictive placements for the Student. (FF 17, 24, 26-30.) The record is preponderant that the School not only considered, but actively attempted to implement, special education consultation and training for the general education teacher. Ibid. Indeed, with the support of such consultation and training, the teacher attempted to implement a host of interventions, including both positive behavior modification techniques and incentives to motivate better behavior, attempting to implement the recommendations of an applied behavior analysis and behavior support plan, utilizing special seating and assistive technology devices, and other interventions. Ibid. All of these interventions were attempted over a period of several months, without satisfactory improvement in the Student's disruptive behavior. (FF 39.)

The School also attempted to provide one-to-one and small group academic tutoring by the School's special education teacher. (FF 26.) The School provided special push-in services through various School staff, and assigned a therapeutic support worker employed by the School. (FF 26, 28.) A separate room was provided for Student, both for purposes of de-escalation and reward; this room was filled with age appropriate activities that provide a variety of sensory

stimuli designed to calm children with sensory needs. (FF 29.) By a preponderance of the evidence, I find that none of these interventions brought Student's behavior under satisfactory control, even when taking into account evidence that there was some improvement at the end of the school year, in part due to use of medications and in part due to the gradual and partial effects of private psychotherapy. (FF 39-41.)

As to the second consideration, I conclude that the benefits of the segregated setting would far outweigh the benefits of inclusion in the general education setting. In this matter, the Student stood to gain greatly by inclusion, especially since kindergarten is primarily for the purpose of teaching social skills and classroom skills. However, the record is preponderant that the Student was not benefitting substantially from this setting, even with the supplementary supports and services provided throughout the year. (FF 2, 39.) Student's social skills improved marginally – Student reported obtaining one “friend” at the end of the year – but violent, dangerous and disruptive behavior continued to occur, with the predicted effect of distancing Student from Student's peers, and even the clinician reported continued need to learn social skills. Ibid. Little progress was made in closing the gap between Student's academic achievement and that of Student's peers.¹² (FF 8.) Thus, the preponderance of the evidence proves that Student would derive substantially greater benefit from a segregated placement.

As to the third consideration, the preponderance of the evidence proves that placing the Student in the regular education setting would more likely than not continue exposing Student's peers to highly disruptive behavior that would significantly diminish the peers' opportunities to benefit from the School's kindergarten curriculum. (FF 2.) Student would be retained in

¹² There was evidence that Student scored overall within the normal range on some standardized achievement tests, but the School psychologist credibly testified that the Student's academic achievement was behind Student's peers based upon classroom performance and teacher report, as well as scattered deficiencies in phonetic skills and writing. The School attempted to address these deficiencies with special tutoring, but the Student's oppositional and defiant behavior prevented Student from deriving any meaningful benefit from these attempts.

kindergarten, and the Student's history – the best indicator of future behavior - at the School demonstrates that further disruptive behavior is likely. Student's clinician testified that Student's symptoms are not in remission. Parents could not provide credible and reliable expert testimony in contradiction of this evidence. I find that the Parents' experts' contrary opinions were not founded on substantial, relevant factual information; thus, they were little more than net opinions, recasting Parents' arguments through expert witnesses, rather than providing opinions entitled to weight to contradict the opinions of the knowledgeable experts from the School. In sum, I conclude that the preponderance of the evidence proves that Student in the regular education setting would interfere with the education of Student's peers substantially, thus militating against placement in the regular education setting. As noted above, the School actually attempted numerous interventions along the continuum to try to enable Student to remain in the general education setting. None of these was sufficient to ameliorate the deleterious effect of Student's behavior.

The second part of the Oberti analysis is whether the School made reasonable efforts to include Student sufficiently in the general education setting – whether partial inclusion would be feasible in certain classes, or in non-academic activities. In the circumstances of a charter school, placement in a special school for behavior management and emotional support by necessity precludes such partial inclusion measures. Depending upon the selection of the private school, the Student, more likely than not, would be at a considerable distance from the School, and therefore unable as a practical matter to participate in any classes during the school day (without losing time from the special program for behavior intervention and emotional support that is recommended here) or in recess or lunch activities. The School provided preponderant evidence that the primary benefit of the private school placement would be an integrated, school-

wide and systematic approach to behavioral intervention and emotional support, (FF 35), and I conclude from this evidence that any partial inclusion would disrupt the continuity of such a program and deprive Student of the benefit of the private school's program. Therefore, I conclude that the School has proved by a preponderance of the evidence that any partial inclusion would not be practicable and would deprive Student of the primary benefit of the segregated setting.

