

This is a redacted version of the original appeals panel 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.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: MH
ODR #8117/07-08 KE
Date of Birth:
Xx/xx/xx

Dates of Hearing:
November 20, 2007
December 4, 2007
December 11, 2007
January 29, 2008

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

Haverford Township School District
1801 Darby Road
Havertown, Pennsylvania 19083

Date Final Transcript Received:
Date Closing Arguments Received:
Date of Decision:

Hearing Officer:

Representative:
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February 3, 2008
February 19, 2008
February 25, 2008

Linda M. Valentini, Psy.D.

Background

Student is a xx year old¹ eligible student, resident of the Haverford Township School District (hereinafter District), who transitioned from preschool early intervention programming to school age programming in September 2007. Mr. and Mrs. (hereinafter Parents) believed that the kindergarten program and placement the District offered to Student were inappropriate, and enrolled him in Private School, a private school for children with learning differences. The Parents asked for this hearing, and are seeking reimbursement for Student's tuition at the private school for the current school year, and reimbursement for the private evaluation they obtained independently.

Issues

1. Were the kindergarten program and placement offered to Student by the Haverford Township School District for academic year 2007-2008 appropriate? If not, is the program unilaterally selected by the Parents appropriate? If so, are there any factors mitigating the District's responsibility for tuition reimbursement?
2. Are the Parents entitled to reimbursement for the evaluation they independently obtained from Dr. R?

Findings of Fact

1. Student is a xx-year-old resident of the District who has been diagnosed with PDD-NOS as well as Developmental Apraxia. (NT 46, 416, 619; P-18).
2. Student began receiving early intervention services at age 19 months. (S-1).
3. For the 2006-2007 school year Student's programming consisted of two parts: a private typical preschool setting at [redacted] Nursery School (hereinafter Preschool) with a 1:1 aide and 18 students, and a reverse mainstream class at [redacted] Developmental Center (hereinafter Developmental Center) with no aide and 13 students. (NT 56-57, 102, 282; S-1)
4. At Preschool Student relied heavily on his aide, covered his ears when he was overwhelmed or afraid, had difficulty transitioning into the classroom, would not participate if the activity was too noisy, and needed reminders to use the bathroom and return to his seat. (NT 40-41, 54, 192, 289, 623, 679; S-7)
5. At Preschool Student was not meeting his goals. (NT 284, 696; S-7)

¹ Incorrectly identified as [one year older] in some places in the record. The hearing officer telephoned the mother to verify the child's birth date and age.

6. At Developmental Center Student was peripheral in class, would not enter the classroom independently, did not look at his paper, took a long time to engage, did not answer questions independently, did not participate at recess independently, did not engage with peers independently, did not greet familiar adults, needed multiple prompts to continue his work, needed prompts to engage in pragmatic activities & social skills activities, had difficulty transitioning, was distracted, did not participate in class, had difficulty paying attention when stories were being read aloud, and had a difficult time answering questions after hearing a story. (NT 54, 93-94, 155-156, 192, 284, 622, 624-625, 635, 696, 699, 701- 702, 725; S-6, S-7)
7. At Developmental Center Student engaged in reactive or odd behaviors such as covering his ears, tending to zone out, crying, going off on his own and trying to leave the classroom, licking the bathroom wall, and mimicking other children. He required constant redirection in the bathroom and at snack time, and was noncompliant. (NT 54, 93-94, 192, 421, 425-426; S-6, S-7)
8. At Developmental Center Student met only one of his IEP goals. (NT 81)
9. The assessment of the occupational therapist who had treated Student up to age three in early intervention and who assessed him in April 2007 for purposes of preparing the ER noted that he had definitely not made the progress in motor skills she would have expected him to make. (NT 325-326)
10. On January 30th, 2007, the District held a transition meeting with the Parent, members of the District's IEP team and the DCIU caseworker. (NT 37; S-3; P-50)
11. At the transition meeting the Parent informed the District that she had obtained an evaluation to obtain information on how Student learned, what he would need in a school program and whether he would need a full-time Kindergarten program². (NT 37)
12. At this meeting the DCIU representative gave the District representative the most recent preschool ER and IEP. (NT 38-39, 480).
13. The District's Coordinator of Elementary Special Programs believed that there was sufficient information in the last preschool ER and IEP such that additional IU records were not necessary. (NT 510).
14. Although she observed both the Preschool and the Developmental Center programs the District's Itinerant Special Education Teacher did not discuss Student's progress with his teachers, and since the District had the updated preschool IEP and information from the Parents did not believe the written progress reports would be needed. (NT 310, 314)

²The District does not offer a full-time Kindergarten program.

