

# Special Education Hearing Officer

---

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

## DECISION

Due Process Hearing for K.M.  
Date of Birth: xx/xx/xx  
ODR File No.: 7768/06-07 KE

Dates of Hearing:  
July 31, 2007  
August 1, 2007  
August 13, 2007

Closed Hearing

Parties to the Hearing:

*Parents*

Mr. and Mrs.

*District*

Mr. Christ Groppe, Director of Special Education  
Tredyffrin/Easttown School District  
738 First Avenue  
Berwyn, PA 19312

Representatives:

Robert Lear, Esquire  
Law Office of Caryl Oberman  
Grove Summit Office Park  
607A North Easton Road  
Willow Grove, PA 19090

Lawrence D. Dodds, Esquire  
Wisler Pearlstine, LLP  
484 Norristown Road, Suite 100  
Blue Bell, PA 19422

Dates Transcripts Received:

August 5, 9, 15, 2007

Record Closed:

September 7, 2007

Date of Decision:

September 22, 2007

Hearing Officer:

Rosemary E. Mullaly

## **I. Background and Procedural History**

### *A. Background*

The Student is a xx-year-old resident of the Tredyffrin/Easttown School District (“District”) who attends his neighborhood school. He is eligible for services under the Individuals with Disabilities Education Act as a child with an autism spectrum disorder. The Parents believe that he has in the past and continues to make meaningful educational progress at his neighborhood school according to the District’s IEP in a part-time learning support classroom and seek an order maintaining his current placement. The District does not believe the Student is making meaningful education progress in his current placement, and seek an order changing his placement to an autistic support classroom in an alternative District school as close as possible to the Student’s home.

### *B. Procedural History*

The Office for Dispute Resolution received the parents’ hearing request in this matter on June 8, 2007. This matter was originally scheduled for July 10, 2007, but a mutually-requested continuance was granted rescheduling the first hearing session for July 31 2007. The mandatory resolution meeting took place on July 9, 2007. The three-session hearing was held on July 31, August 1, and August 13, 2007. The hearing officer received the transcripts of the proceedings on August 5, 9, and 15, 2007. The hearing record was closed on September 7, 2007 upon receipt of the parties written closing statements.

## **II. Stipulations and Findings of Fact**

### *A. Stipulations*

1. The Student and his parents are residents of the District.
2. The Student is identified as eligible for special education under the IDEA.
3. The Student’s date of birth is XX/XX/XX.

(N.T. 12).

### *B. Findings of Fact*

1. In July of 2002, the Student was found eligible for early intervention based upon his communication delays. (S.D. 1).
2. In May of 2004, the District conducted a multidisciplinary evaluation on the Student to determine his educational needs prior to his transition to school-aged programming. In the summary of findings, the evaluation report concludes that “the Student presented with many characteristics of a child with Autism Spectrum disorder and will require a highly individualized education program to address issue of maintenance of attention to instruction, social skill and semantic/pragmatic language development, visual –motor integration, sensory overreactivity and life skill topics such as basic safety rules.” The conclusion of the team was that Student was eligible for services as a child with “speech or language impairment.” (S.D. 1, at 9, 10).

