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: J.E.

Date of Birth: [redacted]

ODR No. 2877-11-12-KE

OPEN HEARING

Parties to the Hearing:	Representative:
Parents	Mark W. Voigt, Esquire Plymouth Meeting Executive Campus 600 West Germantown Pike, No. 400 Plymouth Meeting, PA 19462
Boyertown Area School District 911 Montgomery Avenue Boyertown, PA 19512	Jennifer Donaldson, Esquire Sweet, Stevens, Katz & Williams LLP 331 East Butler Avenue P.O. Box 5069 New Britain, PA 18901
Dates of Hearing	April 17, 2012; June 7, 2012; June 30, 2012
Record Closed:	July 12, 2012
Date of Ruling:	July 23, 2012
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION

The Student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District). (NT 9-10.) The District has identified Student with Autism, Speech or Language Disorder and Specific Learning Disability. (NT 10.) Student was a Student in a private college preparatory school for children with learning differences (HTPS) until graduation in 2012. Parents assert that the District failed to offer the Student a free appropriate public education (FAPE), as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 et seq. Parents seek reimbursement for private school tuition and transportation to the private school, private Extended School Year services (ESY) and reimbursement for the cost of a private educational evaluation requested by Parents. (NT 297-307.) The District asserts that, at all times relevant to this matter, it has offered services reasonably calculated to provide meaningful educational benefit in the least restrictive environment appropriate to Student's needs.

The hearing was concluded in three sessions. The parties submitted written summations, and the record closed upon receipt of those summations.

PREVIOUS LITIGATION

Student moved into the District in 2001; at that time, the Student's placement from the previous district was in an approved private school (APS); the District continued that placement by agreement until 2008. (S-2.) (Decision of Special Education Hearing Officer Anne L. Carroll, Esq.) In September 2008, Parents removed the Student

unilaterally from the APS and enrolled Student at HTPS, whose tuition is the subject of the present matter. (S-2.) (Decision of Special Education Hearing Officer Anne L. Carroll, Esq., finding number 20.) On March 19, 2009, Hearing Officer Carroll awarded the Parents tuition reimbursement and transportation costs for the 2008-2009 school year. Ibid. In her decision, Hearing Officer Carroll found that the placement at HTPS was appropriate for the Student. (S-2.) On June 17, 2009, the District appealed the decision to the United States District Court for the Eastern District of Pennsylvania. (S-9, 11.) That suit was settled, effective March 9, 2010.

In July 2009, the District offered the Student an IEP with part time inclusion and part time placement in its own autistic support class at Boyertown Area Senior High School (BASH). (P-8.) The Parents requested due process on July 27, 2009. On April 1, 2010, this Hearing Officer denied the Parents' request for tuition reimbursement, finding that the District's July 2009 IEP, as amended, satisfied the requirements of the IDEA. (P-8.) At the same time, this hearing officer ruled that HTPS was the pendent placement, and ordered the District to pay all HTPS tuition during pendency.

On June 21, 2010, Parents appealed this Hearing Officer's April 1, 2010 decision in the United States District Court of the Eastern District of Pennsylvania, and, on September 2, 2010, moved for preliminary injunction, seeking District funding for HTPS tuition and transportation during the 2010-2011 school year. On October 12, 2010, the Honorable Eduardo C. Robreno ordered the District to pay for approximately one half year's tuition to HTPS, with transportation, until January 10, 2011. (S-9.) On February 8, 2011, Judge Robreno affirmed this hearing officer's April 1, 2010 decision and ordered the parties to file an agreed upon transition plan for the Student to transition to BASH.

Parents subsequently appealed to the Third Circuit Court of Appeals, and also sought a preliminary injunction in the District Court to establish pendency during the appeal. The District Court denied the pendency injunction, and Parents appealed. On October, 25, 2011, the Court of Appeals affirmed the District Court's denial of the injunction. On November 21, 2011, the Court of Appeals affirmed the District Court's order upholding this hearing officer's April 2010 decision. (S-21.)

ISSUES

1. Was the District's February 2012 Re-evaluation Report appropriate under the IDEA?

2. Did the District offer Student a FAPE in a timely manner for the 2010-2011 and 2011-2012 school years?

3. Was the HTPS an appropriate placement for the Student for the 2010-2011 and 2011-2012 school years?

4. Should the hearing officer order the District to reimburse Parents for the cost of HTPS tuition and transportation of the Student to HTPS for all or any part of the 2010-2011 and 2011-2012 school years?

5. Should the hearing officer order the District to reimburse Parents for the cost of summer educational programming for Student due to a failure by the District to offer appropriate ESY services for the summer of 2010 or for the summer of 2011?

6. Should the hearing officer order the District to reimburse Parents for the cost of a private evaluation submitted to the District and for the cost of expert testimony in this proceeding by the author of that report?

FINDINGS OF FACT

1. Parents restricted their consent to the District's proposed re-evaluation of Student as requested on April 1, 2009, excluding academic and social-emotional

assessments because previous, recent evaluations were available to the District in these areas. (S-2 ff[1]10; S-1.)

2. The June 25, 2009 IEP offered to Student recognized need for specially designed instruction in all academic areas, as well as speech and speech pragmatics and other areas of functioning. (S-1.)