15. As the Parents had already had a comprehensive neuropsychological evaluation performed, the District's Permission to Evaluate form prepared on February 23, 2007, listed three proposed tests and procedures: OT Evaluation; Observation and/or Measures of Social/Emotional Functioning; Measures of Speech & Language Skills. The Parents signed the form as approved, and returned it on March 1, 2007. (S-5)
16. On June 4, 2007, the District issued an ER which fully adopted and attached in its entirety the private neuropsychological evaluation performed by Dr. R in January 2007 in lieu of performing its own psychological testing on Student. The ER also included the three assessments proposed on the Permission to Evaluate form, and a copy of Dr. M's report dated November 17, 2006. (S-7)
17. After reviewing the ER, as the Parents were in full agreement with Dr. R's recommendations, they approved it on July 21, 2007. (NT 116, 485; S-7)
18. Based on information contained in progress reports from Developmental Center, reports from the speech and occupational therapy clinicians, conversations with the teacher, and notes in Student's communication book from the teacher, the Parents concluded that Student's progress was directly correlated to the number of children involved when he was doing a particular task. Student did better when he was part of a small group and was more distracted when part of a larger group. (NT 101)
19. The Developmental Center teacher told the mother that class size would be a concern as he would need help, and on Student's IU IEP dated June 4, 2007, the teacher reported that when Student worked individually with the teacher and there were limited distractions, he was able to recite the alphabet and identify shapes and colors. (NT 102, 145, 151; S-6)
20. Student's preschool occupational therapist determined that Student functioned better in a group of 2-3 children and reduced the size of his therapy group. The itinerant learning support teacher also found this to be true. (NT 140-141, 307-308)
21. Student is sensitive to his environment and a great deal of language in his classroom would exceed his capabilities. (NT 622)
22. Environmental factors will figure prominently in how Student behaves, responds and learns. (NT 623)
23. Dr. R, who gleaned information directly from Student's [Preschool and Developmental Center] teachers, and also provided them with behavioral scales which they completed, determined that Student performed better with fewer children in the classroom, and was less involved and attentive over the course

of the day as the number of children in the class increased. (NT 615, 617, 625, 631-632)

24. Dr. R personally observed Student in both settings and found that he presented differently in the two settings. She observed "behavioral issues with respect to some atypical behaviors, social skills, sensory sensitivities particularly to noise and general reactivity to the environment ...was very dramatic in terms of his differential responses in separate environments. It really highlighted that this was a kid who was sensitive to his environment." (NT 617-618, 622, 625, 678)
25. Dr. R's professional opinion is that Student will tend not to engage if placed in a classroom with more than six children, and the distractions and number of other children in the classroom will directly impact Student's ability to learn. (NT 638-640).
26. The District suggested that the Parents visit a class at [redacted] Elementary School run by the DCIU, and the mother went to see the class before the scheduled IEP meeting with the District. The class contained two groups of children – kindergartners and first graders. (NT 104, 112)
27. Although she liked the Proposed Placement teacher, the mother expressed serious concerns to the supervisor of the program at Proposed Placement, noting the noise and the distractions, the expectations for independent work in the class, the fact that there were different activities in the one classroom for the kindergartners and the first graders, and the amount of talking between the teachers working with one group across the room from the other group. (NT 105, 209)
28. The Parent observed that there was simultaneous instruction in the class, such that while one teacher was doing one-on-one work with the first graders, the other teacher was taking the kindergartners to the front of the class to teach. This was also observed by the private speech/language therapist during her observation of the classroom. (NT 105, 442)
29. The Parent observed that once the first graders were engaged doing independent study, the teachers were talking to each other over the children. (NT 105, 648)
30. Dr. R opined that separate simultaneous instruction to two grades of students would provide competing stimuli for a child like Student and was sure to be a problem. (NT 650-651)
31. The Parent and Dr. R both observed that the children in the Proposed Placement classroom were at times expected to work independently. Student is not able to work independently. (NT 105, 648, 650)

