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

Child's Name: H.L.

Date of Birth: [Redacted]

ODR No. 2555-11-12-AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Dennis C. McAndrews, Esquire Heidi B. Konkler-Goldsmith, Esquire McAndrews Law Offices, P.C. 30 Cassatt Avenue Berwyn, PA 19312
Downingtown Area School District 540 Trestle Place Downingtown, PA 19335-2643	Andrew E. Faust, Esquire Sweet, Stevens, Katz & Williams, LLP 331 Butler Avenue New Britain, PA 18901
Dates of Hearings:	Submitted on Stipulations of Fact
Record Closed:	May 1, 2012
Date of Decision:	May 15, 2012
Hearing Officer:	William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in the title page of this decision (Student) is enrolled in a private school (School), and is a resident of the school district named in the title page of this decision (District). Parents, named in the title page of this decision, seek tuition reimbursement for their unilateral placement of Student at the School for the 2011-2012 school year, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and the Pennsylvania Code, 22 Pa. Code §14.151 et seq. The District offered an Individualized Education Program (IEP) and Notice of Recommended Educational Placement (NOREP) to Student for the 2011-2012 school year, pursuant to a recent re-evaluation; it asserts that it is not responsible for the cost of tuition for the 2011-2012 school year.

The hearing was waived and the parties submitted stipulations of fact and supporting documents. The record closed upon receipt of the parties' written briefs and responses.

ISSUES[1]

1. Did the District offer to Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2011-2012 school year?
2. If not, is the private school program, previously provided to Student by Parents through a unilateral placement, appropriate for the 2011-2012 school year?
3. Does equity support tuition reimbursement for the Parents' unilateral placement, and should the hearing officer order the District to pay tuition reimbursement to Parents for the private school tuition for the 2011-2012 school year?

[1] Although the parties did not stipulate to the exact formulation of the issues, I derive these issues from a reading of their written summations. I give determinative weight to the Parents' request for relief in this regard, which is limited to a request for tuition reimbursement; thus I formulate the issues according to the analysis given to tuition reimbursement claims in Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

FINDINGS OF FACT

As the matter was submitted on stipulations, I make no findings of fact.[2]

DISCUSSION AND CONCLUSIONS OF LAW

RELEVANT HISTORY

Student, who presently is in elementary school, has been identified as a child with a specific learning disability in reading fluency and comprehension and written language. (Stip. 1). Student was identified initially as a child with disabilities in May 2010 (S- 2, at 1, 6-7). In June 2010, Parents withdrew [Student] prior to implementation of the IEP, which was offered in June of 2010. (Stip. 1). Over the 2010-2011 school term, Student was placed at a non-licensed private school (School) in accordance with terms agreed upon between the parents and the District (Stip. 6; S- 1, p. 1-2). In the spring of 2011, the District re-evaluated Student in accordance with the parties' agreement, (S-1, p. 3 ¶ 4; S-2). The District offered an IEP in June 2011, also in accordance the parties' agreement. (S-1, p. 2 ¶ 2; S-3.) Parents have rejected the offered IEP and seek reimbursement of tuition they paid for the Student's 2011-2012 school year at the School.

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

[2] References to the record are as follows: "Stip.-#" for the stipulations; "S-#" or "P-#" for the exhibits filed with the stipulations, consisting of a March 2011 Settlement Agreement between the parties (S-1); a May 26, 2011 Re-evaluation Report (RR)(S-2); a June 16, 2011 Individualized Education Program (IEP)(S-3); an email message dated August 3, 2011(S-4); and Parent's curriculum vitae (P-1.)

convince the finder of fact.[3] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[4] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)(applied to least restrictiveness analysis).

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

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents. L.E. v. Ramsey Board of Education, 435 F.3d above at 392. If Parents fail to produce a preponderance of the evidence in support of their claim, or if the evidence is in "equipoise", then Parents cannot prevail under the IDEA.

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 such a private

[3] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[4] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

placement. 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 legally adequate? 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).

Parents' argument is very specific: that the hearing officer should order tuition reimbursement because the District violated the IDEA requirement to provide a FAPE in the least restrictive environment. Tuition reimbursement is an appropriate remedy for a school district's failure to provide services in the least restrictive environment. T.R. v. Kingwood Township Bd. Of Ed., 205 F.3d 572, 581-582 (3d Cir. 2000). Moreover, I conclude that it is relevant to consider whether or not the Parents' private placement is less restrictive than the public placement offered by the District, Susan N. v. Wilson Sch. Dist., 70 F.3d 751 (3d Cir. 1995); however, judicial authority makes clear that the relevant inquiry is not which placement is less restrictive, but whether or not the local educational agency has complied with the IDEA's less restrictive environment mandate. T.R, above.

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.[5] 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.

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

[5] This continuum assumes a mandate to educate the child in "the school that he or she would attend if nondisabled." 34 C.F.R. § 300.116(c). State regulations require school districts to ensure that "children with disabilities have access to the general curriculum … ." 22 Pa. Code § 14.102(a)(ii).

