This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: SF

Date of Birth: xx/xx/xxxx

Dates of Hearing: 10/15/08; 01/07/09

CLOSED HEARING

ODR No. 9173/08-09 AS

Parties to the Hearing:	Representative:
Parent	Parent Attorney:
School District Philadelphia	School District Attorney Kenneth Cooper, Esq. Office of General Counsel 440 North Broad Street, 3rd Floor Philadelphia, PA 19130
Date Record Closed:	January 13, 2009
Date of Decision:	January 28, 2009

Hearing Officer: Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

[Student] is presently a first grade student in the [Charter School]. Student's Mother would like him to attend a traditional Philadelphia public school, but she contends that the neighborhood school where the District proposes to implement the special education program proposed for Student cannot fully accommodate his needs and provide a safe environment for him. Parent has refused to permit Student attend school in a setting that she believes is an inappropriate placement. Parent requested Student's assignment to another nearby Philadelphia elementary school which she contends would be more suitable for Student. In the alternative, Parent requests a private school or a different charter school placement. Although Parent believes that Student would be academically, behaviorally and socially unsuccessful in the public school proposed by the District, she wants Student to have the opportunity to interact with peers during the school day, and believes her preferred school would meet his needs.

In addition to opposing Parent's substantive contentions, the District argued that the due process complaint should be dismissed for lack of jurisdiction because Student is enrolled in a public charter school. The District's motion was denied for reasons placed briefly on the record and more fully developed in this decision.

The due process hearing record was completed in two brief but widely separated sessions. The lengthy period between sessions resulted from attempts to accommodate the schedule of Parent's former counsel, who withdrew her appearance just before the second hearing session, scheduled for December 19, 2008. After that session was postponed due to bad weather, the hearing was completed on January 7, 2009 with Parent proceeding pro se on behalf of Student.

For the reasons which follow, I conclude that the School District has offered Student an appropriate program and placement.

ISSUES

1. Should the due process complaint for Student have been dismissed for lack of jurisdiction due to his current enrollment in a charter school?

2. Has the School District of Philadelphia proposed an appropriate placement for Student?

3. Has the School District of Philadelphia proposed an appropriate program for Student?

FINDINGS OF FACT

1. Student is a seven year old child, born xx/xx/xxxx. He is a resident of the Philadelphia School District and is eligible for special education services. (Stipulation, N.T. p. 12)

2. [Redacted]. The District also accepts the results of a Cyber Charter School evaluation which concluded that Student is IDEA eligible under the Other Health Impairment (OHI) disability category in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9); 22 Pa. Code §14.102 (2)(ii); (N.T. pp. 12 (Stipulation), 117, 125; P-8)

3. Through private evaluations obtained by his Mother[1] from Thomas Jefferson University Hospital and the Center for Autism, Student has also been diagnosed with Asperger's Syndrome. Parent provided the evaluators with all information they had concerning Student's history and behaviors. The evaluation conducted at Thomas Jefferson, as well as evaluations by Cyber Charter School and the School District noted the possibility of Attention Deficit/Hyperactivity Disorder (ADHD). (N.T. pp. 12 (Stipulation), 27, 36, 52, 53, 84, 102, 110, 125, 193—197, 215, 220; P-8, P-12A, P-12B, S-4)

4. Treatment recommendations resulting from the Thomas Jefferson evaluation included twenty hours of TSS services both at home and at school, as well as five additional hours of behavioral therapy weekly. Although Student began receiving those services, all were discontinued several months ago because Student did not have an educational placement in which he could use twenty hours of TSS services at school. (N.T. p. 106; P-12A)

5. Student has been continuously enrolled in the Cyber Charter School since October 2007, where he is currently in first grade. Student's Mother supervises his computerized program at home each day. Prior to enrolling Student in the charter school, his Mother enrolled him in his neighborhood District elementary school for kindergarten. (N.T. pp. 13 (Stipulation), 26, 27, 32, 113, 115; P-8, S-1)

[1] [redacted]