32. Dr. R noted the Proposed Placement classroom seemed physically large and it would be hard to imagine Student sitting at a desk and working independently on the types of tasks that she observed. (NT 650)
33. The Coordinator of Elementary Special Programs testified candidly that she would not describe the [Proposed Placement]class as a quiet one. (NT 507)
34. Notably, Student has not passed any of his audiological tests due to his distractibility to stimuli present in the examining room. (NT 139)
35. The District witness who described the proposed program at Proposed Placement was unable to testify about the accommodations, if any, designed to assist Student in managing the noise and distractions in his proposed classroom. (NT 587)
36. This witness testified that the type of behaviors usually prevalent in the Proposed Placement class were those behaviors that *did not impact the other students*, such as self-stimulation and rocking in chairs. The basis for the curious finding that this type of behavior did not affect the other children was not provided. (NT 587-588)
37. The witness testified that even though the classroom was divided by a three-foot bookcase with a walkthrough, the students on one side were able to hear what was being said on the other side of the room and that there was visibility over the bookcase barrier in the classroom. (NT 554-555, 590)
38. The Itinerant Special Education Teacher who wrote the draft IEP, and the Occupational Therapist, both members of the IEP team, had not observed the Proposed Placement program and at the IEP meeting could not comment on its appropriateness for Student. (NT 300, 334)
39. On June 20th, 2007, the District convened an IEP meeting to develop a program for Student designed to start in September 2007. It was the Parent's understanding that the District would reconvene the IEP meeting to consider placements, as the meeting ended when the discussion on class size was initiated. (NT 192-193)
40. It was the understanding of the District's Itinerant Learning Support Teacher, who also attended the IEP meeting, that the Coordinator of Elementary Special Programs would send referrals to various programs and would then be in touch with the Parents to talk about the programs after the referral were sent, but not that the entire IEP team would reconvene. (NT 301, 524)
41. The private speech/language therapist, who also attended the IEP meeting, recollected that the Coordinator of Elementary Special Programs was going to

send referrals, and that the mother asked that the IEP team be reconvened to discuss placement after referrals were sent. (NT 433-434)

42. Although class size was discussed at the IEP meeting, the IEP team never made a decision about what “small class size” meant in terms of Student’s needs. The proposed IEP did not define class size. (NT 304, 311, 431-432, 519-520; P-33)
43. The team did determine that a more restrictive placement than full time inclusion in a regular education classroom was required for Student. (NT 488)
44. The IEP team discussed the continuum of placements that could be considered for Student and agreed that a full time learning support class and/or an autistic support class would be appropriate for Student. Such a placement does not exist in the District. (NT 488, 490, 518)
45. On June 29th, 2007, the District issued a NOREP offering an unidentified full-time learning support and/or autistic support class operated by the Delaware County I.U. for the 2007-2008 school year. (NT 523, 524; S-11, S-12)
46. On July 9th, 2007, the Parents rejected this NOREP as it did not identify a program location. (S-12)
47. On August 3rd, 2007 the District issued a second NOREP which offered a placement at the DCIU Class at Proposed Placement Elementary School. (NT 195-196; S-21, S-22)
48. The Parents rejected the second NOREP, stating their reasons in a letter to the District on August 14th, 2007. (NT 185, 186, 211-213, 272-273; S-26)
49. In the letter dated August 14, 2007 the Parents also notified the District of their intent to place Student at Private School for the 2007-2008 school year. (NT 505; S-27)
50. Private School is accredited by the Pennsylvania Association of Private Academic Schools (PAPAS). (P-44)
51. Private School serves a total of 70 students and offers a small and quiet environment. (NT 96, 232-233, 349)
52. Students at Private School generally have language-based learning differences, auditory processing issues, and/or nonverbal learning disabilities. They are students who would struggle in a large classroom and need a small class size. (NT 354).
53. At Private School Student is in a classroom of 4 students with 1 teacher (NT 97, 352, 384)