3. During the 2004-2005 school year, the Student attended his neighborhood school for half-day kindergarten. He spent part of the day in the regular education setting and part in the learning support setting. He received occupational therapy, speech therapy, and the services of a personal care assistant (“PCA”) throughout the day. Behavior consultants were assigned to monitor his program and provide consultation to school staff. (S.D. 3, at 3).
4. In May 2005, the District recommended placement in a part-time learning support program. The Student continued to attend his neighborhood school for first grade during the 2005-2006 school year. He spent part of the day in the regular education setting and part in the learning support setting. He received occupational therapy and speech therapy. He also had adult support through a therapeutic support (“TSS”) person while he was in the regular education setting. (S.D. 2, S.D. 3).
5. During the 2005-2006 school year the Student had positive interactions with classmates in both the learning support and in the regular education classroom. As the year progressed, the Student’s interactions with his peers increased in frequency and in their approximation of what is an appropriate interaction for children the same age as the Student. He demonstrated the ability to form a friendship with a peer in three to four weeks. (N.T. 121-122, 132-133).
6. On September 16, 2005, the Student’s regular education teacher referred him to the intermediate unit’s autistic support team due to her concerns regarding his behavior, academics, social/peer interactions, transition difficulties, communication and sensory reactions. The IU completed a function behavior assessment on the Student in November 2005 which resulted in a social skills group and extended school year (“ESY”) services being added to the Student’s February 15, 2006 IEP. (S.D. 4, S.D. 5, S.D. 6).
7. The Student’s April 27, 2006 IEP provided for continuation of part-time learning support, speech language and occupational therapy, PCA services, social skills group, behavior intervention and ESY. At or around that time, the District discussed with the parents an autistic placement in an alternative district school as close to the Student’s home as possible. The parents rejected this option because they were “satisfied with the progress he is making in his current program. Parents expressed concern for child and his difficulty with changing school. The Autistic Support program is in a start up phase so there is nothing for them to look at, therefore they are uncomfortable with the recommendation.” (S.D. 7, S.D. 8).
8. The Student maintained his skills in reading, math, behavior and social skills during the summer of 2006. (S.D. 10).
9. The student continued to attend his neighborhood school for second grade during the 2006-2007 school year. He received the services of a full-time PCA, social skills instruction twice a week, speech and language therapy three times a week and occupational therapy two times a week. (S.D. 7; N.T. 290-291).
10. The Student’s behavior plan identified compliance with adult directives and environmental rules, toleration of peers and aggression toward adults as the areas of concern. (S.D. 9).
11. During the beginning of the 2006-2007 school year, when the Student was in second grade, data collected demonstrates that the Student spent very little time on task. (S.D. 11).

12. During the 2006-2007 school year when the Student was in second grade, in a group of three during reading instruction, the Student required individualized attention and a high level of prompting to access instruction. The Student's teacher attempted to assess his reading levels by use of the mid-first grade reading assessment, but due to the Student's unwillingness she could not complete this assessment. (N.T. 297-98; S.D. 19; N.T. 312).
13. During the 2006-2007 school year, when he was in second grade, the Student received math instruction in a group of five. The lessons were adapted for him but he continued to need manipulatives instead of paper presentation and individualized instruction. Recent assessments in math indicate that he is not performing at expected levels. (N.T. 316-322; S-31 at 6; S.D. 17; N.T. 321).
14. During the 2006-2007 school year, when the Student was in second grade, all assessments, material and presentation of instruction were significantly modified for the Student. (N.T. 303-07, 322-24).
15. During the 2006-2007 school year, the Student was accompanied by his PCA for attendance in a social skills group with three other students. Even with modifications, he had difficulty participating in this service. (N.T. 592-97, 600-02).
16. An assessment of the Student's social skills in the Spring of 2007 indicated that he currently does not have the basic social skills necessary to participate in group instructional settings. (S-31, at 8-9; N.T. 609-610).
17. Data collected between January and March 2007 indicate that the Student's physical aggression toward adults and peers increased; his compliance with directions fluctuated; and his aggression toward peers increased. (S.D. 20; N.T. 186-87).
18. The Student's IEP was revised on February 22, 2007 to amend three speech goals and to describe the ESY the Student would receive during the summer of 2007. (S.D. 23).
19. On February 23, 2007, the District issued permission to reevaluation after it reviewed existing evaluation data for purpose of its triennial evaluation obligation. The parents gave permission to proceed as indicated. (N.T. 48-50; S.D. 25).
20. During the 2006-2007 school year, the Student's second marking period progress report indicates that he was not making progress on many of the goals and that he required constant cueing and prompting. It noted that when the size of the group increased, he is less successful with following the activity or prompt. The Student continued to require prompting to initiate a conversation and to make eye contact with peers and adults, although some areas of progress were noted. (S.D. 26, 4, 5, 6, 7, 10).
21. The Student did not acquire identified skills in language arts, science or social studies during the 2006-2007 school year. (S.D. 15).
22. Out of the 10 goals on the 2006-2007 IEP the Student achieved in whole or in part only three goals: (Compare S-7 at 5 to S-31, at 6 to S-49 at 1; Compare S-7 at 20 with 6 and S-49 at 1; and Compare S-31, at 11 with S-7, at 22. Compare S-31 at 10-21 with S-7 at 14; compare S-31 at 7 and 10 with S-7 at 15; compare S-31 at 7 with S-7 at 16; compare S-31 at 5-6, 10 with S-7 at