6. Parent reported that before kindergarten, Student was enrolled in eleven day care or pre-school programs that he was asked to leave. According to his Mother, Student reacted negatively to movement and noise in large class groupings. He exhibited physical symptoms such as rigidity, growling, teeth grinding and kicking when entering classrooms where there was a lot of noise and movement. He was also aggressive toward other children. (N.T. pp. 24—26, 84, 85, 127; P-8)

7. Student's Mother refused to permit him to attend his neighborhood school at the beginning of the kindergarten year because the District had not completed a requested evaluation of Student and she was unsure whether the assigned school would be appropriate without special education supports in place and assurances that Student would not be placed in an overwhelmingly large class. Parent expressed no concerns about the staff at Student's neighborhood school, and in fact, liked the school principal and the teacher of Student's prospective kindergarten class. (N.T. pp. 30, 31)

8. Student's Mother requested a special education evaluation from the District in April 2007, at the time she enrolled Student for kindergarten. The District school psychologist who conducted the evaluation administered standardized assessments to measure the likelihood of Asperger's and Student's adaptive behavior level, neither of which supported Parent's reports that Student has Asperger's and cannot function in a regular school setting. The District school psychologist did not have either the Jefferson or the Center for Autism evaluation reports at the time she evaluated Student. The District evaluator selected the Reynold's Intelligence Assessment Scale RIAS) to measure Student's cognitive potential due to Student's short attention span. Student's composite intelligence index score of 118 placed him in the high average range. Student's verbal intelligence index score, 135, was significantly above average, while his nonverbal intelligence index score, 98, fell in the average range. Student was very verbal during the evaluation and liked to move around, which the evaluator permitted when possible. (N.T. pp. 189—193, 196, 201, 202, 204, 205, 213, 215, 223, 224; S-4)

9. Parent initially agreed with the District's October 2007 evaluation report, which was inconclusive with respect to IDEA eligibility, and the District's recommendation that Student be placed in a regular education classroom. Later the same day, however, Parent rejected the District's proposal, writing on the disapproved NOREP that it should be amended to assign Student to the District elementary school that she designated. (N.T. pp. 27, 28, 119—122, 125; S-2, S-3, S-4)

10. Parent would have permitted Student to begin attending a regular education classroom in her preferred school in November 2007. Mother believes that the school she requested on the rejected NOREP is capable of meeting Student's needs, but that he would be unsuccessful in his neighborhood school. (N.T. pp. 122, 123; S-3)

11. [redacted]

12. In the spring of 2008, pursuant to his Mother's request, the Cyber Charter School evaluated Student at his home. The evaluation consisted of information provided by his

Mother, an observation of Student in the home, review of prior evaluations, and two standardized measures of cognitive ability and achievement, the Woodcock Johnson III Tests of Cognitive Abilities—Intellectual Ability/Cognitive Performance and the Woodcock-Johnson III Tests of Achievement in Reading, Oral Language, Math, Writing and Academic Fluency. Student's Mother was present in the room at all times during the testing. (N.T. pp. 34, 35, 113, 114, 116, 147, 148, 153, 154, 199, 200, 218; P-8)

13. Student's scores on all sub-tests of the cognitive ability measures place him in the normal/average to advanced range of intellectual functioning. Achievement scores in reading, oral language and writing were in the average range. Math calculation was mildly impaired to average. Academic fluency difficulties were noted particularly in writing and to a lesser degree in math. (P-8)

14. The charter school evaluator observed that Student was "quite impulsive and squirmy" but could be prompted to return to task and was able to sustain attention during the standardized tests despite distractions. Student's report card in January 2008 reported progress in all academic areas (P-8 at p. 2)

15. Student's social and behavioral difficulties reported in the evaluation were based entirely upon information Parent provided. In light of the private evaluation diagnoses of Asperger's, the charter school evaluator completed the Gilliam Autism Rating Scale (GARS) and the Gilliam Asperger's Disorder Scale (GADS) based entirely upon Parent's responses. Although the standard scores and corresponding percentiles were included in the ER, there was no explanation of the results and neither Autism nor Asperger's were identified as Student's disability category. The charter school evaluation concluded that Student is IDEA eligible in the category of Other Health Impairment (OHI). (N.T. p. 198; P-8)