54. Student's classroom at Private School is physically small with a kidney-shaped table around which the teacher and the students gather, allowing the teacher and Student to have close proximity. (NT 383).
55. Private School offers an individualized approach to learning. The small class size allows the teacher to know when Student grasps a concept or not and affords him individualized attention. (NT 351, 372; P-44)
56. The Private School multisensory reading program addresses four areas: alphabet/dictionary skills; reading; spelling; and handwriting, individualized for each student according to the student's level, age and instructional needs. (P-40)
57. Student learns his letters in a tactile fashion by tracing letters on sandpaper or in sand, helping him see how letters are formed, and also helping him with fine motor skills. (NT 363).
58. At Private School, language is integrated into the classroom curriculum and Student is also receiving individual speech and language therapy with a certified speech/language pathologist once a week for 30 minutes.³ (NT 96, 232, 354, 367, 392; P-40, P-43).
59. In the classroom, Student's speech therapy is reinforced through the multisensory learning approach, for example by the teacher individually teaching him consonant letters using a mirror to recognize the formations of his mouth. (NT 367, P-40)
60. Because he is in a quiet environment, free from distractions and noises, Student is not displaying the types of behavioral and attentional problems prominent in his presentation at the Preschool and Developmental Center programs. (NT 97)
61. There are no behavioral and/or distracting self-stimulating behaviors by other students in Student's class, as the composition of his class consists of learning disabled students without outward manifestations of their disabilities that would distract Student. (NT 97, 234)
62. Student's social skills are formally addressed at Private School by the music therapist and the school counselor through the weekly 'Cycles' class where social skills are taught to the children in small groups. There are two 'teams' at Student's grade level providing the students with opportunities to interact with peers during games and other activities while they are moderated by adults. (NT 98, 233, 381-382).

³ The Parents are also continuing to provide private speech therapy once weekly. (NT 420, 444)

63. Student's fine and gross motor needs are addressed and built into the Private School program by way of the multisensory approach to learning which is reinforced on a daily basis in his classroom. Student also participates in Art, Music and Physical Education activities where his fine and gross motor skills are regularly addressed. (NT 98, 242)

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.⁴ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. This hearing officer has made the following determinations of the witnesses' credibility:

Parent: Student's mother testified and proved to be an exceptionally credible witness. She presented as earnest and honest, and as a very reasonable parent. She did not overstate her position, and did not go beyond what she knew. Although she was a very informed mother, she did not project a "know-it-all" attitude regarding her son's disability. She was willing to acknowledge that she was impressed by the teacher in the District's proposed placement. The mother's testimony that she was led to expect the IEP team would reconvene to discuss placement location was persuasive, and the fact that the whole team did not discuss specific placements when it had more data about what was available was a fatal flaw given Student's extreme sensitivity to environmental factors.

Itinerant Learning Support Teacher: This witness' work at the District consists primarily of providing itinerant learning support pull-out services to children who are included in regular education classes. Although she has special education certification, she presented no credential suggesting she was experienced in educating very young children with the complex neurodevelopmental disabilities Student presents. It was of concern that she observed both Student's programs on behalf of the District, but did not feel it necessary to speak with his teachers about his progress or ask to see written progress reports. Her observations of Student in the two settings were given little weight as her expertise in interpreting what she saw was not established. It was disconcerting that she was given the responsibility of drafting Student's IEP.

⁴ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Occupational Therapist: This witness was Student's occupational therapist in the early intervention (up to three years) program and was part of the District's transition team. She testified in detail and earnestly about her assessment of Student's occupational therapy needs. She credibly established that Student requires direct occupational therapy services in addition to whatever motor activities are provided as part of the curriculum.

Head of School, Private School: This individual presented as a very credible witness. He was precise and stayed with what he knew for a fact. He projected an attitude of openness to questions from both attorneys and the hearing officer, and was not defensive. He presented a comprehensive picture of the program at Private School.