- 17; compare S-31 at 5 with S-7 at 19; compare S-31 at 12 with S-7 at 30; and compare S-31 at 12 with S-7 at 23).
23. The Student requires one-to-one instruction to make the progress that he has made, requiring full prompting and hand over hand modeling to participate in group sessions. (N.T. 540-541; 546-548, 153, 190, 216, 276; S-30 at 4).
  24. The parties agreed to extend the April 20, 2007 IEP until the reevaluation and annual IEP meeting scheduled for May 3, 2007. (S.D. 29, N.T. 74).
  25. The reevaluation report dated April 25, 2007 concluded that the Student's communication and social behaviors were consistent with a diagnosis of Pervasive Developmental Disorder; that he needed an educational setting capable of providing individual and small group instruction along with a language rich environment, adult modeling of language, and use of visual and verbal cues; and that he needed a structured environment where transition can be anticipated and where he can be provided with opportunities for structured social interactions. The team recommendation was to place the Student in an autistic support program because the Student required a lower staff to student ratio than a part-time learning support could provide in order for him to make meaningful progress. (S.D. 30).
  26. The Student's neighborhood school does not contain an Autistic Support Program. (S.D. 31).
  27. The Student's parents agree that the services listed in the proposed IEP are appropriate to meet his educational needs but is not designed to provide social benefit. (N.T. 98-99, 102).
  28. The Student has social peers at his neighborhood school in both the learning support and regular education classrooms. (N.T. 61-62, 108).
  29. The proposed placement in the autistic support program in the alternative district school will provide less opportunity for the Student to interact with students with in the regular education setting – 59.21% compared to 71.98%. While in the learning support setting at his neighborhood school the Student will be educated with only other disabled students, however, five of the students currently assigned to that class are identified as learning disabled and have more traditionally developing language and social skills. (N.T. 540-41, 543-44; Compare S-7 at 29 with S-31 at 32, 39).
  30. In the autistic support setting at the alternative district school, only when the Student attains social developments skills will he be given the same opportunities to get appropriate student modeling that he would have in his current educational setting. The District is unaware of the extent that some of the Student's inappropriate touching of other students is socially motivated. (N.T. 619-20, 621-22).
  31. The Student becomes agitated when put in unfamiliar setting and will refuse to enter certain places. The Student has never driven on a bus to school and his parents have significant concerns that there is no chance that the Student would get on the bus with a stranger. He becomes upset even when there are changes to a familiar setting. (N.T. 47-48, 62, 63-64, 66, 101-03, 109-110).

32. A comparison of the April 2006 IEP and the May 2007 IEP demonstrates that the majority of the specially designed instruction is similar – with the following exceptions: according to the May 2007 IEP, the Student will have modified science and social studies programs with a combination of time spent in special education and regular education settings; the Student will have movement breaks that provide sensory input at regularly scheduled times throughout the day especially prior to seated classroom work; the Student will have modified expectations in special area classes; and he will have an additional speech language session (Compare S-7 at 24-29 and S-31, at 31, 32; N.T. 477, 553).
33. At the end of the 2006-2007 school year, the District started to implement the May 2007 IEP within the learning support program in the Student’s neighborhood school. (N.T.85, 103-05).
34. The Student maintained his reading skills and improved his math skills during the summer of 2007. (S-49).
35. The Student needs more sensory input than he is receiving at in the learning support placement. A lot of time during the day he does not get any sensory input notwithstanding the fact that he learns best when it is provided. (N.T. 218).
36. The District issued a NOREP on May 4, 2007 recommending the proposed change of placement to an autistic support program in an alternative district school. The Student’s parents rejected the District’s proposal and filed a due process complaint on June 7, 2007. (S.D. 34, S.D. 38).
37. As a result of the mandatory resolution meeting, the District forwarded a potential plan developed by its staff to assist the Student to transition to the autistic support program in the alternative district school. (S.D. 41).