16. The charter school evaluator's recommendations for further evaluations, program and placement were directed to Student's charter school IEP team and included additional assessments to determine the need for occupational therapy, as well as evaluations and strategies to asses and manage his behavioral and sensory integration issues. No formal assessments have been done to confirm Parent's anecdotal reports that Student exhibits sensory integration problems. (P-8, P-12A, P-12B, S-4)

17. The charter school evaluator recommended that Student continue in the charter school program, but if necessary to transfer him to a neighborhood school, the evaluator recommended a school close to his home with a strong curriculum and accommodations for instruction in a smaller classroom setting, noting Parent's suggestion of her preferred elementary school. (N.T. p. 127; P-8)

18. Based upon the charter school evaluation, the District convened an IEP team meeting in August 2008 to consider Student's need for special education services. The IEP team recommended assignment to a regular education classroom in Student's neighborhood school with supplemental learning support services. (N.T. pp. 36, 37, 222, 233, 234; P-9)

19. Parent approved the program specified in the proposed IEP but disagreed with the recommended assignment to Student's neighborhood school. Although Parent was not satisfied that the IEP adequately addresses all of Student's needs, she believed it was essential to have a program in place to begin the school year, and that the IEP could later be modified to make it appropriate for Student. Nevertheless, because the District would not assign Student to a school other than his neighborhood school, he remained at the charter school when the 2008/2009 school year began. (N.T. pp. 37—40, 42—44, 57, 58, 60, 130, 131, 155, 238--240; P-9, S-5)

20. The District likewise considered the August 2008 IEP to be a preliminary offering until Student could be observed in a school setting and a more detailed IEP develop, based upon Student's actual skills and classroom functioning. (N.T. pp. 236, 238; P-9)

21. Student's Mother wants him to attend a School District of Philadelphia public school. His current charter school enrollment was selected and continues only because Parent was unsure whether a regular education classroom in Student's neighborhood school was appropriate at the time he was scheduled to begin kindergarten there. Parent now believes that the District has not yet appropriately evaluated Student, that the proposed IEP is not appropriate in that it does not address behavior needs, class size and number of adults in the classroom, and because it provides neither autistic support [redacted]. Parent also believes that the assigned school is not safe for Student and that he will be unsuccessful there. (N.T. pp. 23, 24, 38-40, 43—45, 118, 126, 127, 132)

22. The curriculum, class size, minimum security procedures and number of adults in the elementary school classrooms are uniform throughout the District. There is no significant difference between the elementary school Parent prefers and Student's home school, where the District proposes to assign him, in any of those areas. First grade classes at Student's home school generally have 20—25 students. That school provides a special education curriculum, with a first grade learning support class that generally includes 11 children. Both Student's home school and Parent's preferred school are supported by the University of Pennsylvania. (N.T. pp. 209, 210, 228—231, 241)

DISCUSSION AND CONCLUSIONS OF LAW

A. Substantive Legal Standards

1. FAPE Requirements

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is "reasonably

calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). "Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by the *Rowley* case and other relevant cases, an LEA is <u>not</u> required to provide an eligible with services designed to provide the "absolute best" education or to maximize the child's potential. *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

<u>2. Requirement of Education in the Least Restrictive Environment</u>

The federal IDEA regulations provide that an eligible student's program is to be delivered in the least restrictive environment ("LRE") appropriate for the student, *i.e.*, one in which the student is educated with children who are not disabled to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2)(i). In order for a proposed placement to meet LRE requirements, school districts must, at a minimum, assure that placement decisions are "made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options" §300.116(a)(1); are "determined at

least annually" §300. 116(b)(1); are " based upon the child's IEP" §300. 116(b)(2). In addition, unless an eligible child "requires some other arrangement, the child [must be] educated in the school he or she would attend if not disabled." §300.116(c).

The United States Court of Appeals for the Third Circuit provided additional guidance for applying LRE requirements in *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993) In accordance with *Oberti*, the first step in evaluating a program and placement to determine whether it meets LRE criteria is an assessment of whether the student can be educated satisfactorily in the regular classroom with supplementary aids and services. In making that determination, a school district is required to consider the full range of aids and services available, with the goal of placing the student with a disability in the regular classroom as much as possible. Consideration must also be given to the unique benefits that a student with a disability will derive from placement in a regular classroom, and those benefits must be compared to the benefits likely to be derived from a more segregated setting. Consideration must also be given to whether there are likely to be any negative effects upon the education of the other children from placement of a particular student with a disability in the regular classroom.

