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: J.H.

Date of Birth: [redacted]

ODR No. 2975-11-12-KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Ann Martin, Esquire Gibbel, Kraybill & Hess, LLP 41 East Orange Street Lancaster, PA 17602
Cornwall-Lebanon School District 105 East Evergreen Road Lebanon, PA 17042-7595	Mark W. Walz, Esquire Sweet, Stevens, Katz & Williams 331 East Butler Avenue New Britain, PA 18601
Dates of Hearing:	May 16, 2012; July 17, 2012; July 20, 2012; August 22, 2012
Record Closed:	September 6, 2012
Date of Decision:	September 15, 2012
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

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), pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Student presently receives instruction in the home, and previously attended a District elementary school. (NT 8-10.)

The Student's Parents, identified in the title page of this decision, requested due process under the IDEA, alleging that the District provided an inappropriate placement and program, not in the least restrictive environment, failed to timely evaluate after Parents' request, and retaliated against the Parents for their advocacy on behalf of Student, in violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). The District asserts that it has provided appropriate services and complied with the procedural requirements of the IDEA. It denies engaging in retaliation prohibited by section 504.

The hearing was completed in four sessions. I conclude that the District failed to provide Student with a FAPE in the least restrictive environment, in violation of the IDEA. I deny all other claims and order appropriate relief.

ISSUES

1. From January 17, 2012 to August 22, 2012[1], did the District offer and provide to Student an appropriate placement in the least restrictive environment?
2. Did the District deprive Student of a free appropriate public education (FAPE) by failing to evaluate Student within the time required by law subsequent to Parents' request?

[1] Student began a new placement, instruction in the home, on this date. One of the issues in this matter is the propriety of this placement; thus, I will decide the appropriateness of this placement from the date of its inception on January 17, 2012. I also fixed August 22, 2012 as the end of the period for which I would render any decision, (NT 40-42); August 22 was the last day of hearings in this matter, (NT 1102).

3. Did the District fail to provide a FAPE to Student by reassigning the one to one educational aide identified and requested by Parents?

4. Did the District discriminate against Student or Parents contrary to section 504 by retaliating against them by reassigning the one to one educational aide identified and requested by Parents?

5. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period April 1, 2012 to August 22, 2012[2]?

6. Should the hearing officer order the District to provide a comprehensive educational re-evaluation, including a functional behavioral assessment, by an independent, qualified behavior expert mutually agreeable to the parties; plan a program of special education services for Student in consultation with the independent expert; provide a positive behavior support plan; provide the Parents' identified and requested one to one educational aide to accompany Student in any placement provided prospectively; and train its assigned staff to implement the educational program in the neighborhood school?

FINDINGS OF FACT

1. Student is diagnosed with a congenital brain disorder that may have resulted in seizures, with obsessive compulsive disorder and with autism. Student has a history of being medicated for attention and seizures; Student's physicians have tried a variety of medications over the years to address these medical needs, with little success. (S-2, 9, 14, P-6 p. 27, 95.)

2. Student is identified with Other Health Impairment due to Student's brain disorder, and with secondary identifications of autism and Speech or Language Impairment. (S-2.)

3. Student has exhibited a pattern of [redacted] requiring emergency medical care followed by increases in compulsive behaviors, in a pattern suggesting that the compulsive behaviors were caused by repeated or recurring [redacted]. (S-13, P-6 p. 66.)

4. Student has consistently tested with low scores in cognitive functioning, performing well below age expectations; however, these scores are of limited value because Student's behaviors and very low functional communication skills interfered with both standard conditions and overall performance on the tests. (S-1 to 3.)

[2] Originally, Parents sought compensatory education from January 17, 2012, the first day of instruction in the home, to August 22, 2012, the last day of hearings. (NT 1328.) During the course of these proceedings, Parents reduced their request for compensatory relief due to believed settlement of issues, seeking compensatory education only for the period April 1, 2012 to August 22, 2012. (NT 385-386, 1328-1331.) In a subsequent ruling, I declined to re-introduce the withdrawn period of time into this proceeding, but indicated that Parents are free to seek another due process hearing with regard to such period of time. Ibid.

5. In June 2011, Student exhibited clinically significant behavior problems with atypicality, withdrawal, social skills and functional communication, consistent with the pattern of difficulties seen in individuals with autism. (S-5.)

6. Student's adaptive functioning was in the extremely low range as reported in a June 2011 neuropsychological report. However, Student's overall functioning has improved substantially since February 2012. (S-3.)

7. Student enrolled in the District in 2008 for kindergarten, and remains enrolled in the District until the present time. (S-2.)

8. In November 2010, Student did not exhibit behaviors that impeded Student's learning or that of others. Data showed that a Positive Behavior Support Plan (PBSP), then in place, was no longer needed. (S-1, 2.)

9. In November 2010, Student was enrolled in the neighborhood school and placed in supplemental autistic support, receiving reading and mathematics instruction in a learning support classroom. All other academic instruction was provided to Student in regular education classes with supports including, a one to one educational aide, testing accommodations and itinerant autistic support. Student was included in regular education for about seventy-six percent of Student's school day. The District provided Student with related services including Occupational Therapy and Speech and Language therapy, which included direct instruction on speech pragmatics. (S-1.)

10. Prior to March 2011, Student learned best with one to one direct instruction, with service delivery through both autistic support and learning support. (S-2.)

11. In November 2010, Student was able to access grade level curriculum and show progress in demonstrating reading, writing and mathematics skills, with skills varying from a basic or below basic level to a proficient level, with accommodations, modifications and supports. Student did not make academic progress from March 2011 through January 2012. (S-1, 2, 3, 8, 11.)