### **III. Issues Presented**

- A. What burden of persuasion applies to this matter?**
- B. Whether the Student’s progress in the part-time learning support setting between April 2006 and May 2007 was meaningful?**
- C. If the Student’s progress was not meaningful, whether with the use of supplementary aids and services the Student’s education could be achieved satisfactorily in the same school he would attend if he were not disabled?**

### **IV. Discussion and Conclusions of Law**

- A. *What Burden of Persuasion Applies to This Matter?*

The United States Supreme Court explained the concept of burden of proof in *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citation omitted) stating

The function of a [burden] of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of

adjudication.” The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

*Id.* In administrative and judicial proceedings under the IDEA, the party bearing the burden of persuasion must prove its case by the “preponderance of the evidence.” See 20 U.S.C. § 1415(i)(2)(C)(iii). The term “preponderance of evidence” is defined as “evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it.” *Black’s Law Dictionary* (Fifth Edition), at 1064. The burden of persuasion in “an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 546 U.S. \_\_\_, \_\_\_, 126 S.Ct. 528, 537 (2005). The Third Circuit more recently addressed the issue of burden of proof in *L.E. v. Ramsey Board of Education*, 435 F.3d 384; 2006 U.S. App. LEXIS 1582 (3d Cir. 2006) wherein it affirmed that the party bearing the burden of persuasion must prove its case by a preponderance of the evidence. Since the parents requested the hearing in this matter, they bear the burden of proving that the District’s proposed placement in an alternative district school does not constitute a free appropriate public education in the least restrictive environment.

Because this matter concerns the least restrictive environment, discussion of the impact that *Schaffer* had on the burden established in *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993) is warranted. In *Oberti*, the Third Circuit had established unambiguously that the burden of proof in a matter involving mainstreaming must be shouldered by the district; specifically, it explained, “We hold that the school bears the burden of proving compliance with the mainstreaming requirement of the IDEA, regardless of which party (the child and parents or the school) brought the claim under IDEA.” *Id.* at 1207. See also *T.R. v. Kingwood Township*, 205 F.3d 572, 579 (3d Cir. 2000). Subsequent to *Schaffer*, attempts were made to establish that a different burden applied to IDEA cases asserted in the Third Circuit in light of *Oberti* and *Kingwood*. The Third Circuit recently took the opportunity to put to rest any doubt about the application of *Schaffer* in its 2007 decision in *Andrew M., et al. v. Delaware County Office of Mental Health/Mental Retardation*, 435 F.3d 384, 391 (3d Cir. 2007).<sup>1</sup> Therein the court provides the following rationale for refusing to apply the *Oberti/Kingwood* reasoning and to instead apply the burden of persuasion established by *Schaffer*:

We have always placed the burden of demonstrating compliance with the IDEA on the school district. See *Kingwood Township*, 205 F.3d at 579; *Oberti*, 995 F.2d at 1219. ... however, the Supreme Court held that the “burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). The *Schaffer* Court declined to address the issue of whether a state could, by statute, place the burden exclusively upon the school district. *Id.* New Jersey has no such statute. Nevertheless, appellants contend that the rule in *Lascari v. Bd. of Educ.*, 116 N.J. 30, 560 A.2d 1180 (1989), where the Supreme Court of New Jersey placed the burden on the school district regardless of which party sought relief, is unaffected by *Schaffer*. Appellants thus attempt to avoid the application of *Schaffer* by arguing that it “does not provide the rule of law in New Jersey.” (Appellants’ Letter Br.) That argument is unavailing. The Court in *Schaffer* saw no reason to depart from “the ordinary default rule that plaintiffs bear the risk of failing to prove their claims,” 126 S. Ct. at 534, leaving for another day whether a state can overcome that rule by statute. *Lascari* addressed that very question: where, in the absence of a federal or state statutory provision providing otherwise, should the burden of proof rest when the appropriateness of an IEP is challenged? Citing state and federal statutory and regulatory

---

<sup>1</sup> While the *Andrew M.* analysis addresses burden of proof in the framework of New Jersey law, this analysis would similarly obtain to cases brought in Pennsylvania which similarly lacks a statute or regulation which would make it the district’s burden in all matters related to compliance with the IDEA.

schemes implementing not the IDEA, but its precursor, the *Lascari* Court determined that placing the burden upon the school district was most appropriate. *See Lascari*, 116 N.J. at 44-46. *Schaffer* rejected that conclusion. Because this case is brought solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs, *Schaffer* controls.