Finally, if education outside of the regular classroom for all or part of the school day is found necessary, the proposed placement must be evaluated to determine whether it provides for contact with non-disabled peers to the greatest extent appropriate. In *Oberti*, the court noted that the continuum of placements mandated by the IDEA statute and regulations is designed to assure that a school district does not take an "all or nothing" approach to the placement of a student with a disability, but considers using a range of placement options to assure that the unique needs of each child are met. A school district's obligation to place an eligible student in the least

restrictive environment does not diminish its responsibility to educate an eligible student appropriately.

3. Burden of Proof in Due Process Hearings

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of proof. Consequently, in this case, because Parent has challenged the appropriateness of the District' program/placement recommendation in the NOREP issued in August 2008, Parent must establish that the District's proposal is not reasonably calculated to assure that Student would receive a meaningful educational benefit from the proffered services

B. Jurisdiction

Although the District fully participated in the due process hearing with respect to the substantive issues in dispute, the District moved to dismiss Parent's due process complaint for want of jurisdiction immediately after the first hearing session was convened, and renewed its motion in its closing argument. *See*, N.T. pp. 17, 18, 258. The District's motion to dismiss the due process complaint is based upon its contention that Student's enrollment in the [Charter School] transfers the entire responsibility for providing Student with FAPE to [charter school], since a charter school has Local Education Agency (LEA) status under federal and state law. *See*, 34 C.F.R. §300.28; 22 Pa. Code §711.3. In essence, therefore, the District contends that it is not required to provide Student with IDEA due process protections until and unless Student begins attending classes in a District school. The District argues that a hearing officer lacks jurisdiction to conduct a due process hearing concerning an appropriate program and placement to be provided in and by the School District as long as Student is enrolled in the charter school.

There is no question that the District would be correct if Parent were seeking to hold the District responsible for a claim that Student is not presently receiving an appropriate educational program. There is, however, no suggestion that Parent is dissatisfied with Student's current academic progress or the charter school curriculum. Nevertheless, because Student's instruction is computerized and delivered on a one to one basis at home, he has no peer interaction, which Parent believes he needs and wants. It is primarily to obtain and program placement in a setting where Student will be educated with his peers that Parent filed a due process complaint to seek FAPE for Student from the public school District where she and Student reside. Certainly, Parent has no recourse against the charter school via an IDEA due process hearing for Student's lack of peer interaction during the school day, since in-home, computerized instruction is the essence of a cyber charter school. Parent, however, contended that she chose to enroll Student in the charter school only to assure that Student received academic instruction while she continued her efforts to resolve her concerns with the District's proposed public elementary school placement for Student, including litigating her due process claim that the District failed to offer an appropriate program and placement. *See*, F.F. 7, 19, 21. Parent's contention with respect to the role of the charter school in this dispute is, in essence, that enrolling Student in the charter school was not a real choice in the sense of selecting a preferred program and placement, but a reasonable stop gap alternative to accepting a District placement that Parent contends is inappropriate, indeed, unsafe, for Student. F.F. 21.

The underlying legal question with respect to jurisdiction is whether the due process protections available to eligible students may be invoked against only one public agency at a time under all circumstances, *i.e.*, that parents of eligible students may seek an appropriate program and placement from either their school district of residence or a charter school,

depending upon enrollment and attendance. The corollary question is whether school districts retain the obligation to engage in due process proceedings in a dispute over whether a district has offered an eligible resident student an appropriate program and placement even if the student is enrolled in a public charter school. In other words, are parents first required to accept the educational program and placement offered by their school district of residence, notwithstanding their belief that the district's proposal is inappropriate and wholly unacceptable, in order to pursue an IDEA due process hearing to seek FAPE from the school district?