12. In the second half of Student's second grade year (2010-2011), Student began to exhibit compulsive behaviors that began to interfere with Student's ability to learn in March 2011. The District's May 2011 re-evaluation report recognized that controlling Student's compulsive behaviors was an educational need. The behaviors became so severe that the Student needed intensive behavioral intervention. (S-2, 5, P-6 p. 22, 95, 108.)

13. Student's compulsive behaviors were accompanied by extreme emotional outbursts when these behaviors were blocked. This is a common effect of blocking the fulfillment of a compulsive behavior, sometimes called an extinction burst. (S-5, 14.)

14. The May 2011 re-evaluation report recognized that Student's compulsive behaviors were related to Student's neurological condition and possibly to medications. (S-2.)

15. District staff and Mother conducted a Functional Behavioral Assessment (FBA) in April 2011. They reinstituted the Student's PBSP, which was based upon a reward system for

shaping behavior. In addition, staff attempted to reduce the behaviors by focusing on one at a time, teacher using a "mean face" in response to compulsive behaviors, ignoring, praising Student for not engaging in compulsive behaviors, attempting to teach substitution of sensory regulation activities and a technique utilizing three warnings called "one, two three magic". (S-2, 3.)

16. District staff also sought help from behavior specialists and from Student's physicians for medical management through Mother's interventions. (S-2.)

17. The most effective method of treating compulsive behavior is exposure with response prevention, in which a desired compulsive behavior is blocked after exposure to the stimulus. (S-5, P-9 p. 1-3, 4, 10.)

18. The family successfully employed exposure and response prevention at home to reduce Student's compulsive behaviors. (S-9.)

19. A private neurological evaluation in June 2011, provided to the District, recommended intensive behavioral intervention to deal with Student's compulsive behaviors, speech and language therapy three times per week, avoidance of curriculum that is too advanced for Student's capabilities, small group instruction that could be provided in a learning support classroom, one to one support, consistent routines with limited transition, individualized, direct, multisensory concrete instructional techniques, breaks and physical activity. (S-5.)

20. In June 2011, after [redacted], Student developed a new form of compulsive behavior [redacted]. Student's treatment team recommended ignoring this behavior with reassurance rather than exposure and response prevention. (S-13, P-6 p. 55, 61, 66, P-9 p. 28.)

21. In September 2011, the District offered an IEP that placed Student in full time dual learning and autistic support, with inclusion in general education for less than 20% of the school day. Student was to receive instruction in a learning support classroom at Student's neighborhood school for about eighty percent of the day. This was agreed upon as a temporary measure until Student's medical issues could be resolved. (S-3, 6, P-6 p. 70.)

22. In October 2011, a private consultant behavior specialist provided the District with a report that emphasized the critical need to get Student's compulsive behaviors under control, and the need to employ a consistent program of exposure and response prevention, labeled "blocking and exposure" in the report. The report recommended continuation of Student in general education with transitions back and forth from the special education classroom. (S-7, P-3.)

23. District personnel began internally to discuss planning for a move to the IU autistic support program as early as April 2011. By November 2011, due in part to insufficient staffing, District staff had concluded that it was not possible to modify Student's compulsive behaviors because Student's reaction to attempts to control such behaviors included escalating screaming and aggressive behaviors that were considered unsafe for

Student, staff and peers. Educational progress was so limited that staff considered the current placement to be a "band aid" whose only daily goal was to get through the day keeping Student calm and quiet. In December, a plan was put in place to move Student to the IU autistic support program. (NT 646-650; S-3 p. 13, S-9, 14, P-6 p. 25, 77, 89-91, 112.)

24. The special education teacher repeatedly reminded administrators that she was concerned about upcoming maternity leave, and repeatedly impressed on the Director of Elementary Education that she was afraid for her safety in dealing with Student's tantrums and aggression after preventing compulsive behaviors. (NT 1198-1206; P-6 p. 91, P-7 p. 6, 10.)

25. In December 2011, District personnel formulated a plan for dealing with Student's compulsive behaviors. The plan included blocking Student's compulsive behaviors on occasions when permitted in light of situational variables and teacher judgment. It also permitted removing Student to an area for sensory activities when Student's reaction to blocking should exhibit increased anxiety, and allowing compulsive behaviors related to [redacted]. The plan also allowed a "time limit strategy" when dictated by the "situation in the classroom" or "after an extended period of anxiety". This strategy allowed Student to perform compulsive behaviors without interruption for a predetermined period of time. The plan also called for calling the Parents if the other strategies did not work, so that they could come and assist in reducing Student's anxiety. It also called for operational definitions of the data being collected. (S-7, P-6 p. 126.)

26. The overall effect of the District's approach and interventions was to reinforce the obsessive behaviors and thus strengthen both those behaviors and the extinction burst that is likely to result when such behavior is blocked. (NT 986-987; S-14, P-4 p. 139, 143, 145, 147-148, 159, 173, P-6 p. 22, 79, 81-2, 86, P-9 p. 17-18.)

27. On December 1, 2011, the District's Director of Elementary Education observed Student during a one to one instruction session with the learning support teacher. The Director was not familiar with Student or Student's behaviors and had no training in dealing with compulsive behaviors. In order to see Student's reaction to blocking of a compulsive behavior, the Director instructed the teacher to block one of Student's compulsive behaviors, and this led to a behavioral outburst by Student that lasted about fifty minutes. During this time, the Director briefly held Student in order to take a pencil out of Student's hands for safety purposes. (S-8, P-4 p. 147.)