*Id.* at 391.

**B. Whether the Student’s progress in the part-time learning support setting between April 2006 and May 2007 was meaningful?**

*1. Free Appropriate Public Education*

The IDEA defines a free appropriate public education (“FAPE”) as special education and related services that

- (a) are provided at public expense, under public supervision and direction and without charge;
- (b) meet the standards of the State educational agency;
- (c) include preschool, elementary school or secondary school education in the State involved; and
- (d) are provided in conformity with an individualized education program (IEP) under Sec. 614(d).

*See* 20 U.S.C Sec. 1402(9) and 34 C.R.F. § 300.13.

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district’s efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.” *Id.* The high court placed procedural compliance on the same level as substantive compliance with IDEA mandates. *Id.* An appropriate IEP is one that meets the procedural and substantive regulatory requirements and one that is designed to provide meaningful education benefit to the child. *Board of Education v. Rowley*, 458 U.S. at 206-07, 102 S. Ct. 3034 (1982); *see also Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. Pa. 1996).

In addressing whether a student was offered an appropriate program, the Pennsylvania Appeal Panel offers the following standard:

In order to be appropriate, the program must be in a regular public school class unless certain criteria are met, and when offered be “reasonably calculated” to confer “educational benefit”, or “meaningful educational benefit”, that is not trivial nor *de minimis*. *See Board of Education v. Rowley*, 458 U.S. 176 (1982), *Polk v Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3<sup>rd</sup> Cir., 1998), *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3<sup>rd</sup> Cir., 1993), *Susan N. v. Wilson school District*, 70 F.3d 751 (3<sup>rd</sup> Cir., 1995), *Neshaminy School District v. Karla B.*, 25 IDELR 725 (ED PA, 1997), *Oberti v. Board of Education of the Borough of Clementon*, 995 F.2d 1204 (3<sup>rd</sup> Cir., 1993), 20 U.S.C. § 1412 (a) (5), and 34 C.F.R. § 300.550.

*In re: the Educational Assignment of S.J., A Student in the Tredyffrin/Easttown School District*, Spec. Educ. Op. No. 1435 (PDE 2004), at 5 and *In re: The Educational Assignment of R.A., A Student in the*



*Interboro School District*, Spec. Educ. Op. No. 1431, at 7-8 (PDE 2004). See also *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3<sup>rd</sup> Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3<sup>rd</sup> Cir. 2003).

Judicial and administrative bodies interpreting the *Rowley* standard have fleshed out the extent of a district's obligation to provide FAPE to students. For example, a school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925 (1988). An appropriate IEP will identify a student's needs and strengths and provide programs and services to address the needs and enhance the strengths the IEP identified. See *In Re: Educational Assignment of K.H.*, Spec. Op. No. 1031 (PDE 1999). An IEP is appropriate if it offers meaningful progress in all relevant domains under the IDEA. See e.g., *M.C. v. Central Regional S. D.*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996), cert. denied, 117 S. Ct. 176 (1996); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999). If an IEP does not address all areas of a child's needs, if it does not contain measurable annual goals to monitor a student's progress, or if it is inadequate in any material way, the IEP is not appropriate. See e.g., *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. Pa. 1996); *In Re: the Educational Assignment of T.K.*, Spec. Educ. Op. No. 892; and *S.H. v. Newark*, 336 F.3d 260 (3<sup>rd</sup> Cir. 2003). If the evaluation upon which the District bases the IEP is not appropriate, the IEP is not appropriate; the IEP cannot reflect the Student's needs because the ER does not identify them. See *In re: Educ. Assignment of S.K.*, Spec. Educ. Op. No. 1759 (PDE 2006), at 11. see also *In re: Educ. Assignment of R.N.*, Spec. Educ. Op. No. 1785 (PDE 2006), at 8; and 34 C.F.R. §300.305 and 34. C.F.R. §300.320(a)(2).