3. The District invited Parents to an IEP team meeting on April 12, 2010, to discuss ESY services for the summer of 2010 and programming for the 2010-2011 school year. The District set a date of April 20, 2010, and subsequently rescheduled for May 4, 2010. (S-3, 4.)

4. Parents attended an IEP team meeting on May 4, 2010. On May 6, 2010, the District sent Parents a Notice of Recommended Educational Placement (NOREP) for ESY services for the summer of 2010 and a NOREP offering an education program for the 2010-2011 school year, along with an IEP for that year, dated May 4, 2010. (S-5 to 8.)

5. The May 2010 IEP contained substantially all of the present levels of academic achievement and functional performance (present levels) from the District - offered June 25, 2009 IEP, revised in August 2009. These included test reports and reports of academic performance from Student's ninth grade teacher reports and grades earned at HTPS. The May 2010 IEP contained updated present levels by adding Student's third quarter grades and reports of teachers from tenth grade at HTPS, and HTPS recommendations for specially designed instruction, strengths and needs, and other recommended services as of May 2010. At Parents' request, the IEP included in the present levels certain recommendations from a private evaluation dated August 2008. Present levels also contained an update to reflect the District's offer of ESY services for the summer of 2010. (S-8, P-1.)

6. The May 2010 IEP offered to place Student in supplemental autistic support in the neighborhood school (BASH) for reading, resource room, social skills and homeroom, with inclusion for mathematics, social studies, science, physical education, Spanish and electives, and ESY programming in an autistic support placement. Inclusion was to be accomplished through a continuum of regular education, co-taught or dual-taught classes with support from the autistic support program and a one to one aide present as needed. Student's preference was to be considered in allocating regular education assignments and supplemental aids and services, including the one to one aide and supported classroom placements. (S-8.)

7. The autistic support classroom teacher was a Pennsylvania certified special education teacher with substantial experience in teaching students with autism at

[1] A lower case "ff" refers to the findings of this hearing officer as set forth in the previous final decision regarding this Student, marked as an exhibit in this matter, S-2. Uppercase "FF" refers to the findings of fact in this decision.

various ages and grade levels. The teacher, moreover, had accumulated most of the necessary credits for a master's degree. (NT 789-792.)

8. The May 2010 IEP provided that the Student would spend about 25 percent of the school day in the autistic support classroom, with the rest of the day in the general education setting. (S-8.)

9. The May 2010 IEP contained substantially the entire transition plan for transition back to the BASH, with some modifications. (S-1, 8.)

10. May 2010 IEP goals for reading and mathematics fluency, speech and language services, occupational therapy services, social skills, anxiety awareness and self regulation were identical to those proposed in the June 2009 IEP as revised; the May 2010 IEP offered to establish new baselines at the start of the school year. (S-1, 8.)

11. The May 2010 IEP offered related services that were substantially the same as those offered in the June 2009 IEP as revised. (S-1, S-8.)

12. The May 2010 IEP offered two reading comprehension goals based upon instructional grade level materials, to be established as baselines at the start of the school year. (S-8.)

13. The May 2010 IEP offered an Algebra I goal based upon state curriculum standards requiring sequential teaching of the state algebra curriculum based upon curriculum based assessments in each constituent Algebra I skill. This was identical to the goal that had been offered in the June 2009 IEP as revised. However, it was offered substantially as a goal for ESY services for the summer of 2010. (S-1, 8.)

14. The May 2010 IEP offered revised goals for written expression to begin in summer 2010 ESY, and as an annual goal. (S-1, 8.)

15. The May 2010 IEP offered to provide a goal for perspective taking and a goal for social skills during ESY, and to begin two annual goals for self-regulation during ESY through provision of related services. (S-1, 8.)

16. The May 2010 IEP offered a revised goal for self advocacy and a new goal for bullying awareness. (S-1, 8.)

17. The May 2010 IEP offered additional specially designed instruction in speech fluency and a new program modification to provide a list of accommodations to Student. (S-1, 8.)

18. Parents declined both NOREPs and the IEP offered in May 2010. Parents rejected the educational program and placement because they regarded it as essentially the same as the program and placement that they had rejected in June and August 2009. Parents considered the autistic support classroom to be

inappropriate for Student and not reasonably calculated to appropriately address Student's needs. (NT 79-80, 97-98, 101; S-5 to 8.)

19. On October 8, 2010, pursuant to Parents' motion for summary judgment, the District Court ordered the District to reimburse Parents for all tuition and transportation costs at HTPS from the beginning of the 2010 school year until January 6, 2011. (S-9.)

20. On February 3, 2011, the District Court ordered the parties to file a plan for transition of Student from HTPS to BASH, and by order dated February 18, 2011, the Court approved the parties' Joint Transition Plan for Student. (S-12, 13.)

21. On February 15, 2011, the District sent Parents documents to be signed in order to register Student at the BASH, and on March 2, 2011, Parents sent the forms back with signatures. (S-13, P-25 p. 10.)

22. The transition plan, among other things, provided a plan for five days of transition, during which the Student would attend meetings and classes at the BASH. On day one of the plan, the District would draft a schedule for Student's class assignments at the BASH. Parents would observe the autism support class and other classes to which Student might be assigned. District personnel would assess Student's current reading and mathematics skills, and would finalize a schedule for Student based upon those assessments. (S-13.)