28. Parents protested the Director's actions in a series of meetings after the incident. The Director suggested that Parents consider a different placement for Student to be located at a different school; Parents did not agree. The Director moved the Student's classroom to a larger room in the building. (S-8.)

29. The teacher was scheduled to take maternity leave in January. The Director hired a temporary replacement teacher on an accelerated basis to enable the outgoing teacher to train the new one and allow the Student to become familiar with the new temporary teacher before the original teacher left on maternity leave. (S-8.)

30. The District revised the IEP in December 2011 to provide a modified PBSP, additional specially designed instruction (SDI) and increase the amount of speech/language therapist services provided by thirty minutes per week. Revised SDI included charting compulsive behaviors, monitoring academic progress, review of records of outside agencies, assessment by IU specialists, a reference to teacher discretion in addressing Student's compulsive behaviors in the classroom, an Independent Educational Evaluation (IEE), use of an iPad, and restrictions on use of restraints. (S-10.)

31. Parents did not approve the Notice of Recommended Educational Placement (NOREP) recommending the steps set forth in the December 2011 revised IEP. Instead Parents requested a meeting to discuss the NOREP. (S-10.)

32. In December, the District began to implement the PBSP by selectively blocking Student's compulsive behaviors. (S-10, P-4 p. 164, P-6 p. 137, P-9 p. 31.)

33. At the same time, in mid December, Student began to show symptoms of [redacted] and received physician's intervention for [redacted]. Student's compulsive behaviors started to increase about this time. Student was hospitalized [redacted] in early January, 2012. (P-4 p. 166, 179-185, P-5 p. 21, P-6 p. 131-132, 138-40, 152-166, P-9 p. 30.)

34. Parents and District personnel inquired into or visited two private schools for children with autism and the IU autism classroom operated in another District elementary school. The private schools did not accept Student and the IU classroom teacher questioned the appropriateness of placement in that program because the level of functioning of the students there was apparently lower than that of Student. The IU classroom would have provided slightly more staffing per student than the neighborhood school's learning support classroom. (NT 558, 743, 1026-1027, 1264; S-10.)

35. On January 9, 2012, the District met with Parents and offered a plan to place Student temporarily in instruction in the home, contract for an evaluation and plan by a BCBA from the IU, and thereafter return Student to the neighborhood school with the new plan in place. At the meeting, the selected consultant expressed concerns about the ability of the neighborhood school staff to carry out a program of exposure and response prevention with integrity. (S-12.)

36. On January 12, 2012, the Parents agreed to a change in placement from the neighborhood elementary school to instruction in the home. Parents understood that this placement would be temporary until the District could receive a consultant's report detailing the appropriate placement and a plan to deal with student's compulsive behaviors within that placement. The consultant's report was not received when expected, and the instruction in the home placement was extended while the parties waited for the consultant's report. (S-11, P-5 p. 20-24, P-6 p. 193, P-9 p. 30.)

37. On February 17, 2012, the consultant psychologist retained by the District issued a report with recommendations for dealing with Student's behaviors. (S-14.)

38. The consultant criticized the District's data collection for failing to define the behaviors being counted with rigor, and for inconsistent record keeping. Recording in 2011 and

2012 was variable; recording forms and behaviors to be counted were changed several times from December 2011, when data collection began, until the summer of 2012. In some periods, duration and intensity of behaviors was not counted. Staff did not utilize the given behavior definitions with fidelity. (NT 347-365, 818-835, 1008-1011; S-14, 18, 26, P-4.)

39. The report recommended that inclusion be the goal of planning for Student, and found that Student can learn in an inclusive environment, benefitting from academic challenge and social skills building, as well as from the modeling of appropriate behavior by typical peers. The report also suggested an interim placement to give the neighborhood school's personnel time to develop a plan and be trained to implement it with fidelity. The report recommended engaging the private consultant behavior specialist, initially referred to the District by Parents, who provided the October 2011 report. (NT 488-90, 745-747, 751-752; S-14, 21, P-3, 5 p. 23, P-6 p. 197.)

40. A psychologist from the local behavioral services program issued a report on February 27, 2012, recommending that the District plan and implement a six month program of exposure and response prevention, supported by a behavior specialist and Therapeutic Staff Support (TSS) in the classroom for thirty hours per week. The psychologist also recommended an evaluation in a multi-disciplinary setting specializing in autism. (S-9.)

41. At a meeting on February 20, 2012, the District sought to revise the IEP then in effect and offer a placement of autistic support in the IU program in another school; Parents sought to discuss other options for less restrictive programming and the District personnel declined to discuss other options. A return to the neighborhood school was not discussed as an option. (P-5 p. 22, P-10 p. 67-68, 177-178.)

42. Parent visited the IU program in March 2012, and felt that it was not appropriate for Student, because the students in that setting were at a lower level of functioning. The Supervisor of Pupil Services for the District, a psychologist by profession, felt that the program was appropriate. (NT 152-153, 345-347, 620-622, 1217-1218; P-6 p. 209.)

43. A new medication regime, begun in February 2012, appears to be effective in reducing Student's compulsive behaviors. (S-14, P-5 p. 22, P-6 p. 192, P-9 p. 32-33.)

44. On April 10, 2012, through counsel, Parents requested re-evaluation of the Student prior to discussing a new IEP for the subsequent school year. The pending IEP was scheduled to expire in May 2012. The District declined to re-evaluate. (S-17.)