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. 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 and communication 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 stipulated record and exhibits, I first inquire as to whether or not the District gave "serious consideration" to whether Student can be provided with a FAPE "satisfactorily" and "appropriately" while placed entirely in the general education classroom with supplementary aids and services. Such consideration must be more than a perfunctory nod toward the option of full inclusion, as the word "serious" implies. See, Blount v. Lancaster-Lebanon Intermediate Unit, 2003 WL 22988892 (W.D. Pa. 2003). In attempting to apply this standard, I searched the record for any evidence that the District gave careful consideration, not only to what specially designed instruction the Student needed, but also to the utilization of supplementary aids and services for the purpose of

delivering needed specially designed instruction services to Student in the general education classroom. I found scant consideration of the question of inclusion – such a prominent obligation of the District in the law – and no consideration of the use of supplementary aids and services in the regular classroom for Student.

The District did receive and presumably consider that Parents desired specially designed instruction to be delivered in a setting of full inclusion. (S-2 p. 2.) It also attempted to get information from the School, which failed to provide that information until well after the RR was issued pursuant to IDEA time lines. (S-2 p. 4.) It also considered Parents' lengthy description of the Student's programming at the School. (S-3 p. 33-34.) Yet the only evidence in this record that the District gave any consideration to the use of inclusion with supplementary aids and services is two pro forma lines in the NOREP dated June 16, 2011: at the prompt on the form that says, "Options Considered", the District response was: "Regular education environment with supplementary aids and services". At the prompt on the form that says, "Reason for Rejection", the District response was: "This would not meet [Student's] need for specially designed instruction at this time". (S-3 p. 37.) I note that these lines are not supplemented with any explanation in the IEP section where the form prompts the agency to address its obligations under Oberti: "What supplementary aids and services were considered? What supplementary aids and services were rejected? Explain why the supplementary aids and services will or will not enable the student to make progress on the goals and objectives (if applicable) in this IEP in the general education class." (S-3 p. 22.) Three other questions, which track the Oberti analysis for application of the LRE requirement of the IDEA, are also left blank in the IEP.

I find that this evidence is insufficient to raise an inference of "serious" consideration of the District's obligation to utilize supplementary aids and services in the general education classroom in order to deliver special education and related services that the Student needed. On the contrary, I conclude that the District gave only perfunctory if any consideration to providing services in the regular education classroom. Weighed against the Parents' substantial evidence that the District was on notice that Parents were requesting full inclusion, I conclude by a preponderance of the evidence that the District failed to offer FAPE within the LRE to this Student for the 2011-2012 school year.[6]

The District argues that the School provided the equivalent of special education by providing language arts pull out services for 110 minutes weekly and additional services, such as episodic 30 minute sessions and occasional push in services, all devoted to Student's reading and writing difficulties. (Stip. 4, 9, 10.) It notes that these services were with a small group of three students, always the same persons, and was segregated from the School's regular classroom – either in a separate building, or during the push in services in a separate group within the classroom. Even Parents admitted in writing that they did not consider these services to have been "mainstreamed." (S-3 p. 33.) This evidence, the District argues, demonstrates that the Student needed segregated special education for language arts, and that the School's services were no less restrictive than those offered by the District.

I conclude that these facts are not relevant to the initial stage of the Oberti analysis, because none of these facts is evidence that the District considered inclusion with supplemental aids and services. There is no evidence that the services being provided at the

[6] Conversely, I find that the offer of FAPE was appropriate in all other substantive and procedural respects. The RR was comprehensive and procedurally appropriate, and no argument was made that the IEP was inappropriate, other than the failure to offer services in the LRE.

School were comparable to the special education reading services that the District offered. Indeed, the parties stipulate that the services offered by the School were not special education. (Stip. 11.)

Thus, these facts cannot raise an inference that the Student needed to be segregated for special education services; the School's services were not sufficiently similar to special education services to give such inference determinative directness and weight. Moreover, the District's knowledge of these facts says nothing about its process of considering them, and says nothing at all about consideration of supplementary aids and services.

Having concluded that the District failed to offer a legally appropriate IEP – because of its failure to consider inclusion as discussed above – I must now reach a conclusion as to the appropriateness of the Parents' unilateral placement. Burlington Carter, above. I conclude that the placement is inappropriate for this Student. The School's program fails to address Student's language arts needs appropriately. In reaching this conclusion I am mindful that a parent need not prove that the parent's placement is the equivalent of the school district's offered placement; however, here, the record is devoid of any reliable indicator that the School has addressed Student's serious language arts deficiencies appropriately.