23. The transition plan provided that educational services provided to Student would be based upon the June 2009 IEP as revised, for one month. One month after Student should begin classes at the BASH, the IEP team, including the parties, would review and revise the IEP as needed. The team at that meeting would determine how any additional transition needs would be addressed and whether or not any new assessments were needed. (S-13.)

24. On February 24, 2011, by way of an invitation to participate in an IEP team meeting (pursuant to the transition plan), the District invited Student to participate in day one of the transition plan. Student requested a delay until March 2, 2011. (S-14.)

25. The IEP meeting pursuant to the transition plan was held on or about March 2, 2011. Student attended as well as the Parents. Parents asked for a proposed IEP and the District provided a copy of the June 2009 IEP as revised. (P-25; NT 103-111.)

26. Parents and Student observed the autistic support class and concluded that the students assigned there were functioning far below Student's level and that the curriculum would not have been at Student's level. (P-25 p. 10-12; NT 143, 147-148.)

27. Parents completed day one and day two of the transition plan, but declined to attend day three, instead opting to appeal the District Court's previous decision.

Parents asserted pendency and asked for transportation to HTPS. The District denied pendency and declined to provide transportation, but invited Parents to reconsider their decision at any time and continue with the transition plan. (NT 161-164; S-16, 17.)

28. During the summer of 2011, Student attended a summer camp program by HTPS that included travel to the Grand Canyon. (P-24 p. 7-11, P-27.)

29. On September 1, 2011, responding to Parents' motion for a preliminary order for tuition and transportation to HTPS, [the court] denied the motion and ruled that the transition plan constituted an agreement between the parties. (S-18.)

30. On September 1, 2011, the District invited the Parents to re-enroll Student in the District and continue with the transition plan. (S-19.)

31. On October 25, 2011, the United States Court of Appeals for the Third Circuit denied the Parents' appeal. (S-20, 21.)

32. The District reimbursed Parents for the cost of transporting Student to and from HTPS from the beginning of the school year in 2010 until October 18, 2010; thereafter, the District provided transportation services to Student to and from HTPS from October 19, 2010 until February 11, 2011. (NT 208-213, 239-242; S-41 to 43, P-30.)

33. On December 7, 2011, Parents wrote a letter to the District's Board, indicating that Student had already obtained a class ring and graduation pictures; at least by implication, the Parents asked the District's Board to pay for the final half year's tuition at HTPS, so that the Student could graduate with Student's friends. (S-22.)

34. On or about January 5, 2012, Parents' attorney forwarded to the District a private psychoeducational evaluation, entitled "Independent Educational Evaluation" with recommendations for specially designed instruction and related services. Parents' counsel asked for a re-evaluation and a proposed IEP. (NT 187-188; S-23.)

35. The private evaluator, based upon the evaluator's testing and the student's history, found that Student has weaknesses in mathematics facts, reasoning and calculation, self-organization, reading fluency and comprehension, speech pragmatics, and adapting to novel or complex situations. The evaluator diagnosed the Student with Asperser's Disorder, Mathematics Disorder, Learning Disorder NOS and Pragmatic Language Disorder. (S-24.)

36. On or about January 23, 2012, Parents through counsel forwarded an addendum to the private evaluator's report, which opined that the June 2009 IEP, as revised, and the May 4, 2010 IEP were inappropriate and failed to offer a FAPE for the 2009-2010 and 2010-2011 school years. (NT 189-193; S-27.)

37. On February 7, 2012, the District completed a re-evaluation report based in part upon review of the private psychoeducational evaluation provided by Parents. The IEP team, including Parents, discussed this on February 9, 2012. (NT 196; S-29.)

38. The re-evaluation report discussed the findings of private reports in 1999, 2008 and January 5, 2012, as well as recent parent input, achievement testing by District personnel, classroom based assessments from the previous summer program that the Student had attended, teacher input from HTPS, an observation at HTPS by District personnel, and speech-language and occupational therapy evaluations conducted at HTPS by District personnel. (S-29.)

39. The re-evaluation identified Student with Autism and Speech or Language Impairment. It recommended a highly structured classroom with direct speech/language and occupational therapy services, and a sensory diet. It also recommended support in all academic areas, recognizing a specific learning disability in mathematics, and direct instruction for pragmatic language skills. The report discussed educational needs as stated in the private psychoeducational report provided to the District on or about January 5, 2012, and indicated the multidisciplinary team's agreement and disagreement with that report, indicating the team's reasons. The report made recommendations regarding how to support Student's aspiration to attend college. (S-29.)

40. Parents disagreed with the re-evaluation report only to the extent that it disagreed with the private psychoeducational report. (S-29.)

41. Also on February 9, 2012, the IEP team met and discussed the District's offer of a revised IEP. Revisions included updated present levels based upon reports and grades from HTPS, information from Student's private summer 2011 program, and a plan to consider further revisions one month after Student's transition to BASH. The IEP offered a plan to gather data and consider performing a Functional Behavioral Assessment and creating a Positive Behavior Support Plan if appropriate. (S-30, 31.)

42. The February 9, 2012 proposed IEP modified BASH curricular requirements to account for work done at HTPS. A proposed provisional class schedule was included in the IEP, and the District promised to revise the class schedule as part of Student's transition to BASH. (S-31.)