45. In April 2012, the District attempted to schedule an IEP meeting with Parents before the one year anniversary of the IEP then in effect. By letter of counsel dated April 10, 2012, the Parents requested a re-evaluation of Student prior to drafting any new IEP. The District declined to re-evaluate and assured Parents that all new private evaluations and behavior data would be considered in formulating a new draft IEP. After negotiations between counsel, the District agreed on April 27, 2012 to re-evaluate and Parents agreed to attend an IEP meeting before the expiration of the IEP then in effect. (S-17, 20, 23, P-6 p. 218.)

46. On May 2, 2012, the District offered an IEP and NOREP that would place Student in full time autistic support to be delivered through the IU autism support program in a different school within the District. The District's plan included consultation by the private consultant behavior specialist suggested by Parents and recommended in the IU consultant's report, for a period of six months, related services including speech and language therapy and occupational therapy, and a PBSP that included a plan to address Student's compulsions that included blocking Student's compulsive behaviors. The plan would be re-evaluated after two months and thereafter in two month increments. (S-24, P-10 p. 178.)

47. Under the District's proposed IEP and NOREP, the Student would be included with regular education students for specials, recess and lunch; this was approximately the same degree of inclusion that Student was eligible to receive under the IEP in effect when Student left the neighborhood school. (S-10, 24.)

48. The offered IEP indicated that Student could not continue in the previous placement of full time autistic and learning support, delivered through a learning support classroom and an itinerant autistic support teacher at the neighborhood school, because the staff at that location could not control Student's behavior. Options for behavior control other than the learning support classroom, itinerant autistic support teacher, consultative autistic support through a District facilitator, and one to one educational aide, were not noted. The IEP stated that the only setting and placement capable of providing for Student's needs was that offered in the IEP. (S-24.)

49. The IEP stated that Student's behaviors and anticipated "extinction burst" behaviors did and would impact peers negatively. (NT 98, 123, 128, 130; S-24.)

50. Under the District's proposed IEP and NOREP, a one to one educational aide would be provided to Student during the entire school day; however, the aide who had worked with Student for years would be ineligible to continue serving Student because the autism support classroom is staffed by the IU, not the District. (NT 1027-1030; S-24.)

51. The District's proposed IEP offered nine hours per week of ABA instruction. (S-24.)

52. The District's proposed IEP offered to re-evaluate Student after two months at the IU program for purposes of planning transition back to the neighborhood school. (S-24.)

53. Parents declined to accept the NOREP on grounds that the District had not completed a re-evaluation which Parents contended was necessary to produce an appropriate IEP. (S-24.)

54. Student received Extended School Year (ESY) services in the summer of 2012. (P-9(b).)

55. Most recent data suggest that Student's behaviors have improved while in the placement of instruction in the home. (S-25, P-9(b).)

56. Student went on a class trip with peers from Student's neighborhood school, accompanied by Mother, without behavioral incident. (P-9(b).)

57. Student has developed separation anxiety when separated from Mother. (P-9(b).)

58. In the summer of 2012, Parents consulted [a physician regarding] the syndrome thought to be the cause of at least some of Student's compulsive behaviors, and Student is receiving medical treatment [redacted]. (P-9(b).)

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 (which in this matter is the hearing officer).[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 other party failed to fulfill its legal obligations as alleged in the due process complaint. 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.

[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.

[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.

In this matter, the Parents requested due process and the burden of proof is allocated to the Parents. The Parents bear the burden of persuasion that the District failed to comply with its obligations under the IDEA and section 504. If the Parents fail to produce a preponderance of evidence in support of their claims, or if the evidence is in "equipoise", then the Parents cannot prevail.

LEAST RESTRICTIVE ENVIRONMENT

Parents challenge the District's offer of a placement in full time autistic support through an IU autism program located in a different school, asserting that this offer fails to provide a FAPE in the least restrictive environment as required by the IDEA. I find that the offer was inappropriate at the time it was made, and remains inappropriate at this time.

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). This mandate is to be implemented consistent with the IDEA's mandate that educational services be tailored to meet the unique educational needs of the child. Oberti, 995 F.2d above at 1214.

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 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. 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 regular curriculum… ." 14 Pa. Code §14.102(a)(ii).

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.

I conclude that the District did give serious consideration to whether or not the Student could be educated in general education classes entirely, and reasonably concluded that this would not be feasible. (FF 1-16, 21.) Even before Student's compulsive behaviors became disruptive to Student's learning, Student needed specially designed instruction in a separate learning support classroom, due to Student's low rate of achievement in reading, mathematics and writing. When Student's compulsive behaviors became prominent in the spring of 2011, Student needed even more support and by November 2011, Student could not be satisfactorily placed in general education academic classes at all.

However, I conclude that the District did not apply the second part of the Oberti analysis appropriately. In that part of the analysis, I 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. This requires consideration of the feasibility of providing supplemental supports and services to educate the child in the least restrictive environment, and as discussed above, it requires consideration of educating the child in the school in which the child would otherwise have attended if nondisabled. On the record in this matter, I conclude that the District failed to provide education in the neighborhood school or in the general education setting to the extent feasible.

In September 2011, in response to the increase in behaviors observed in the spring of 2011, the District provided an individualized behavior management plan to address Student's

compulsive behaviors; however, the plan did not address these behaviors appropriately. (FF 21.) The plan was not based upon the recommendations of the private medical reports[5] to engage in a program of exposure and response prevention; rather, District made only fitful attempts to block some behaviors at teacher discretion, and only when the teacher deemed the circumstances favorable to prevention of the compulsive behaviors. Record keeping did not even commence until December 2011, and it was characterized by inappropriate definitions of the behavior to be counted, and inconsistent counting of the behaviors. (FF 25, 38.) The net effect of the District's response to the increased behaviors, from March 2011 until Student was placed on instruction in the home in January 2012, was to reinforce the very behaviors that the District was trying to eliminate. (FF 26.)