Speech/Language Therapist (Private): Other than the Parents, this individual has the most extensive experience with Student. She met him when he was two years old and has been providing speech/language services since that time. Additionally she was the teacher of the intensive language-based preschool classroom Student attended from summer 2004 to May 2006. Her area of specific expertise is children with autistic spectrum disorders, having seen a "couple of hundred" and she also has seen a fair number of children with apraxia, approximately 75 to 100. When presenting her testimony, this individual was exact, and when she did not recollect details from some years back she was careful to testify "to the best of (her) knowledge" without being defensive. She spontaneously confirmed the Parent's recollection that the Parent had requested/expected another IEP team meeting at which placement was to be decided.

Supervisor of Special Education, DCIU: This individual was called for the purpose of testifying about the transfer of records from the DCIU to the District and was not asked to offer more. Although her testimony was credible, the entire side matter of what records are transmitted from the DCIU to Districts and how they are transferred seemed to be a red herring and contributed little to the substance of the case.

Coordinator of Elementary Special Programs: This witness was low-keyed and did not overstate her position. She displayed no rancor toward the Parent or Parent's counsel, and was cordial throughout the proceedings. She seemed to be testifying to the best of her recollection and was credible regarding information that concerned the IEP meeting and the placement process. However, based upon Student's presentation as documented in the ER and as described by his mother and his long-time speech language therapist this hearing officer cannot find credible her opinion that the District's proposed placement was appropriate and questions her choice not to reconvene the IEP team to discuss program location.

Lead Teacher for Literacy, DCIU: This witness was able to describe the physical characteristics of the Proposed Placement and the services attached thereto. Given that she is not the teacher in the classroom and her involvement in the classroom and the frequency with which she visits there is unknown, her testimony about what actually happens in the classroom was given little weight. Her answers regarding classroom interventions were vague, suggesting little actual familiarity with any aspect of the proposed placement other than curriculum. It was notable, and lessened her credibility, that she was willing to opine with certainty about the relative merits of printing and cursive writing without being able to cite research to support her position.

Supervisor of Special Education (DCIU): This witness' testimony added little to the case given that it involved the records transfer, a point which this hearing officer does not believe to be essential to the case. It was noted that the witness appeared to be somewhat defensive, but this may be because of lack of experience with due process.

Private Neuropsychological Evaluator: This witness is very well trained and highly experienced. She answered all questions comfortably and confidently. She seemed to be very fair in her response to questions about whether the District's proposed classroom would be appropriate for Student. Overall, she was an "ideal" independent educational evaluator witness, one of the very best this hearing officer has heard. She was judicious in her responses and did not overstate her position. She projected the attitude of being at the hearing to share what she knew to be true and to offer her professional opinion when it was requested, without being a champion for the Parents or an adversary of the District.

Speech/Language Pathologist (District): This witness lost credibility when she initially tried to attribute Student's difficulty in performing some of the tasks required of him to the fact that it was the first time he had met her and therefore she could not get him to focus on the testing tasks. Given that she screens all incoming kindergartners, who are probably meeting her for the first time, it would have been helpful if she had attempted to discern what it was about Student that made an initial meeting difficult, or considered what other factors might have been in play at the time (such as Student perhaps not being able to do the tasks) rather than brushing it off. Additionally this witness allowed herself to become more rattled during cross examination when asked about the absence of baseline information relative to the language goals and objectives; her voice tone changed and her face flushed. It was not clear whether she had a problem with the testimony she was providing or whether she felt personally challenged/offended.

School Psychologist: The witness candidly testified that early childhood is not his area of expertise, although he was given the task to compile information and develop the ER. He offered credible testimony that the recommendations of the private evaluator were appropriate based on her evaluation. He established credibly that Dr. R's report was adopted into the District's evaluation as if it were the District's own and therefore would receive the same consideration that a report by a District psychologist would be given.

Discussion and Conclusions of Law

Legal Basis

Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the District asked for this hearing, the District bears the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless

the evidence is equally balanced so as to create a 50/50 ratio. In this matter that is not the case.