43. The proposed February 2012 IEP goals for social skills, anxiety awareness, self advocacy and bullying awareness were substantively identical to those proposed in the May 2010 IEP as revised. (S-8, 31.)

44. The proposed February 2012 IEP offered related services that were substantially the same as those offered in the May 2010 IEP as revised, except that the occupational therapy offered was calculated differently. (S-8, S-31.)

45. The proposed February 2012 IEP goals for reading fluency posited an eighth grade level reading sample, a full grade lower than the grade level to be used in the reading fluency goal offered in the May 2010 IEP as revised. (S-8, 31.)

46. The proposed February 2012 IEP offered one reading comprehension goal based upon instructional grade level materials, with baselines to be established during Student's first week at BASH. The goal was identical to that proposed in the May 2010 IEP as revised; one reading comprehension goal from that IEP was omitted in the February 2012 proposed IEP. (S-8, 31.)

47. The proposed February 2012 IEP goals for mathematics fluency were slightly changed from those offered in the May 2010 IEP as revised. Baselines were to be determined in the Student's first week at BASH. (S-8, 31.)

48. The proposed February 2012 IEP goals for speech and language services were revised from those proposed in the May 2010 IEP as revised, utilizing some of the previously offered goals, omitting goals, adding one goal, and revising the language of goals. (S-8, 31.)

49. The proposed February 2012 IEP offered revised goals for self-regulation, incorporating some but not all of the goals for occupational therapy services offered in the May 2010 proposed IEP as revised. (S-8, 31.)

50. The proposed February 2012 IEP did not offer an Algebra I goal, as had been offered in the May 2010 IEP as revised. (S-8, 31.)

51. The proposed February 2012 IEP did not offer a goal for written expression, as had been offered in the May 2010 IEP as revised. (S-8, 31.)

52. The proposed February 2012 IEP offered most of the specially designed instruction and program modifications that had been offered in the May 2010 proposed IEP as revised; the February 2012 proposed IEP added a significant number of new specially designed instruction items and program modifications. (S-8, 31.)

53. Specially designed instruction included a comprehensive reading and language arts program that included cumulative, systematic and explicit teaching of writing. (S-31.)

54. Along with the February 2012 proposed IEP, the District offered a revised plan for Student's transition from HTPS to BASH, incorporating all of the elements of the previous court approved transition plan, and revising with added elements for parental and Student participation. (S-32.)

55. On February 17, 2012, the District offered a NOREP to place Student in supplemental autistic support. The NOREP rejected the option of returning Student to HTPS because HTPS would not teach Student social skills, self regulation and skills taught in speech therapy directly, did not offer any degree of

inclusion, and would not provide student with opportunities to generalize learning. (S-31, 33.)

56. Parents did not return the NOREP of February 2012. Parents filed for due process on February 20, 2012. (P-26; NT 200.)

57. On or about March 1, 2012, Parents observed the autistic support class and a co-taught general education class, writing a report that criticized both classes, concluded that Student's level of functioning was higher than those in the autistic support class, and arguing that Student should not be required to attend BASH. (P-47.)

58. Student has been accepted to a number of colleges. (P-50.)

59. On March 21, 2012, revised by supplemental report dated on or about March 29, 2012, a private consultant engaged by Parents' counsel observed the District's autistic support classroom. Subsequently, the private psychologist who wrote the 2011 psychoeducational report produced a second supplement to the original report. This supported Parents' argument that the environment of a large neighborhood public high school would be detrimental to Student, and recommended that Student continue at HTPS. (S-37, 38.)

60. The report noted that the autistic support class at BASH is appropriate. (S-37.)

61. During the summer of 2011, Student attended a summer program at a private college in Western Pennsylvania with a special program for students with learning differences; the program featured college level courses and living at the college dormitory. (P-25, 37.)

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.[2] 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[3] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

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

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents' claims, or if the evidence is in "equipoise", the Parents cannot prevail.

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

[2] 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).

[3] 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.

fund such a private 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).

FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d

238, 247 (3d Cir. 1999). In order to provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a "trivial" or "de minimis" educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court's interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity" – it is not required to provide the "optimal level of services." Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996) (appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on

the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

I conclude that the District has offered a FAPE to Student for the 2010-2011 and 2011-2012 school years. Therefore, Parents have failed to meet the first Burlington Carter test, and their claim for tuition reimbursement and transportation must fail. Since the first test is not met, it is unnecessary to reach the remaining two Burlington Carter tests.

APPROPRIATENESS OF THE EDUCATIONAL PROGRAM AND PLACEMENT OFFERED FOR THE 2010-2011 SCHOOL YEAR

I have reviewed carefully the May 2010 proposed IEP as revised, in contrast with the June 2009 proposed IEP, as revised, which I previously found to be an offer of a FAPE. (Decision of Hearing Officer William Culleton, April 1, 2010, P-8.) While the May 2010 IEP incorporated much of the language and many of the provisions of the June 2009 IEP, I conclude that it was based upon present levels that were updated as much as possible with the Student enrolled at a private school, (FF 1), and that it addressed all of Student's educational needs in a way that was reasonably calculated to provide meaningful educational benefit to the Student.