An IEP must further address the child's needs in all areas of deficit including academic, behavioral and communication needs. In general, the IEP team must consider the strengths of the child, concerns of the parents for enhancing the education of their child, evaluation results and the academic, developmental and functional needs of the child. See 20 U.S.C. ' 1414(d)(3)(A); see also, 34 CFR. ' 300.305(a)-(e); *Ridgewood Bd. Of Education v. N.E.*, 172 F.3d 238 (3d Cir. 1999), *In re: J. L.*, Spec. Educ. Op. No. 944 (PDE 1999). The District has an obligation to use in the evaluation process "technically sound instruments that may assess the relative contribution of cognitive or behavioral factors, in addition to physical or developmental factors." 34 C.F.R. § 300.304(a)(3). The IDEA also requires, when evaluating children with impaired sensory skills, the tests be selected and administered to accurately reflect the abilities that the test purports to measure rather than reflecting the child's impaired sensory skills and it must assess the child in all areas related to the suspected disability including, and if appropriate, hearing. See 34 C.F.R. § 300.304(c)(3)-(4). The IEP must include a statement of the specially designed instruction that will be utilized in the provision of educational services. 34 CFR. ' 300.320(a)(4). Specially designed instruction means adapting, as appropriate, the content, methodology or delivery of instruction to address the unique needs of the child and to assure access to the general curriculum to allow the child to meet the educational standards that apply to all children within the district. 34 C.F.R. § 300.39(b)(3)(i)-(ii). The IEP must identify the existence of special factors, including hearing loss, and whether the child needs assistive technology devices. 34 C.F.R. § 300.324(2)(iv),(v). Finally, the IEP must include objective means of measuring the child's progress in a special education program. 34 C.F.R. § 300.320(a)(3).

A student with a disability is entitled to meaningful, not trivial progress. *L.E. v. Ramsey Bd. of Educ.* 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006); 20 U.S.C. § 1400(c)(4). The IDEA does not require that a school district maximize a student's potential or provide the best possible education. Rather, the statutory obligation is satisfied "by

providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982). The IEP must provide "meaningful" access to education, *id.* at 192, and confer "some educational benefit" upon the child. *Id.* at 200. In order to be appropriate, however, this educational benefit must be more than "trivial." *Ridgewood Bd. of Educ. v. N.E.* 172 F.3d 238, 247 (3d Cir. 1999). An appropriate IEP is "gauged in relation to the child's potential," *id.*, and must offer the potential for "significant learning" and "meaningful benefit." *Id.*

Congress has expressed its intent that the implementation of the IDEA not be impeded by low expectations and a failure to employ effective instructional methods. *See*, 20 U.S.C. § 1400(c)(4); 34 CFR. ' 300.320(a)(4) (special education and related services, and supplementary aides and services should be based upon peer-reviewed research to the extent practicable); *County School Bd. of Henrico County, Va. v. R. T.* 433 F.Supp.2d 657, 689 (E.D.Va. 2006).

## 2. *Least Restrictive Environment*

The IDEA contains a requirement that the IEP for a disabled child educate that child in the "least restrictive environment":

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when 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. Section § 1412 (a)(5); see also, 34 C.F.R. §Sec. 300.114(a)(2). *See also* 34 C.F.R. § 116(c) ("Unless the IEP of a child with a disability requires some other arrangement, the child [should be] educated in the school that he or she would attend if nondisabled"). The Third Circuit has interpreted this requirement to mean "mandating education 'in the least restrictive environment that will provide [the student] with a meaningful educational benefit.'" *S.H. v. State-Operated School District of the City of Newark*, 336 F.3d 260, 265 (3d Cir. 2003) (quoting *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000)). "The least restrictive environment is one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir. 1995).

The analysis which must be applied to the inquiry currently before this hearing officer - whether the Student should remain in his home school or be educated in an alternative district elementary school starts with the inquiry of whether the preponderant evidence of record supports a finding that the Student's progress between April 2006 and May 2007 was meaningful. If it was meaningful, the Student should stay where he is with a program that is substantially the same. If it was not meaningful, the inquiry switches to whether with the use of supplementary aids and services the preponderant evidence of record supports that conclusion that the Student's education could be achieved satisfactorily in the same school he would attend if he were not disabled. Finally, if it can not be

achieved satisfactorily in his neighborhood school, what is the next least restrictive placement for the Student.