Entitlement to FAPE

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). When a child has been found eligible for special education, the child is entitled under the IDEIA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

Private School Placement and Tuition Reimbursement

Parents who believe that a district’s proposed program is inappropriate may unilaterally choose to place their child in an appropriate placement. The right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in Burlington School Committee v. Department of Education, 471 U.S. 359, 374 (1985). A court may grant “such relief as it determines is appropriate”. “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” Burlington, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

In 1997, a dozen years after Burlington the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i) In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(ii) Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii)

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Case law has established that the private school placement selected by a parent, where the District's program is inappropriate, does not need to conform to federal or state IDEA regulations. Florence County 4 School District v. Shannon Carter, 126 L.Ed.2d 284 (1993). Therefore the teachers do not have to meet state requirements and the students do not have to have IEPs generated by the school. Under the federal IDEA as interpreted by the United States Court of Appeals for the Third Circuit in Oberti v. Board of Educ. of Borough of Clementon School Dist., 995 F.2d 1204 (3d Cir. 1993) [Student] is presumed to be entitled to the least restrictive environment, that is, the educational setting appropriate to her needs that maximizes interaction with nondisabled students. However, when a District has failed to provide an appropriate program, the fact that the private school is not the least restrictive environment is not relevant. See, for example, Rose v. Chester County I.U., No. 95-239 (E.D. of Pa., May 6, 1996), aff'd. 114 F.3d 1173 (3rd Cir. 1997) and Rairdan M. v. Solanco School District, 97-CC-5864 (E.D.Pa. 1998). Equitable considerations must now enter into the equation as it has been determined that the District did not offer Carl an appropriate IEP for the 2005-2006 school year and the placement unilaterally chosen by the Parents was appropriate.

IEP

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that "Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. Additionally, the court in Polk held that educational benefit "must be gauged in relation to the child's potential."

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a "free appropriate public education as defined by the Act." Polk,

Rowley. The purpose of the IEP is not to provide the “best” education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

The IEP for each child with a disability must include a statement of the child’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum and meeting the child’s other educational needs that result from the child’s disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress.

Independent Educational Evaluation Reimbursement:

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must either initiate a hearing and at that hearing show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency initiates a hearing and the final decision is that the agency’s evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).

Discussion

Student is a student with at least two complex neurodevelopmental disabilities: speech apraxia and autism. The record clearly establishes that he requires a small learning environment that is individualized and has limited distractions, and that in the absence of these conditions he is overwhelmed by sensory stimulation and engages in reactive behaviors.

Originally, at the end of June 2007 following an IEP meeting, the District timely offered for parental approval a NOREP that did not identify the location of the proposed placement for Student. Although in some cases this omission has been found to

constitute a significant violation⁵, it does not necessarily have to be a fatal procedural or substantive flaw. However, in Student's case failing to offer a specific location was highly inappropriate given his documented need for a certain type of environment in order to profit from his educational program. When the Parents properly rejected this NOREP on July 9, 2007 the District waited until August 3, 2007 to issue another NOREP, this one proposing a classroom placement about which the Parents had expressed serious concern. Upon observation of the program, this concern was reiterated by Student's private speech/language pathologist who had also been his teacher and by Dr. R, the neuropsychologist whose evaluation report the District had adopted in its entirety in lieu of performing its own psychological assessment. Based upon the record taken as a whole, this hearing officer shares the Parents', the speech/language pathologist's and Dr. R's concerns about the proposed placement and finds it highly inappropriate for Student.

The District's proposed IU operated classroom at Proposed Placement, an elementary school outside the District, is situated in a large physical space, it contains up to twelve disabled students at or near the age of beginners, the students are divided into a kindergarten class and a first grade class, the students are instructed simultaneously at opposite ends of the room, the room is delineated into two spaces for the two classes by low bookcase barriers with a pass-through, the barriers offer neither visual privacy nor auditory containment, the teachers talk to one another across the classroom space, the children at times engage in self-stimulatory behaviors such as rocking in their chairs, and the children at times are required to work independently. Although by all accounts the teacher at Proposed Placement is excellent, given that Student is highly environment-dependent, any one of these conditions present in her classroom would present a challenge; in combination they can be confidently predicted to constitute a disaster.