The situation presented by the jurisdictional issue this case is analogous to the issue considered by the U.S. Supreme Court with respect to private school tuition reimbursement in *Burlington School Committee v. Department of Education of Massachusetts,* 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). In *Burlington,* the Supreme Court held that where there is a dispute over the appropriateness of an IEP for a student in need of special education services and the parent removes the child from a school district placement to enroll him/her in a private school, the parent is permitted to seek reimbursement for the private school tuition from the school district in a due process hearing. By that decision, the Supreme Court established the principle that parents do not forfeit an eligible child's right FAPE, to due process protections or to any other remedies provided by the IDEA statute and regulations by unilaterally selecting a placement other than that offered by the LEA. Parents do not waive their right to a due process hearing with their school district of residence by choosing a private school placement when that choice is made in the context of a dispute over the child's IEP.

In explicitly permitting parents to initiate a due process hearing under such circumstances, the Supreme Court recognized that the right to a due process hearing to secure FAPE for an eligible child from his/her school district of residence is an important means for

protecting the rights of eligible students. The *Burlington* decision established that a parent's rejection of an IEP proposed by a school district and the parent's unilateral decision to provide an alternative program/placement does not permit the district to evade or avoid its obligations under the IDEA statute. If a parent establishes that the district's proposed program is inappropriate, the district must fulfill its obligation to the child by reimbursing the parent for the costs of the alternative placement.

There is no reason to treat enrollment in a charter school as a waiver of due process rights against the school district of residence when the charter school is chosen for the same reason, *i.e.*, because of a disagreement over the school district's offer of FAPE. The only real difference between enrolling a child in a charter school because of a disagreement over the program/placement offered by the district and enrolling a child in a private school under the same circumstances is the absence of financial risk to the parent, since the charter school is likewise public education provided without cost to the parent.

There is also, however, less financial risk to the school district if the parent chooses to enroll the child in a charter school rather than in a private school. That fact provides another reason for permitting parents to seek a due process hearing to secure FAPE from their school district of residence. If the right to engage in a due process with a public school district is automatically lost or waived by enrolling a child in a charter school, even where such decision is based upon the parent's belief that the school district's program and/or placement offer is inappropriate, the incentive for a school district to engage in an ongoing dialogue with parents to develop an appropriate program for the child would be reduced. As the Supreme Court implicitly recognized in *Burlington* and in a subsequent tuition reimbursement case, *Florence County School District v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993), if there

is no parental recourse in the face of a school district refusal to provide an appropriate program and placement to an eligible student, the protections afforded by the IDEA statute and regulations are weakened. Although charter schools likewise have the obligation to provide FAPE to IDEA eligible students, there is no basis for concluding that such requirement was intended to automatically relieve a school district of its independent obligation to provide FAPE to eligible students who reside within the district where parents seek special educations services from the district.

I conclude, therefore, that under the appropriate factual circumstances, such as exist in this case, where Parent and School District disagree with respect to whether the School District offered an appropriate NOREP, and where Parent asserts a preference for having the eligible child educated in the School District, Parent may pursue a due process hearing to challenge the District's proposal. Here, in addition to Parent's uncontested testimony that her preference is for Student attend a local public elementary school, there is ample evidence that the District was well aware of Parent's desire to enroll Student in the District, and, indeed, Parent did enroll Student in his neighborhood school for kindergarten, although he did not ultimately attend school there. F.F. 5. Moreover, in the period since the dispute between Parent and District began, the District evaluated Student to determine his eligibility for [redacted] special education [redacted] services, accepted the charter school's conclusion in its evaluation report that Student is IDEA eligible by reason of OHI, developed two proposed IEPs for Student, and issued several NOREPs. F.F. 2, 8, 9, 11, 18. All such actions by the District, except the initial evaluation and NOREP, occurred after Student was enrolled in and attending the charter school. The District, therefore, recognized its ongoing obligation under the IDEA to provide Student with FAPE at Parent's request. There is no reason to conclude that such obligation does not extend to Parent's

right to a due process hearing with the District to resolve the substantive issues in dispute concerning the District's offer.