3. *Was the Student's progress between April 2006 and May 2007 meaningful?*

Out of the 10 goals on the 2006-2007 IEP the Student met in whole or in part only three goals in one year: specifically Goal 5 mastering 150 sight words (Compare S-7 at 5- 14 words, S-31, at 6 – 127 words, ESY Progress Report S-49 at 1 – 150 words); a portion of Goal 7 related to matching a penny, nickel and dime to the correct value 3 out of 4 times (Compare S-7 at 20 with 6 and S-49 at 1);<sup>2</sup> and Goal 9 with prompting - including choices of answers, fill in the blanks, rephrasing and compensatory cuing, he was able to state similarities, differences and name up to three critical features when presented with a set 5 grade appropriate words/pictures, although he was unable to meet the goal independently. (Compare S-31, at 11 with S-7, at 22).

The Student did not meet any part of the remaining seven goals. *See* Goal 1, compare S-31 at 10-21 with S-7 at 14; Goal 2, compare S-31 at 7 and 10 with S-7 at 15; Goal 3, compare S-31 at 7 with S-7 at 16; Goal 4, compare S-31 at 5-6, 10 with S-7 at 17; Goal 6, compare S-31 at 5 with S-7 at 19; Goals 8, compare S-31 at 12 with S-7 at 30; Goal 10, compare S-31 at 12 with S-7 at 23.

An IEP is appropriate if it offers meaningful progress in all relevant domains under the IDEA. *See e.g., M.C. v. Central Regional S. D.*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996), *cert. denied*. 117 S. Ct. 176 (1996); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999). Based upon the standard of what is appropriate progress and the evidence of record support the conclusion that achieving less than 33% of his annual goals simply is not meaningful progress. While there is seemingly contrary evidence in the record regarding whether the Student's progress was meaningful, it is not consistent with the applicable legal standard to conclude that because the Student made progress toward some of his goals; or that he could continue to access support in both the regular education or learning support class setting; or that the goals and specially designed instruction could continue to be implemented in the learning support class, *see e.g., N.T.* 229, 237, 245, that the progress the Student made was meaningful. Testimony that the Student's social skill needs could be addressed in his neighborhood school (*see, e.g., N.T.* 163) does not demonstrate that within that setting the Student can make meaningful progress in attaining his social skills goals. The fact that he maintained his reading skills and improved his math skills in ESY (S-49) are similarly not dispositive of whether he met his annual goals.

Even though the Student's parents are satisfied with the progress he has made. (N.T. 33, 49, 69, 84-85), and several district witnesses provided testimony which suggested that their recommendations were founded upon a desire to have the student make more progress at the expense of the least restrictive environment (*see e.g., 627*), it does not change the lack of meaningful progress. Undisputed on the record is the fact that at this point in his development with the services that were being provided during the 2006-2007 school year, the Student requires one-to-one instruction to make the small amount of progress that he has made, requiring full prompting and hand over hand modeling to participate in group sessions. (N.T. 540-541; 546-548, 153, 190, 216, 276; S-30 at 4).

---

<sup>2</sup> As it relates to the other aspects of Goal 7, the Student is not able to participate functionally in his math group; he completes tasks only if prompted every step of the way. He understands number concepts but no operational concepts. If items are drawn or he is given manipulatives with an operation, he will count and give the correct answer. Her requires total assistance to complete an assessment. *See* S-31 at 5.

**C. If the Student's progress was not meaningful, whether with the use of supplementary aids and services the Student's education could be achieved satisfactorily in the same school he would attend if he were not disabled?**

It is not lost on this hearing officer that moving this xx-year-old to the autistic program is more than just a change in the location of intervention from a special education class in his home school to a special education class in an alternative district school. His parents have articulated serious concern regarding his ability to transition to a different school (N.T. 108), and this change will remove him from interaction throughout the day with children with more traditionally developing language and social skills who currently make up roster of his learning support class. The class at the alternative district school will be made up completely of children with limited language and social skills – eliminating any chance of incidental learning from peers for approximately 80% of his school day. (N.T. 543-44, 619). The *Oberti* court provides standards for determining when a school's decision to remove a child from his home school violates the IDEA's presumption in favor of the least restrictive environment. The *Oberti* court recognized the tension between providing individualized programs tailored to the specific needs of each disabled child and the strong preference for mainstreaming. It explained, "the key to resolving this tension appears to lie in the school's proper use of supplementary aids and services." *Id* at 1214. Therefore, after the determination that the Student's progress was not meaningful, the inquiry must turn to whether something could be done in his neighborhood school for the Student to achieve meaningful progress.