When the District finally realized that its approach was not working, it simply decided to remove Student from its school and send Student to a more restrictive environment.[6] It did not first consult with a medical professional and attempt to devise an appropriate plan of exposure and response prevention at the neighborhood school; rather, it moved forward on removing

[5] I give greater weight to these medical recommendations than I accord to the judgments of the educators with regard only to the appropriateness of exposure and response prevention for this Student's compulsive behaviors. Ordinarily, I take the opposite approach when medical and educational opinions differ; however, here, Student's behaviors were symptoms of a medical condition, not simply habits or willful resistance that is ordinarily addressed within the scope of educational expertise. The medical opinions' weight is enhanced on this record because the recommendations were unanimous from a variety of medical and educational evaluators and consultants.

[6] The District argues that there is no difference in restrictiveness between full time learning and autistic support in the learning support classroom in the neighborhood school, and full time autistic support in the IU program. The record is preponderant to the contrary. The IU program was in a separate school, contrary to the IDEA's principle that the student should be educated in the school he or she would have attended if nondisabled, 34 C.F.R. §300.116(c). (FF 34.) The program was administered by an agency other than the District, so that even the identity of the one to one educational aide would be taken out of the District's hands. (FF 50.) The evidence showed that the students in the IU autistic support classroom were lower functioning than Student; only one of the students assigned to that classroom was able to be included with typical peers. Even the teacher at that classroom questioned the appropriateness of the placement for Student. (FF 34, 42.) Once enrolled in the IU program, the record is preponderant that the Student would have been constrained to remain for a lengthy period while the program staff familiarized themselves with Student. All staff and peers would have been new to Student. Thus, sending Student to the IU would have been an increase in restrictiveness - and in the isolation from social relationships that the term implies, especially for a student who had established social relationships at the neighborhood school over the course of several years of participation there. (FF 42, 46.) The IDEA raises these factors to the level of a presumption in favor of keeping Student at the neighborhood school. Oberti, 995 F.2d at 1224 n. 31.

Student to the IU program or to a private program on a schedule that the evidence shows was heavily influenced by the fact that the assigned special education teacher was leaving on maternity leave. (FF 23-25, 28, 34.)

I find that the District's administrators and staff focused on removing Student from the neighborhood school as early as October 2011. (FF 23.) Its subsequent brief attempts at blocking Student's compulsive behaviors were not based upon appropriate practices, were not attempted consistently or for an adequate amount of time, and did not include an attempt to bring adequate resources to bear upon the behavioral issues at the neighborhood school. (FF 25-28.)

When the Parents refused to agree to the IU program, the District offered the more restrictive placement of instruction in the home as the only alternative. (FF 36.) This placement was more restrictive than the full time autistic support placement discussed above. It made no provision for social activities with Student's peers or non-academic activities with typical peers. Thus, even the specials, lunch[7] and recess offered in the IU program were not available. It goes without saying that the total hours of instruction were far fewer than would be offered in a third grade school day. Thus, I conclude that the placement of instruction in the home was inappropriate as well, and failed to meet the second part of the Oberti analysis.

I have carefully considered the practical situation that the District was in at the time of the offer. Student's compulsive behaviors and their putative cause were indeed unique. They arose unexpectedly – although the District was on notice as of March 2011 that it would need to deal with these behaviors in September 2011, as they were disrupting Student's learning at that time. (FF 23.) The behaviors worsened in the fall. (FF 13, 20, 26, 33.) Any attempt to redirect

[7] There is some reference in the record to the Student participating with neighborhood school peers in lunch; however, I give this little weight, because the evidence does not establish a regular and explicit program of inclusion in lunch on every school day.

Student risked tantrums and sometimes aggressive behavior that would disrupt the education of Student's peers. Ibid.

In these difficult circumstances, it might be argued that the District's decisions were not unreasonable. However, such a view would assume that removing Student to an autistic support classroom somehow would have enabled educators to deal more effectively with Student's behaviors. The record does not support this view. The evidence is preponderant that the IU's autistic support classroom would have had only slightly more staffing than the neighborhood school's learning support classroom. (FF 40, 41.) While it would have had slightly more staff per student, tantrums and aggression by Student would have disrupted the rest of the students in that room to the same extent as it would have done in the neighborhood school[8]. Since the placement was full time in each setting, the potential for disruption of the general education environment would have been no less in the IU setting.

The record as a whole shows preponderantly that the training needed by staff was training in exposure and response prevention as applied to Student. While ABA training was recommended by one consultant[9], all consultants recommended addressing Student's compulsive behaviors by preventing them across all environments. (FF 12-17.) The chief and most acute obstacle to learning was Student's behaviors; the fact that the neighborhood school's learning support program did not employ ABA instructional methodology was not fatal to their ability to

[8] Considerations of safety would have been approximately the same in either setting; although slightly increased staffing at the IU program would have arguably attenuated any safety concerns, there is insufficient evidence of record showing that this would have been the case.