The May 2010 IEP was based upon a recognition that Student needed support in all academic areas, a college preparatory course of study, and explicit teaching or therapy for speech, pragmatic speech, self regulation, and social skills. (FF 2-6, 9, 10, 11.) In addition, the May 2010 IEP was based upon a detailed, gradual plan for transition of Student from the private school to the District's public high school. (FF 9.) The IEP included an offer for ESY services in the summer of 2010, and the ESY goals were

coordinated with and integrated into the plan for transition and continuation of Student at the District's high school. (FF 4, 6, 13-15.) The May 2010 IEP also provided for inclusion of Student in the District's regular education classes, several of which were co-taught with a special education teacher, and all of which were to be supported through the District's autistic support program, which includes supplementary aids and services including a one to one paraprofessional to provide individual support to Student in the regular education setting, as needed. (FF 6, 8.) The May 2010 IEP also included revised or new goals for self advocacy and bullying awareness. (FF 16.) Specially designed instruction and program modifications were supplemented and new speech and language therapy services were offered to address Student's speech fluency. (FF 17.)

Parents argue that the May 2010 IEP was inappropriate because it was simply a re-hash of the June 2009 IEP as revised; as such, they argue, the May 2010 IEP could not have been appropriate because Student was one year older and had made substantial progress at HTPS, thus obviating some of the needs addressed in the June 2009 IEP while creating new ones. I conclude on the contrary that the May 2010 IEP was not simply a re-hash; rather, it was carefully updated, while retaining many of the elements of the previous IEP that continued to address those current educational needs of which the District was aware. D.S., above. The present levels repeated those from the year before, but also included updated grades and teacher comments from Student's program at HTPS, as well as recommendations for future programming from HTPS staff. (FF 5.) While the placement was the same as the previous year, supplemental autistic support, Student was to receive a curriculum at present levels of achievement through inclusion in grade level general education for mathematics and most other academic courses. (FF 6,

8.) Goals were to be based upon baselines established at the start of the school year, when Student would be present to be assessed for baseline purposes. (FF 10, 12, 13, 14.) Some goals were revised and others were new. (Ff 10-16.) The IEP offered new items of specially designed instruction and program modification. (FF 17.) I conclude that the May 2010 proposed IEP addressed Student's current educational needs to the extent known to the District at the time that it was offered. (FF 5.)

Parents argue that the reading and mathematics levels were below Student's actual achievement levels as of May 2010. However, I conclude that, even if true, this would not render the goals inappropriate. The IEP also offered to establish baselines for these goals as of the beginning of the school year should Student be present at the District's high school; thus, the offered goals were not fixed immutably at any level of achievement, and the offer included adjusting the baselines to match the Student's achievement as soon as Student could be made available for assessment.

I reach this conclusion in consideration of the circumstances in which this IEP was offered. As the record makes clear, Student had never attended school in a District facility, but had received private schooling throughout Student's educational history. The District had never had the opportunity to assess Student's academic achievement with reference to its own curriculum. While the assessments of private schools and standardized achievement scores, available to the District before May 2010, should have been and were taken into account, there was no evidence that the District was being unreasonable in its judgment that Student's achievement needed to be assessed additionally with reference to its own curriculum in order to establish appropriate baselines for Student's IEP goals.

Parents argue that the autistic support classroom was inappropriate to Student's needs as of May 2010, because Student made substantial progress at HTPS in the intervening year. Parents base this argument upon observations made by the Parent and a private consultant, as well as the expert opinion of Parents' private psychoeducational evaluator. Parents challenge the teacher's qualifications, because the teacher does not have a masters degree[4], the curriculum, which they assert is limited to an etiquette curriculum for lower functioning students that Student has mastered, the repetition of the same lessons every year, the assertion that the same curriculum is provided for all students in that classroom, the conclusion that many of the students in that classroom are lower functioning than Student, the fact that some students come in and out of the classroom during classes, and the observation of one student in the classroom fondling that student's private parts while unattended.[5]

Parents' evidence of these assertions was not sufficient to prove by a preponderance that the autistic support classroom was inappropriate for the programming that was offered to Student in the May 2010 IEP. In reaching this conclusion, I take into consideration that the Student would have been assigned to that classroom for reading, resource room, social skills and homeroom. (FF 6.) This would have amounted to about 25 percent of the Student's school day. (FF 8.)

The present levels supported the conclusion that this setting was necessary in order to provide specially designed instruction in reading – which required explicit and

[4] While this is true, the record shows that the teacher was a Pennsylvania certified special education teacher with substantial experience in teaching students with autism at various ages and grade levels. The teacher, moreover, had accumulated most of the necessary credits for a master's degree. (FF 7.)

[5] The observations of activity (and thus distraction) and inappropriate behavior by one student are not sufficiently weighty to characterize the entire program in the classroom as inappropriately distracting or not educationally controlled, as Parents imply, for the reasons set forth below.

remedial instruction, and which would require Student to read out loud in a one to one setting, among other things. (FF 5, 6.) Present levels also support the conclusion that social skills needed to be provided in a support classroom, where role playing, modeling, scripting and practice could be provided away from the routine and peer pressure of the regular education classroom. Ibid. Resource room and home room services by definition need to be provided in a special education classroom, and the present levels justified the conclusion that these might be needed, especially in regard to Student's ongoing organizational needs and the anticipation of severe anxiety during the transition to the District. Ibid. Thus, there was a need for a specialized classroom, and this was offered for a limited number of specially designed instructional services.