The School offers a program whose hallmark is a lack of objective evidence of educational progress. The School does not adhere to the Pennsylvania statewide curricular standards. (Stip. 7.) It does not report grades in any subject; all assessments are general and subjective. (S-2 p. 3, S-3 p. 29-30.) Its stated philosophy is to give heightened weight to methods that incorporate drama and pictorial art into instruction, and to the student's degree of creativity in assessing academic performance. (S-3 p. 29-30; Stip. 7.)

The School provided no special education to a child who had been found to have severe difficulties in reading and writing, two areas of learning that are central to accessing higher level curriculum. (Stip. 4, 9.) It did provide interventions, and Student was segregated from the School's general education classroom to receive them, (Stip. 9, 10); however, since the children pulled out with Student were not identified under the IDEA, they must be considered to be "non-disabled peers" for purposes of LRE analysis. Nevertheless, Student was segregated from peers and given instruction that was not research based. (Stip. 9, 10, 11, 12, 13.) Moreover, the School did not measure Student's progress by any reliable process of data gathering or progress monitoring.[7] (S-2; Stip. 13.)

No writing scores based upon rubrics were provided; instead there was much emphasis on Student's creativity in judging Student's writing to be a strength, despite the standardized test scores in the District RR to the contrary. (S-2; S-3 p. 29 to 30; Stip. 13.) Assignments in Mathematics were modified, so Student's apparent progress in math is based upon an unreliable measure, though subjectively there seems to be sufficient evidence of progress. (S-3 p. 31.)

Parents point out that the Student made progress in mathematics, improved in emotions and attitude, and demonstrated progress in social skills, all during the 2011-2012 school year. (Stip. 15-17.) The record suggests that Student's gains in these areas were, while real, not complete; teachers and Parents indicated continuing emotional concerns. (S-2.) Mathematics gains were not based upon a proven age appropriate curriculum and were

[7] I give no weight to the QRI score provided at the end of the school year by the IU reading specialist who provided reading and writing interventions during the 2011-2012 school year. This assessment is a single curriculum based measure, rather than the comprehensive reading assessments given by the District in its RR. Moreover, the Student is older than the maximum age for which the administered QRI was normed. The record, therefore, suggests that no weight should be given to this measure, since its validity is seriously called into question.

assessed with supports that render their reliability suspect. (S-31.) Parents' and teachers' subjective impressions must be given less weight due to the self serving circumstances in which such impressions are given.[8]

I give more weight to the fact that all of the reliable evidence indicates that Student did not make meaningful progress in reading and writing. (S-2.) These skills are essential, and Student's needs with regard to these skills are great. The School's failure to appropriately address these needs undercuts the Parents' assertion that the Student received a comprehensive education at the School. While I must tolerate serious deviations from the public school norm when considering the appropriateness of a private parental placement, I conclude that the inadequacies of the School's services are far more fundamental than a mere deviation from the way things are done in the public school. They call into question the fundamental soundness of the educational program. On the weight of this evidence, then, I conclude that the School was not appropriate for this Student, within the meaning of the IDEA and its judicial interpretation.

I add that this is not a situation in which the relaxed standard for assessing the appropriateness of a parental placement is equitably necessary. In the typical case, the parents are faced with a massive task of selecting a private school after the agency fails to offer a FAPE; this circumstance militates in favor of the relaxed standard of appropriateness. In this case, however, the Parents have had over a year to make their choice of private placement, since the Student was enrolled in the School at District expense for over a full school year.

[8] Moreover, with no disrespect to the Student's Father, who is a psychologist by training, the opinions he expressed must be given little weight as such, because he has limited experience in providing special education in regular education settings. (P-1.)

Having answered the second test of the Burlington analysis in the negative, I conclude that it is inappropriate to order the District to reimburse Parents for the tuition that they paid to the School for the 2011-2012 school year. In light of this conclusion, I do not reach the equitable considerations that are the third step of the analysis.

COMMENT

The question before me is whether or not the District must pay for Student's 2011-2012 school year at the School. Although the Parents have raised the question of transition, the nature of their request for relief does not present that issue with ripeness. The record does not anticipate whether or not the Parents will choose to return the Student to the District, or choose – as they have done once in the past – to keep Student at the School at their own expense. Should the Parents choose to return Student to the District, I urge that the District give careful consideration to its LRE obligations under the IDEA as explicated in Oberti, and also that it carefully construct a transition process that will address the apparent fragility of Student from an emotional perspective.

CONCLUSION

I conclude that the District failed in its obligation to provide serious consideration to the obligation to include Student in regular education for all programming, including special education. Thus, I find that its offered educational program was inappropriate. However, I also conclude that the School is an inappropriate placement for Student, and I decline to order the District to pay tuition reimbursement for the 2011-2012 school year.

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

ORDER

1. The District failed to offer to Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2011-2012 school year.

2. The private school program is not appropriate for the 2011-2012 school year.

3. The hearing officer will not order the District to pay tuition reimbursement to Parents for the private school tuition for the 2011-2012 school year.

William F. Culleton, Jr. Esq.

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

May 15, 2012