[9] The District suggests that ABA training was the primary recommendation of the District-selected consultant. On the contrary, the consultant named inclusion as his "overriding" concern. (NT 490-492; S-14 p. 10.) The consultant found that there was nothing in the neighborhood school's learning support classroom that would render it an inappropriate placement. (NT 492.) Thus, it is clear that the consultant condoned giving the learning support staff the training they needed in ABA principles to implement an educational plan for Student with integrity. (NT 559.) The consultant did not recommend against placement in the neighborhood school because the IU program staff were ABA trained. (NT 552.)

resolve this problem[10]. Thus, the ABA trained staff in the IU program would have needed to be trained for exposure and response prevention, just as the neighborhood school staff would have needed to be trained in the same techniques. Indeed, the District has hired an outside consultant BCBA to oversee Student's behavioral program. (NT 1018-1020.) On the record as a whole, I conclude that the ABA training of the IU staff did not militate in favor of placement with them.[11]

There was evidence that the ABA classroom could have been more beneficial to Student, even with regard to reducing behaviors, because it incorporated center based one to one instruction. However, the IEP proposing this placement promised ABA instruction for only nine hours per week; the record did not show that the IU program's ABA orientation would provide similar benefit during the non-ABA remainder of the school day. (NT 971.)[12]

Any differences between these two settings that could have impacted on Student's behaviors could have been remedied by increasing the staffing and expertise of staff in the learning support program.[13] To the extent that greater staffing was a benefit, there is no reason

[10] The consultant referred to the District by Parents also recommended a form of exposure and response prevention to deal with Student's compulsive behaviors. (FF 22.) This consultant professes a non-ABA methodology called Relationship Development Intervention (RID). While this approach differs from ABA, it incorporates many of the same principles. The District's selected consultant did not reject it as an alternative to the preferred ABA approach, and the District ultimately agreed to utilize the RID consultant's services to design an exposure and response prevention program for Student. Thus, the record does not support the District's suggestion that ABA methodology is the overriding criterion for Student's placement.

[11] The evidence shows that the non-ABA method of teaching employed up until the behaviors began to be disruptive had enabled Student to make reasonable educational progress. While it might be argued that ABA training somehow enhanced the IU staff's ability to implement an exposure and response prevention program for Student, there was not preponderant evidence to this effect. In fact, there was evidence that the substitute teacher (who replaced the special education teacher during the latter's maternity leave) had training and experience in ABA methodologies; thus, the IU was not the only source of ABA trained staff for Student. (NT 1055-1056, 1090.)

[12] The record did show that the IU program's autism support staff had experience with addressing compulsive behaviors because children with autism do display such behaviors. However, there was no detail to or corroboration of this hearsay evidence introduced through the Supervisor of Pupil Services. Indeed, the Director's testimony on the whole provided little detail on the question of the appropriateness of the IU program as a placement; it was contradicted by eyewitnesses. Therefore I accord the Director's opinion on this point reduced weight.

[13] The District cites cases supporting the validity of considering cost in determining whether or not the IDEA requires modifications of the neighborhood school's programming as opposed to transfer to a non-neighborhood school. See, e.g., Cheltenham Sch. Dist. v. Joel P., 949 F. Supp. 346, 352 (E.D. Pa. 1996) *aff'd,* 135 F.3d 763 (3d Cir. 1997). However, in that case and in many of the cases cited therein, the choice was not between transfer and the addition of supplementary aids and services with re-configured teaching methods, as in the present matter. In

why the District could not have provided it. To the extent that center based instruction would have helped staff to keep Student focused, it could have been performed in the learning support classroom with sufficient staffing. To the extent that training was needed, it could have been provided to learning support staff as easily as to autistic support staff. (NT 536-540.) I conclude that moving Student to another program did not automatically address the primary need of Student for control of compulsive behaviors, and that the record does not show that the IU program was better suited for that purpose.

Under the District's plan for temporary placement at the IU program, there is no basis to assume that any reduction of the Student's compulsive behaviors would have transferred to the neighborhood school, where such behaviors had been reinforced over a period of years. The record does not support such an assumption and does show that the neighborhood school staff would have to be trained intensively even under the District's plan; thus the effect of placing Student in the IU program would not be to reduce the need for training neighborhood school staff; however, the effect would be to delay the confrontation of the larger problem – addressing Student's compulsive behaviors in the neighborhood school – for months. (NT 986-982.) The Supervisor of Pupil Services pointed to no data indicating that the temporary IU placement would reduce the likelihood or intensity of compulsive behaviors upon Student's return to the neighborhood school.

The documented communications in this record support my conclusion that District personnel who decided to move the Student did not appropriately consider alternatives to that move. (FF 12-32.) As early as April 2011, administrators were encouraging the special education teacher to address with Parents the "elephant in the room" – namely, a change of

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those cases, whole new classrooms and programs were needed. The record in this matter shows preponderantly that the Student's needs did not require such drastic changes or such a level of expenditure, and I conclude that this line of cases does not govern the present matter.

placement. In the fall of 2011, the neighborhood school principal forbade further attempts to prevent compulsive behavior until consultation could be had with an expert. By October 21, 2011, the neighborhood school's principal was encouraging exploration of the IU program. The special education teacher repeatedly reminded administrators that she was concerned about upcoming maternity leave, and repeatedly impressed on the Director of Elementary Education that she was afraid for her safety in dealing with Student's tantrums and aggression after preventing compulsive behaviors. In December, the District Director of Elementary Education put in motion a long term plan whose purpose, by a preponderance of the evidence, was predetermined: to move Student to the IU program. (FF 25.)

In sum, I conclude that the District did not appropriately consider how to address Student's compulsive behavior in the neighborhood learning support setting. It did not seek appropriate advice before determining that Student should be moved to the IU setting. Its faltering attempts at blocking Student's behavior in that setting were not planned appropriately and did not account for the extinction burst that was to be expected. Its conclusion that the IU setting would somehow enhance its ability to address Student's behaviors is not borne out by the record. Therefore, its offered placement was not an offer of a FAPE in the least restrictive setting feasible.