There was no evidence that the teacher would fail to differentiate instruction to provide appropriate services at Student's level of functioning, as the teacher was fully trained and competent to do. The non-opinion evidence about this classroom is that on three half days, out of two school years, observers[6] saw lower functioning students in the autism classroom, as well as part of the curriculum being taught to those lower

[6] In giving the appropriate weight to this evidence, I take into account that two of the observations were by Parents, (FF 26), who have no education, training or experience in special education, and are not qualified to draw inferences from their observations about the quality of special education programming. Moreover, both observations were taken in the context of ongoing litigation between the parties, and the Parents' conclusions about the quality of programming were patently self serving. From the entire record, which includes numerous examples of Parents' criticisms of District programming, some of which were based upon the most scanty factual grounds, I conclude that the Parents were predisposed to find fault with the District's program at the time of the observations. Consequently, I accord these observations and the Parents' conclusions little weight. The expert consultant's observations are entitled to greater weight; however, the expert gave credence to the District's offer of services by opining that the autistic support classroom was appropriate for high functioning students with Asperger's. (S-37 p. 6.) The observation was a small sample of the total hours during which the classroom was in operation, and the expert did not observe any services being given to Student, who was still at HTPS. The opinion was given during the present litigation, and I take this into account in giving reduced weight, not to the observations, but to the conclusion that the autistic classroom was not appropriate to Student's needs. Moreover, this observation report and opinion were not available to the District at the time that it offered the autistic support classroom placement in May 2010; it cannot be used as a basis upon which to find the offer inappropriate at that time. This last consideration applies equally to one of the Parents' observations, which post dated the May 2010 IEP. D.S., above.

functioning students. This does not rise to the level of preponderant evidence that Student would have been dragged down to the level of the students who were observed at those points of time, as Parents suggest. Certainly, there was not preponderant evidence that this was intended. Thus, there is no reason for this hearing officer to disbelieve that the District would have provided the individualized and appropriate educational services that the May 2010 IEP offered.

Parents' evidence included an addendum to a private psychoeducational report, and expert testimony explaining that addendum, that finds the District's program and placement to be inappropriate for Student, based upon a consultant's observation of the program as applied to other students, and review of the IEP and related documents. (FF 34-36.) I find that the evaluator's qualifications are impeccable and fully adequate to merit some deference to the evaluator's expert opinions. Nevertheless, in reviewing the program and placement based upon all of the record in this matter, I cannot agree with the factual conclusions that the expert reached as a predicate for the expert's opinion. I find that the placement is justified as necessary due to educational needs that the expert had identified in the psychoeducational evaluation, and that it addresses the educational needs identified in that report. On the face of the IEP and evaluation reports in the record, and with the benefit of the testimony of record, I find that the goals are measurable and that the IEP offers specially designed instruction addressing Student's needs, along with program modifications and accommodations reasonably calculated to provide Student with access to appropriate curriculum.

I find two significant flaws in the underpinning of this expert's reports. First, the expert had little interaction with or information from District personnel regarding the

autistic support classroom and the programs that were being offered. Thus, an important factual basis for the expert's opinions about the District's offered program was missing. Second, the addendum was provided some time after the primary psychoeducational evaluation and report, as to which the presenting question had been about guidance for college admission, not the appropriateness of the District's programming. Thus, the addendum is expressed in conclusory terms that are not persuasive, and in the context of litigation, which further reduces the persuasiveness of the opinions.

Parents argued strenuously, (NT 242-247; S-22, 34), that the BASH environment was inappropriate for Student because of the risk of bullying, emphasizing that Student had been victimized years before at a different private school. Parents introduced evidence of a report by a private advocacy organization that found that bullying exists at BASH. Parents also introduced witness testimony that there were reports of bullying at a Board meeting, and that, at least by implication, the Board did not respond adequately to those reports. Further, the Parents offered to prove that a student of the autistic support classroom had committed suicide, and that another student of that classroom had been bullied. I limited some of the evidence to be provided on these offers of proof, because such evidence would have introduced into the record numerous details of events having nothing to do with Student, and that, even if I found all of the offered facts to be true, they would not have constituted preponderant evidence that the Student was reasonably likely to be bullied at BASH to the extent of preventing Student from receiving meaningful educational benefit.

In reviewing these offers of proof in light of the entire record, I adhere to this conclusion. The private advocacy report, (P-32), did not assert any heightened incidence

of bullying at BASH; it found simply that bullying exists at BASH. Even if supplemented by the offered examples of bullying at BASH, this evidence would have established the fact that there is some risk of bullying at BASH; however, nothing in the offers of proof would support an inference, especially in light of the evidence of the District's systemic response to the advocacy organization's report[7], that this risk of bullying at BASH is so great as to make Student's presence there unsafe in light of the protective aspects of the program and placement offered to Student at BASH.

The risk of bullying would have been addressed through protective factors in the transition plan and the IEP itself. The IEP transition and program and placement provided for recourse to counseling, explicit teaching of social pragmatics and language skills, one to one attendance as necessary throughout the day, and a bullying awareness goal based upon explicit teaching. (FF 6, 16, 20, 43, 52, 54.) It also provided for frequent review and revision of the program and placement. (FF 54.) On the whole, therefore, I conclude that the evidence is not preponderant that the risk of bullying was so high as to negate the evidence that the offered program and placement were reasonably calculated to provide Student with meaningful educational benefit.