This conclusion, however, does not mean that Parent has an unlimited right to engage in a due process hearing with the District while keeping Student in the charter school. As discussed in detail below, Parent failed to establish that the District's proposed IEP and assignment of Student to his neighborhood school are inappropriate. Based upon the evidence adduced with respect to the substantive issues, therefore, the District has offered FAPE. If Parent still disagrees and refuses to permit Student to attend his home school, the District would have no further obligation to participate in a due process hearing with respect to the same issues.[2] Student must be re-enrolled in the School District and the District permitted to complete its observations and any additional assessments it deems necessary before Parent may again request a due process hearing to challenge the School District's proposed IEP or request a new IEP.

C. Appropriateness of School District's Proposed Program and Placement

1. Placement in the Neighborhood School

Parent's claim in this case is based primarily upon her belief that the District cannot provide all services specified in the IEP the District proposed for Student, or address the needs arising from Student's high academic potential at his neighborhood school. *See, e.g.* F.F. 21and N.T. 130: "I cannot identify a program offering at the neighborhood school that can accommodate my son's abilities." The District is required to fully implement an eligible student's IEP and assure that the student makes meaningful progress. The District, however, is not required to assure that an eligible—or any other-- student has access to facilities, staff, classrooms or programs that a parent prefers or that a parent believes will assure optimum

[2] Parent, of course, has the right to appeal in accordance with the procedures distributed at the first due process hearing session and sent again with this decision.

progress. The District is also not required to convince parents that the recommended placement is appropriate where, as here, the eligible student is assigned to a regular education class in the school he or she would attend if not disabled. The IDEA statute and regulations require that the District make that assignment unless it can establish that a child cannot make meaningful progress in that setting when provided with a modified curriculum and supplemental aids and services, if necessary. 34 C.F.R. §300.114, 115(b)(2), 116; *Board of Education v. Rowley; Oberti v. Board of Education.*

Parent characterized the District's assignment of Student to his neighborhood school as its "insistence in sequestering" Student based upon the District's "prevailing logic" that his "performance levels are presented as more consistent with his … peers [at that school]." There is, however, no dispute that the school building specified in the August 2008 NOREP, as well as in the NOREPs presented to Parent in October 2007 and June 2008 is the school Student would attend if not disabled. Parent, in fact, enrolled Student in that school for kindergarten in April 2007 (F.F. 5) There is no evidence that the District's decision to assign Student to that building has anything to do with the District's belief that Student "belongs" there based upon the nature of his disability and/or a perceived similarity to the rest of the student population at that school. To the contrary, the District's assertion that it assigned Student to the proposed school because the location of his residence puts him within the geographic boundaries of that elementary school is uncontradicted. Parent had the burden of proving that the regulatory requirement that Student be assigned to his neighborhood school should be set aside in this case because that school would be an inappropriate placement for Student.

Although Parent relied upon the Charter School evaluation and the independent evaluations to support Student's "documented" need for small classes, the evaluations reflect

only Mother's reports of Student's difficulties in larger groups of children. *See, e.g.*, P-8, p. 2, quoted at N.T. pp. 135, l. 23—136, l. 7:

> [H]is natural grandmother feels he needs a small classroom size, opportunities to be exposed to technology, and a strong program in math and science. To succeed socially, she feels that he needs to be in situations that he interacts with fewer numbers of children where he will experience some successes from his interactions prior to being immersed with greater numbers of children.

I conclude that to the limited extent that the charter school and independent evaluation reports suggest that Student needs small classes, such opinions are entitled to no more weight than Mother's own subjective beliefs concerning Student's classroom needs. None of the independent evaluators ever observed Student in a large group of children or in a public elementary school classroom. Repetition of Parent's beliefs in an independent evaluation report does not make the reports any more accurate or reliable than Parent's own testimony, which was based solely upon her opinions and beliefs. The Jefferson, Center for Autism and charter school evaluations provide no objective, independent support for Parent's conclusions. In addition, although Mother referred to her observations of the school she prefers and Student's home school, she provided no real basis for concluding that her preference would, in fact, offer smaller classes and a safer environment for Student by, *e.g.*, stating how many children she observed during this school year in Student's proposed classroom and the classroom he would attend in her preferred school. The District, on the other hand, provided specific credible testimony that there are no differences in either class size or security precautions between the two schools. (F.F. 22) After repeated testimony from both Parent and a friend that Student's neighborhood school is not appropriate for him, it is still impossible to determine why Parent and her witness hold that belief, or determine the characteristics of Parent's preferred school which support their belief that Student could attend that school without experiencing the difficulties they foresee at