However, I also conclude that the private placement must be limited in time to whatever reasonable period is necessary to enable Student to derive the benefits of the private school. Moreover, it is consistent with the purpose of the least restrictive environment requirement that the IEP team begin immediately to plan for the Student's transition back to the regular education environment. Therefore, I will order such prospective transition planning to occur after Student spends a reasonable time in the private school, to give the new school time to familiarize itself with Student and develop recommendations for Student's transition back to the regular education environment.

School's Ability to Create a Program for Student

Parents seem to argue that the School failed to appropriately consider the less restrictive alternative because it did not commit to creating an emotional support program. I conclude that the School was not obligated to do so. The legal standard is whether or not the Student could be educated "satisfactorily" in the regular education setting. The School attempted to educate the Student in regular education and concluded that this could not be accomplished "satisfactorily." (FF 26-30.) It does not have trained staff who are capable of providing a systematic behavioral

program, and it lacks the qualified staff who are capable of providing emotional support services. (FF 32.)

The Parent argues that the School should be willing to train its staff to provide such services. However, the establishment of a full time emotional support program at the School would entail extensive training for all staff, and this would have to be provided over a lengthy period of time. Thus, appropriate services would not be available to the Student for some time if Student were retained at the School. (FF 31, 39.) Moreover, even if staff could be trained sufficiently to carry out a comprehensive and systematic program, there would not be a sufficient student cohort at the School who needed the level of emotional support required by the Student to be able to provide separate settings as needed with other students; the Student would be in separate programming alone during much of the kindergarten year when the primary objective is to teach social skills and classroom skills, and this would not be appropriate. (FF 32.) I conclude that a preponderance of the evidence supports the School's position that the School cannot meet the Student's needs for the present school year.

Parents argue that there was evidence that the School's responses to the Student's behavior were misguided and that the fact that those responses were ineffective was therefore not proof that the Student cannot be taught in a regular education setting. I conclude that there is evidence to that effect, but that it does not prove the conclusion sought by the Parents, for two reasons. First, while there was evidence suggesting misguided responses, it was not preponderant. On the contrary, I find that the School's witnesses were well qualified to make educational judgments about how to handle the Student's behaviors, and that they exercised educational judgment in doing so. Parents failed to counter the weight of this testimony with credible expert evidence of any weight that the School's responses fell below the standard of

reasonable professional judgment. To be sure, their witnesses testified to that effect, but I find their testimony to lack credibility and weight, because it was based on the slimmest of evidence, and on no evidence as to the events of the previous school year. The witnesses did not even read all the documents available in the record – nor did they read the testimony of the School’s witnesses in previous hearings. They failed to read anything beyond the evaluation report and the IEP; they did not read any of the written reports of Student’s behaviors in school, and they were unaware of the most severe behaviors, such as utilizing a dangerous chokehold to bring down a student from behind, overturning book shelves and tables in the classroom, throwing objects and climbing on desks and fences. Thus, their opinions as to the appropriateness of the attempts by School personnel to respond to Student’s behaviors were offered without sufficient underlying facts upon which to rely in forming such opinions.

CONCLUSION

I conclude that the March 2011 evaluation was appropriate, and that the placement and program offered by the School is appropriate. I decline to order an independent educational evaluation. I will order the School to convene an IEP team meeting within 90 days of this order, to begin planning for Student’s transition back to the general education environment at the School. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The initial evaluation provided by the School in March 2011 was appropriate.

2. The placement of full time emotional support at an approved private school, offered by the School in March 2011, is appropriate.
3. The hearing officer will not order an IEE at public expense.
4. Within ninety days of the date of this order, the School shall convene an IEP meeting, inviting a representative of any private school which Student will be attending. The IEP team will begin planning for the transition of the Student from the private school to the School's general education setting. This transition shall be accomplished as soon as it is reasonably practicable to educate the Student satisfactorily, through the provision of supplemental aids and services, unless the Parents and the School agree otherwise.

William F. Culleton, Jr. Esq.

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

October 5, 2011