[7] At the hearing, Parent argued that it was unfair and imbalanced to admit this evidence without allowing Parent to establish the contrary through specific incidents of bullying that were not adequately addressed through District anti-bullying policies and procedures. While I ruled that some evidence could be admitted on both sides, my conclusion as to the viability of Parents' bullying assertion in the FAPE context is not dependent upon the weight of the evidence credibly presented as to the BASH anti-bullying policies and procedures. In my weighing of the evidence, if all of the evidence offered by Parents were to have been admitted and given full weight, it could not have proven that conditions at BASH were so dangerous that Student's IEP was transformed into an offer not reasonably calculated to provide meaningful educational benefit. Thus, my exclusion of some of Parents' offered evidence about incidents that had happened involving other children was based upon the incomplete nature of the inferences that could have been derived from any such evidence about the degree of risk at BASH, as well as considerations of administrative economy for the due process hearing itself. As noted above, I see no reason to reconsider those rulings in light of the entire record.

Parents claim that the May 2010 IEP failed to offer appropriate ESY services to Student. This is factually incorrect. (FF 4, 6.) The claim fails based upon the weight of the evidence.

My evaluation of the evidence of the appropriateness of the District's offer is based upon an additional consideration. Pursuant to court order, the Parents and the District entered into an agreed upon transition plan for the 2010-2011 school year, and began implementing that plan. (FF 20.) However, the parents withdrew from participation in that plan and returned to litigating their claims regarding the June 2009 IEP as revised, by appeal to the Third Circuit Court of Appeals. (FF 21- 27.) Thus, the District was unable to complete parts of the transition plan that were integral to ensuring that the District's services would be individualized to meet Student's current needs. These parts of the plan included assessment of reading and mathematics levels, finalization of a course schedule, and counseling and orientation of Student. In these circumstances, I give reduced weight to Parents' criticisms of the offered program and placement with regard to individualization of instruction in the learning support classroom, addressing current achievement levels, measurability of goals, and the likelihood that Student's transition needs, including anxiety, would not be addressed effectively. In short, my estimation of the Parents' criticisms is that they were premature; the Parents did not give the District a fair chance to address these concerns.

APPROPRIATENESS OF THE EDUCATIONAL PROGRAM AND PLACEMENT OFFERED FOR THE 2011-2012 SCHOOL YEAR

Parents argue that the District failed to offer a FAPE in a timely manner for the 2011-2012 school year. They point to judicial authority interpreting the IDEA to require local education agencies to evaluate and offer program and placement to children with

disabilities regardless of whether such children were enrolled in the agency's schools – that residency triggers the obligation to provide an IEP for every disabled student at the beginning of each school year. 34 C.F.R. §300.323(a). I conclude that this judicial authority is inapplicable to the facts of the present matter. The cited authorities in the Third Circuit stand for the proposition that an education agency must evaluate and offer a FAPE regardless of whether the child is enrolled in a private school, when parents either request or desire such services. See generally, Moorestown Bd. Of Educ. v. S.D., 811 F.Supp. 2d. 1057, 1066-1077 (D. N.J. 2011). These authorities do not address a situation where, as here, the parents have indicated unambiguously that they and the student do not desire the services of the school district where they live. Indeed, the Office of Special Education and Rehabilitative Services (OSERS) has long advised that the district has no obligation to offer a FAPE to a child enrolled in a private school where the parent makes clear his or her intention to keep the child enrolled in the private school. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 76540-01 at 46593 (August 14, 2006). I conclude that, based upon the entire record before me, that the Parents made clear their intention to keep the Student in private school at all times after the second day of the transition plan in the Spring of 2011, when they withdrew from the plan without completing it and stated their intention to seek tuition reimbursement for the tuition of the private school, declining or ignoring multiple subsequent offers to recommence the court ordered process for offering a FAPE through the transition plan. (FF 21-31, 33, 55.) Thus, I conclude that the District had no obligation to offer a FAPE after that date and by the beginning of the 2011-2012 school year. [8]

[8] Parents also argue that the District never offered an ESY program for the summer of 2011. The above

I conclude that Parents have failed to prove by a preponderance of the evidence that the Re-evaluation Report and IEP, offered pursuant to their request in January 2012, were inappropriate. (FF 37-55.) The re-evaluation report took into consideration all of the private evaluations and private evaluators' recommendations for programming, addressed all of the educational needs identified in those reports[9], and incorporated many of the private recommendations for programming. I find that it was updated with all pertinent new information available to the District. It was if anything, more comprehensive and individualized than the previous IEPs, which I have found to have been appropriate.

Parents argue that one of the goals, for reading fluency, posited a grade level of materials that was lower than that posited for fluency teaching in the May 2010 IEP. I conclude that, even if this was an error in the formulation of the goal (a proposition that was not supported by the weight of the evidence), this error would not render the IEP inappropriate, especially because the transition plan upon which it was based provided for updating the IEP one month after new curriculum based assessments should be obtained.