For a student like Student education includes not only academics but also must address factors such as social, attentional and emotional needs impacting the child's total school experience. County of San Diego v. California Special Education Hearing Office, 24 IDELR 756, 760 (9th Cir. 1996); Bucks County Public Schools, Commonwealth of Pa., 529 A. 2d 1201 (Pa. Commw. 1987), 1987-88 EHLR 559:153. Manchester School District v. Charles M. F., 21 IDELR 732, 734, citing Lenn v. Portland School Comm., 998 F.2d 1083, 1089 (1st Cir. 1993); Caldwell-West Caldwell Bd. Of Educ, 33 IDELR ¶ 88 (SEA NJ 2000). Rather than assisting Student to improve his functioning in these very important areas, given his constellation of needs the Proposed Placement is likely to negatively impact him and precipitate regression.

In addition to presenting the multitude of reasons they objected to the District's proposed placement, the Parents also put forth a variety of areas in which they believed the IEP itself was inappropriate. Given the clearly inappropriate placement offered by the District, the deficits of the proposed IEP are almost moot. Even if the IEP had been perfect, and it was far from perfect, the place where the District proposed to implement the IEP was not appropriate for the reasons presented above. Among the flaws of the IEP, all of which will not be examined in detail here given that the location of the

⁵ Special Education Opinions No. 905 and No. 997.

intervention is the heart of this case, are the lack of reporting on Student's progress or lack thereof on his previous goals and objectives⁶, the lack of baseline data for the proposed goals and objectives, the failure to address Student's behaviors in reaction to hypersensitivity to visual and auditory stimuli, and the incomprehensibly incorrect calculations of the hours in special education vs. regular education.

The program at Private School is appropriate for Student. It provides the small class size, individualized instruction, freedom from distractions, and multisensory instruction that Student requires at this time to be successful. The one area of deficiency is the lack of direct occupational therapy services or occupational therapy consultation, although appropriate fine and gross motor activities are integrated into the multisensory curriculum. However, given its overwhelming superiority to the inappropriate program proposed by the District, this flaw is not fatal, and is fairly easily remedied by an arrangement with the IU or the District for the provision of this supportive service to Student.

Although there is some support among the body of appeals panel decisions for reimbursement for an IEE that was not obtained because of a disagreement with a district's ER⁷, in this case it is very clear that in the late fall of 2006 the Parents proactively and freely commissioned the independent evaluation solely in order to have an updated picture of Student's needs. The resultant masterful report was comprehensive and obviated the need for the District to re-assess Student in the areas the report addressed. Although the District wisely decided to adopt the private report in its entirety, the District should not be penalized for declining to subject Student to its own testing which would likely be duplicative. Although parents have the right to obtain private rather than public evaluations, they are not entitled to do so at public expense when they substitute their own preferences in timing no matter how proactive, or in evaluator no matter how excellent, for the district evaluation to which they are entitled.

⁶ It was clear that the District had not obtained nor sought this information from the DCIU. (NT 310, 463, 510, 521-522)

⁷ PA Spec. Educ. Op. No. 899 (1999); PA Spec. Educ. Op. No. 1111 (2001); PA Spec. Educ. Op. No. 1140 (2001); PA Spec. Educ. Op. No. 1573 (2005); PA Spec. Educ. Op. No. 1733 (2006).

Order

It is hereby ordered that:

1. The kindergarten program and placement offered to Student by the Haverford Township School District for academic year 2007-2008 were not appropriate.
2. The program unilaterally selected by the Parents is appropriate.
3. There are no factors mitigating the District's responsibility for tuition reimbursement.
4. The Haverford Township School District shall reimburse Mr. and Mrs. for Student's tuition at Private School for the 2007-2008 school year, and shall also reimburse the Parents for all required fees including those for books and supplies, associated with the placement.
5. Mr. and Mrs. are not entitled to reimbursement for the evaluation they independently obtained from Dr. R.

February 25, 2008

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.

Hearing Officer