FAILURE TO RE-EVALUATE UPON PARENTS' REQUEST

The IDEA requires that local education agencies re-evaluate their students upon parental request, 34 C.F.R. §300.303(a)(2), except that agencies are not required to evaluate more than once per year, 34 C.F.R. §300.303(b)(1). Parents argue that the District violated this requirement by refusing to evaluate Student upon Parents' request on April 10, 2012. The District's previous re-evaluation had been provided to Parents on May 6, 2011, less than one year prior to the Parental

request in 2012. Thus, at the point of Parents' initial request for re-evaluation, the District was under no obligation to re-evaluate. Parents' re-iteration of their request on April 24 by email did not create any IDEA obligation in the District. On April 27, 2012, the District relented and agreed to re-evaluate, even though it was not at that time obligated by law to do so. Parents signed a consent to re-evaluate on May 3, 2012. (FF 45.)

During the period of this dispute, Parents declined to attend an IEP meeting that the District proposed to discuss future planning for Student. (P-6 p. 218-219.) I conclude that the above described events do not constitute a procedural violation of the IDEA; moreover, in light of Parents' decision not to attend an IEP meeting until the issue of re-evaluation was resolved, I conclude that the above events do not constitute a denial of a FAPE. Any delay in Student's receipt of services was incurred despite the District's efforts to offer them and because Parents chose to delay their participation. Any impediment to Parents' participation in educational planning was for less than a month and cannot be characterized as a substantial impediment.

Parents argue that the District has not yet fulfilled its April promise to re-evaluate Student. They point out that this is important because numerous private reports have yet to be considered in a written report and Student's improvement while in the home-based ESY program must also be considered. While I agree with these assertions, I cannot attribute a denial of a FAPE to any procedural default; the IDEA allows a district 60 days from signing of the permission to evaluate for completion of a re-evaluation, not including summer break time, and that time has not expired. 34 C.F.R. §300.301(c)(1); 22 Pa. Code §14.124(b).

REASSIGNMENT OF THE AIDE

Parents assert that the District denied Student a FAPE, discriminated against Student and Parents, and retaliated against Student and Parents, by indicating that the one to one educational aide would not be able to serve Student upon Student's putative transfer to the IU program under its latest IEP offers. I conclude that the evidence does not prove these claims.

As to a denial of a FAPE, the evidence shows that, regardless of the District's statements about their plans, the aide has continued to attend Student during Student's ESY period this summer. Moreover, the District has offered full time one to one educational aide services no matter what the student's next placement is. Thus, I conclude that the District has not withdrawn one to one services from Student. While the District ordinarily is entitled to appoint staff to provide IEP services, even if it is argued that the aide is personally indispensable to Student, I find insufficient evidence in the record to support such an argument.

To demonstrate discrimination under section 504, Parents must show that the Student was excluded from or deprived of the equal opportunity to benefit from, the District's educational services, by reason of Student's disability. 29 U.S.C. §794. . I conclude that Parents failed to prove discrimination under section 504 by a preponderance of the evidence, because the evidence shows that the reason for the putative re-assignment of the aide was not by reason of Student's disability.

Parents produced circumstantial evidence raising the inference that the aide was reassigned after the aide insisted on writing the aide's own statement about the December 1, 2011 physical contact between the Director of Elementary Education and the Student, when the Director was trying to remove a sharp pencil from Student's hand as Student was engaging in intense compulsive behavior. The aide declined to sign a version presented to the aide, drafted by either administration

or the District's lawyers. Shortly thereafter, it was conveyed that the aide would not accompany Student to the IU program, even though the opposite had been conveyed to Parents previously. However, the District's Supervisor of Pupil Services explained credibly that the aide would not follow Student to the IU because the IU hires its own staff, and the District cannot dictate its staffing at the autism support program.

Parents produced evidence that the aide was reassigned by the Principal of the neighborhood school to a setting that did not expect the aide and did not need the aide. Again this evidence tended to raise an inference that the assignment was not due to educational staffing needs, but it is not sufficient in my view to establish a preponderance of evidence that the District made this re-assignment by reason of Student's disability.

To prove retaliation, a Student must show: (1) engagement in a protected activity with the agency's knowledge; (2) adverse action by the agency, sufficient to deter a reasonably firm person from engaging in the protected activity; and (3) a causal connection between the activity and the adverse action. Derrick F. v. Red Lion Area Sch. Dist., 586 F. Supp.2d 282, 300 (M.D. Pa. 2008). I have reviewed the record and I conclude that the Parents have failed to prove retaliation as so defined for the same reasons as are discussed above. The evidence is not preponderant that the actions of the District were taken in connection with the alleged protected activity: insisting on writing a statement in the aides' own words, rather than as drafted by administration or the District's attorney.

Similarly, the evidence is not preponderant that the District reduced communication with Parents in retaliation for their advocacy for Student. There could have been reasons based upon a prudent defensive legal and administrative strategy on the part of the District that would explain this reduction of communication, without implication that it was retaliatory in nature.

Thus, any reduction of communication, while likely to have been causally connected with the protected activity of advocacy for Student, was not such that a reasonably firm individual would be deterred from continuing that advocacy. Indeed, Parents were not deterred, but rather intensified their efforts to obtain services for Student.