Parents argue that the placement was inappropriate for all of the reasons discussed above. As discussed above, I am not persuaded that this was the case.

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conclusions dispose of this contention.

[9] I am not persuaded that the 2012 re-evaluation somehow failed to address the needs identified in the private reports because the re-evaluation declined to identify Student with a learning disability as described in those reports. In fact, the re-evaluation and subsequent IEP recognized a learning disability in mathematics, and addressed all of the educational needs described in those reports, by incorporating many elements from the previous proposed IEPs and revising the 2012 offered IEP to address new information available to the District. Even if the failure to identify Student with a learning disability in the formal section of the re-evaluation set aside for that purpose could be deemed a deficiency of the re-evaluation, it remains appropriate in substance, as it addresses all educational needs.

Parents argue that the IEP was offered too late in the year (January and February 2012) to allow meaningful educational benefit because Student was set to graduate from the private school and graduation from BASH would not have been guaranteed. I am not persuaded by a preponderance of the evidence that Student would have been precluded from graduating from BASH under such circumstances, although the common sense in Parents' argument cannot be discounted. Even if a transition to BASH would have made no sense in terms of the child's wellbeing at the time at which the 2012 IEP was offered, I conclude that this situation was created by the Parents, not the District. Parents made it clear that they did not want to return Student to the District, and they refused to cooperate with a court ordered plan for transition. The record before me makes it clear beyond cavil that the Parents did not intend to return Student to the District as of the 2012 offer of a FAPE or any time after they withdrew from the transition plan after day two in the Spring of 2011. Under these circumstances, Parents bear full responsibility for the circumstances of the 2012 offer and the impracticality of returning Student to the District as of the date of that offer. These circumstances prevented the District from offering a FAPE earlier and do not prove a failure to offer a FAPE.

TRASPORTATION

The evidence does not show by a preponderance that the District failed to provide any transportation due to Student during pendency. (FF 32.) Parents offered vague testimony as to some days on which Parents might have transported Student to HTPS during pendency, but this was not corroborated by any contemporary documentation. I conclude that this is not preponderant evidence of any reimbursement due and I deny this claim.

PRIVATE EVALUATIONS

Parents claim reimbursement for the cost of the private evaluations provided to the District in 2011 and 2012, as well as the cost of the expert testimony introduced in the hearing. I deny these claims. (FF 34-40, 59.) Although the reports themselves differ marginally from the prevailing re-evaluation reports at the time of the private reports, the substance of the private reports does little more than confirm the findings and recommendations of the District reports, with the exception of placement. Although the District took these reports into account and used some of the recommendations, these reports did not uncover any deficiencies in the re-evaluation reports of the District or its IEPs, as discussed above. Moreover, the reports were provided partially as addenda to previous reports, criticizing District programming, and I find, based upon a preponderance of the evidence, that they were provided in anticipation of litigation and for purposes of litigation. Under these circumstances, I find it inequitable to reimburse for these reports, and I decline to do so.[10]

Likewise, I decline to order reimbursement for the Parents' expert testimony. I have not accepted the ultimate conclusions expressed in that testimony, and it has not led to any relief. Thus, I find it similarly inequitable to order the District to pay for it, especially given the Parents' lack of cooperation with a court ordered transition plan that led to the use of these experts in due process.

For the same reasons, I reject Parents' claim for reimbursement based upon Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Nothing in the different

[10] There is some argument in summations as to whether or not the Parents were disagreeing with District re-evaluations when seeking the private reports. The evidence does not support this assertion. Rather, the only disagreement expressed to the District specifically challenging the re-evaluation reports was conveyed by Parents' counsel at about the time that due process went forward.

substantive standards under section 504 contradicts my conclusions with regard to the equities inherent in this claim and its factual underpinning.

APPROPRIATENESS OF THE DISTRICT'S FEBRUARY 7, 2012 RE-EVALUATION REPORT

Parents did not offer much evidence addressing this issue. There was little testimony or documentation addressing whether or not the District violated the IDEA's numerous procedural requirements for evaluations and re-evaluations. 20 U.S.C. §1414. The gravamen of Parents' complaint in this regard was that the District's evaluation was somehow inconsistent with the private psychoeducational report; however, on their face both the private and agency reports are substantially in agreement concerning Student's educational needs. (FF 34-37.) Thus, there is not preponderant evidence that the District's re-evaluation was inappropriate. This claim is denied.

CONCLUSION

I conclude that the District's 2012 re-evaluation was not inappropriate, that the District offered FAPE for both years at issue here, and that the Parents are not entitled to reimbursement for either transportation expenses or private expert reports. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District's February 2012 Re-evaluation Report was appropriate under the IDEA.

2. The District offered Student a FAPE in a timely manner for the 2010-2011 and 2011-2012 school years.

3. The hearing officer will not order the District to reimburse Parents for the cost of HTPS tuition and transportation of the Student to HTPS for any part of the 2010-2011 and 2011-2012 school years.

4. The hearing officer will not order the District to reimburse Parents for the cost of summer educational programming for Student for the summer of 2010 or for the summer of 2011.

5. The hearing officer will not order the District to reimburse Parents for the cost of a private evaluation submitted to the District and for the cost of expert testimony in this proceeding by the author of that report.

William F. Culleton, Jr. Esq.

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

July 23, 2012