the neighborhood school. Parent specifically stated that staff is not the issue. (F.F. 7) Parent and her witness referred to Student's adverse reaction to noise and a large group of children in the hallway during change of classes during a brief visit to the school, (N.T. pp. 170, 171) but provided no explanation for Parent's apparent, although unexpressed, belief that Student will not be exposed to similar situations at her preferred school. In short, there is nothing in the record which gives even a hint as to why Parent prefers the school she requested, much less why that school would be appropriate for Student while his neighborhood school is not.

Finally, Parent testified that Student would have been entitled to 20 hours of TSS services in school had he attended a regular elementary school. (F.F. 4) Presumably, he would be able to access those services if he enrolls in his neighborhood school and Parent again seeks those services. It is difficult to understand and credit Parent's safety concerns, therefore, since Student would be accompanied by a TSS worker for most of each school day. The likely availability of a TSS worker for Student presents a significantly different situation than a child alone in a large group of children. The one to one TSS should be able to assure that Student does not elope from either the classroom or the school if he does react badly to the noise and movement in his home school, as well remove him to a quieter place should he become overwhelmed.

Certainly, if Parent's fears were realized and Student did react adversely to the public school environment, the District would need to take appropriate steps to address that situation with appropriate supports and services. As the District pointed out, however, it first needs to supplement its evaluations with first hand observations in a school setting to determine whether Student would, in fact, be unable to function well in a regular classroom situation before considering adjustments to the proposed IEP. *See,* N.T. p. 204; F.F. 20. The District will need

to take precautions to assure that neither Student nor any other child is injured if he exhibits the symptoms his Mother described as his reactions when exposed to large groups of children. (F.F. 6) Based upon the District's testimony concerning staffing and class size, (F.F. 22), such reactions would more likely occur in the larger school environment, such as the hallways during dismissal, or possibly the cafeteria. The potential for adverse reactions, however, could certainly be greatly diminished by assuring that Student is accompanied by another adult at any time he does not have TSS services until the District can be certain that Student can successfully handle situations such as eating in the cafeteria and being in the hallways with large numbers of children.

2. Appropriateness of the Proposed IEP

Although Parent contended at the due process hearing that the District failed to propose an appropriate IEP for Student, in that the District did not update its evaluation to fully assess Student's potential needs and did not fully consider Student's needs arising from his high intellectual potential and Asperger's diagnosis, such arguments were directed toward supporting Parent's primary contention that the District's proposal to implement the IEP at Student's neighborhood school is inappropriate. Parent accepted the substance of the IEP offered in August 2008, and, indeed, would have accepted the October 2007 NOREP for a regular education placement had the District agreed to permit Student to attend her preferred school. (F.F. 10, 19) In addition, the District provided credible testimony that both parties agreed that the proposed IEP was an initial offering based upon limited information which was subject to revision once the District had the opportunity to assess Student in the public school setting. F.F. 20 There was no real contradiction in the parties' testimony concerning their respective understanding of the function and purpose of the August 2008 IEP. *See* F.F. 19, 20.

The District's proposed IEP provides a reasonable means of acclimating Student to attending the public school by offering small group instruction for part of the school day in a learning support classroom. Parent's contention that supplemental learning support is *per se* inappropriate because Student is not learning disabled is misguided. Learning support classes are not exclusively for students with learning disabilities, but are designed to provide a smaller, more supportive classroom environment particularly "for students with a disability who require services primarily in the areas of reading, writing, mathematics, or speaking or listening skills related to academic performance." 22 Pa. Code §14.131(a)(1)(v). The Charter School evaluation noted a possible mild impairment in math calculation, as well as academic fluency difficulties in writing and math. (F.F. 13) There is, however, no information available with respect to whether Student can successfully access the regular education curriculum in light of the concerns raised by the evaluation results. Moreover, the District is confronted with Parent's refusal to place Student in a regular elementary school classroom, the possibility of attention, focus and behavior issues, and the need to further assess Student's abilities and current academic functioning in order to fully determine his academic strengths and any academic or behavioral needs. An initial offer of a regular education classroom with supplemental learning support services is a reasonable and appropriate means for accommodating all such concerns. Parent is entirely accurate in her assessment that Student's initial IEP must be a starting point, with adjustments made according to how Student performs both academically and behaviorally, [redacted] In addition, the District's evaluation of Student must be updated with classroom observations which might suggest the need for further assessments, such as in the areas of occupational therapy and sensory integration. Determining the need for further evaluation and/or

additional supports and services, however, cannot begin until and unless Student begins to attend classes in his neighborhood school.