COMPENSATORY EDUCATION

As noted above, I will consider this issue only for the period April 1, 2012 through August 22, 2012. I have previously concluded that the placement offered by the District was inappropriate. Thus, compensatory education is due. The ordinary school day at the District's neighborhood elementary school is 6.5 [hours]. (S-11 p. 25.) The Student received 2.5 hours of instruction per day. Therefore, Student was deprived of 4 hours per day of educational services, including the benefits of social relationships, for part of the relevant period – that is, from April 1, 2012 until the last day of school in the 2011-2012 school year.

This deprivation included opportunities for additional academic and social instruction, as well as the social interaction opportunities with typical peers at recess, lunch and specials. While Student was unable to fully benefit from the latter opportunities when Student left the District in January, the record shows that Student's behavior has improved substantially, beginning in February 2012, and the inference follows that Student would have been able to take advantage of these social and inclusion opportunities if Student had been in school with an appropriate program of behavior management. While it would have required planning to put such a program in place, on this record it is reasonable to accord the District sixty days from the date Student left the District for this purpose. This would have expired in March 2012, well before the period for which I will order compensatory education. Therefore I will order the District to provide

compensatory education to Student in the amount of 4 hours per day from April 1, 2012 to the last day of school in the 2011-2012 school year.[14]

For the period beginning on the last day of that school year until August 22, 2012, I will not order compensatory education. During that period, [the] record shows that the Student received ESY services in the amount of 2.5 hours per day in addition to related services including the one to one educational aide's services. This is well beyond the amount of services ordinarily provided for ESY purposes, and there was no evidence suggesting that this was an inadequate amount.

PROSPECTIVE RELIEF

As discussed above, I conclude that the District provided an inappropriate placement due to its failure to provide services in the neighborhood elementary school. Therefore I will order the District to do what it should have done in the first place, which is to plan an educational program in that setting, and provide appropriate supports and services for that purpose. My detailed order follows.

CREDIBILITY

The above findings and conclusions are based in part on my assessment of the reliability of the witnesses and the weight to be accorded to their testimony. In particular, I find that the Mother's testimony is given great weight. Her testimony was fair, balanced and by all

[14] The record shows that the Student received undiminished related services during the time in which Student was in instruction in the home; thus, no compensatory education is due for related services. Parent indicated at the end of the hearing that one of the instructors had failed to provide the total hours of services called for in the IEP; however, there is no clear evidence sufficient to prove by a preponderance of the evidence that this failure occurred during the relevant period for which I will order compensatory education. Therefore I will not enhance the order due to this alleged deprivation.

appearances most sincere. Her advocacy for her child, as reflected in this record, was for the most part done with a sense of reason and cooperation.

For the most part, I also found the District's witnesses reliable, except where noted above.

CONCLUSION

I conclude that the District failed to provide Student with a FAPE in the least restrictive environment from January 17, 2012 to August 22, 2012. I find no procedural violation or denial of FAPE by reason of the District's implementation of the IDEA's procedures. I find no denial of a FAPE regarding the services of the one to one educational aide, nor do I find any discrimination or retaliation regarding the aide and the communication between the parties. I order prospective relief as set forth below. Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. From January 17, 2012 to August 22, 2012, the District failed to offer and provide to Student an appropriate placement in the least restrictive environment.

2. The District did not fail to evaluate Student within the time required by law subsequent to Parents' request or thereby deprive Student of a free appropriate public education (FAPE).

3. The District did not fail to provide a FAPE to Student by reassigning the one to one educational aide identified and requested by Parents.

4. The District did not discriminate against Student or Parents contrary to section 504 by retaliating against them by reassigning the one to one educational aide identified and requested by Parents.

5. The District is hereby ordered to provide compensatory education to Student in the form of hours of remedial or enriching educational services that further the goals of the May 2, 2012 offered IEP or the Student's current or future IEPs and/or will otherwise assist Student in overcoming the effects of Student's disabilities.

6. The number of hours of such compensatory services will be 4 hours for every school day from April 1, 2012 until the last day of school in the 2011-2012 school year.

7. Selection of compensatory education services shall be at Parent's sole discretion. Compensatory services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parent. The hours of compensatory education, or fund for compensatory education services/products/devices, should the District choose to create such fund, may be used at any time from the present to Student's 21st birthday.

8. The district hereby is ordered to complete a reevaluation report within sixty school days of May 3, 2012. The evaluation report shall take into account all private medical evaluations made available to the District. The evaluation report shall also assess and take into account Student's current behaviors, including the incidence of compulsive behaviors that interfere with learning in the ESY setting, and reported separation anxiety. The evaluation report shall take into account the Student's anticipated need for supplementary and supportive services upon placement in the learning support program of the Student's neighborhood school.

9. Within thirty days of the due date of the re-evaluation ordered herein, the District shall convene an IEP team meeting at a time and date convenient to the Parents, in order to plan for the Student's transition back to Student's neighborhood elementary school. The IEP shall determine the educational placement to be provided in that setting, provide for appropriate supplementary aids and services, and provide for appropriate related services. The IEP shall include a PBSP that establishes a plan for addressing Student's compulsive behaviors should they arise, as well as Student's behaviors in reaction to any prevention of response or blocking of compulsive behaviors that might be required. The IEP shall provide for appropriate staff training and support in order to address Student's compulsive behaviors and any reaction to response prevention or blocking of those behaviors.

10. Within thirty days of the Student's re-enrollment in the neighborhood elementary school, the District shall provide to Parents and the IEP team a Functional Behavioral assessment according to ABA best practices.

William F. Culleton, Jr. Esq.

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

September 14, 2012