Particularly compelling to the inquiry of whether with the use of supplementary aids and services the Student's education could be achieved satisfactorily in his neighborhood school is the addition to the May 2007 IEP of the specially designed instruction describing a proactive sensory diet. (S-31, at 31). Similarly compelling is the testimony of the occupational therapist assigned to the autistic support program wherein she described the global impact that sensory issues have on the Student's educational functioning. When she was asked whether there were any structures or mechanisms in that autistic support class for proactive sensory breaks, she indicated,

That's one of the best things about it. The theory -- almost all children that are autistic have sensory processing problems. And in order for a child to learn, they have to have an internal calming of their central nervous system so that they can take control of some of the learning that has to occur. And we know that his can happen with a lot of sensory input. And the sensory -- the autistic support classroom was designed around a great deal of sensory equipment so that there's on-going sensory input in the classroom all day long. If the child needs a half hour of swinging when they come in to be able to follow the routine in the room, they get it. It is to provide exactly that they need so that they can eventually leave the sensory input, attend to task, and then if need be, go right back to it. We're trying to meet the individual sensory needs of each child so that they can develop learning behaviors to learn.

(N.T. 554-555) When she was questioned about the services available to the students assigned to the autistic support class described in her testimony she indicated that the services available in the autistic support classroom *could also be available in other settings*. (N.T. 579) (emphasis added).

According to the testimony by OT for the autistic support class, many of the Student's known needs (*see* description of present levels S-7, at 5-7; S-31 at 7-13) often revolve "back to the sensory processing needs." (N.T. 559). She explained that, "when a child has a very calm and organized central nervous system which comes from implementing a lot of sensory input, they are more able to do things that they previously had difficulty doing like transitioning, following directions, sequencing

steps, [and] writing.” (N.T. 559-560). According the OT, “the initial part [of her involvement with the Student] would be assessing how we can meet his sensory processing needs so that we can help him be more independently calm and organized. When he is -- he's sort of reached that stage and he can handle transitioning, then we will do it, but it's nothing that we push on the child. We gradually develop this ability to be more calm in his environment, and then gradually stretch it out. So, it would be a step by step process that we could make sure he was comfortable with on each step.” (N.T.560).

Although there is a reference to “opportunities throughout the day for proprioceptive and sensory activities,” in the IEP implemented for the 2006-2007 school year, no evidence in the record supports the conclusion that an individualized proactive plan of the kind envisioned for the 2007-2008 school year was in place for the 2006-2007 school year. Nor is there evidence that an assessment of the Student’s sensory needs was performed while he attended his neighborhood school during the 2006-2007 school year. (S-7, at 24; N.T. 571, 623-24). In fact, the evidence is undisputed that the Student needed more sensory input than he was receiving at in the learning support placement. The record clearly supports a finding that for a significant part of the day during the 2006-2007 school year the Student did not get any sensory input notwithstanding the fact that he learns best when it is provided. (N.T. 218).

The evidence of record is preponderant that the inclusion of the OT services described by the occupational therapist assigned to the autistic support class contained in the record is the exact type of supplementary aids and services through which the Student’s education could be achieved satisfactorily in the same school he would attend if he were not disabled. Her testimony demonstrates that she could provide these services in a variety of settings with the appropriate equipment – not just the autistic support classroom. (N.T. 557, 579). After the District implements these recommendations at the Student’s neighborhood school and his rate of progress remains unchanged from his current levels, at that point it may warrant movement of the Student to the autistic support program in the alternative district school.

## **V. ORDER**

AND NOW, this 22nd day of September 2007, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the District maintain the Student’s placement in the part-time learning support classroom in his neighborhood school with the addition of supplemental aides and related services - specifically the OT assessment and services and proactive sensory diet described by the occupational therapist assigned to the autistic support class - contained in the record. All other relief not contained in this order is specifically denied.

Dated: September 22, 2007

*Rosemary E. Mullaly*  
Special Education Hearing Officer