The District will be required to update its evaluation by the end of the first full progress reporting period during which Student is enrolled in his home school. If he enrolls immediately after this decision, *e.g.*, and the District is in the midst of a progress reporting period, the District shall have until the end of the next full marking period to complete an updated evaluation report. In addition, in order to accommodate Parent's concerns with respect to the safety of both Student and other children should he react adversely to large groups of children in the hallways and other common areas of the school, the District shall assure that Student is accompanied by an adult responsible for no more than two other children when he is moving from one area of the school to another during the school day, including going to another classroom, the gym, library, cafeteria, and when school is dismissed. The District's obligation to provide such close supervision shall, however, terminate after four weeks or as soon as Student is provided with TSS services, if that occurs first.

3. Parent's Request for Additional Placement Alternatives

In light of the conclusion that Parent has provided insufficient evidence to establish that placement of Student in the school he would attend if not disabled is inappropriate for him, and the conclusion that the District's proposed IEP is a reasonable and appropriate starting point for transitioning Student into a public school setting, there is no reason to discuss in detail Parent's suggestions that the District fund a private school placement or find a different charter school for Student. Briefly, however, it should be noted that there is no basis for considering private school paid by the District, since Student has never attended a regular public school program and there is no

evidence that the District is not able to provide an appropriate program and placement for him. At present, the District has very limited information about Student's academic, social and behavioral characteristics, and no firsthand knowledge concerning his ability to make meaningful progress in a regular public school with any level of accommodation. Even if it becomes apparent soon after Student begins attending his home school that the proposed IEP must be substantially revised, there is no reason to believe that the District cannot provide appropriate additional assessments, if needed, and an appropriate program for Student.

With respect to finding a different charter school, Parent is perfectly free to do so, but there is no basis for requiring the District to search for or suggest a charter school that Parent would deem acceptable. The District has proposed a placement for Student in the least restrictive environment in accordance with the IDEA statute and regulations. There is no basis for concluding that Student's home school cannot appropriately deliver the proposed program or that he will be either so unsafe or unsuccessful there that he needs an alternative placement, despite his Mother's fears and beliefs. Consequently, the District is under no obligation to find a different school for Student.

CONCLUSION

The School District of Philadelphia has offered an appropriate initial IEP for Student, and has appropriately recommended that he attend his neighborhood school. The District, however, shall be required to assure that its evaluation of Student is updated within a reasonable period, and that steps are taken to assure Student's safety and the safety of other students during his first weeks of attending the public school, when he will be exposed to more children and more noise in the common areas of the school than he may have experienced recently.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby

ORDERED that:

1. The NOREP offered to Student on August 12, 2008 by the School District of Philadelphia (P-9) is appropriate as an initial offering of FAPE.

2. The School District of Philadelphia is not required to offer Student an educational placement in any school other than the school he would attend if not disabled.

3. The School District of Philadelphia shall update its evaluation of Student by the end of the first full progress reporting period during which Student is enrolled in his home school.

4. In order to accommodate Parent's concerns with respect to the safety of both Student and other children should he react adversely to large groups of children in the hallways and other common areas of the school, the School District of Philadelphia shall assure that Student is accompanied by an adult responsible for no more than two other children when he is moving from one area of the school to another during the school day, including going to another classroom, the gym, library, cafeteria, and when school is dismissed. The obligation set forth in this paragraph shall terminate four weeks after Student begins attending his neighborhood school, or as soon as Student is provided with TSS services, if that occurs first.

January 28, 2009 Anne L. Carroll

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Anne L. Carroll, Esq.
HEARING OFFICER