

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: D.P.

Date of Birth: [redacted]

ODR No. 9903-0809 AS

Parties to the Hearing:

Representative:

Council Rock School District
30 North Chancellor Street
Newtown, PA 18940

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Date of Resolution Session

Waived

Date of Hearings:

September 10, 2009, January 6, 2010,
February 9, 2010, April 27, 2010,
April 30, 2010, May 6, 2010

Date Record Closed:

May 25, 2010

Date of Ruling:

June 9, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an elementary school-age eligible resident of the Council Rock School District (District); Student is a student at a private school [hereinafter Center]. (NT 12-1 to 19, 114-15 to 17; P-16 p. 1.) Center is a private school for children with autism; it follows the principles of applied Behavior Analysis. (NT 114-23 to 115-5.) The Student attended two District elementary schools during the 2007-2008 school year. (NT 14-23 to 20-9.) The Student is identified with Autism and Speech and Language Impairment. (NT 12-1 to 8; S-5 p. 10.)

In July 2008, the District offered the Student an IEP with part time inclusion and part time placement in its autistic support class at one of its public schools. (P-41 p. 24.) The Parents withdrew the Student from the District and enrolled Student in Center on July 14, 2008. (P-13 p. 43, P-19, S-9 p. 77.) The Parents requested due process on April 1, 2009, asserting that the District's offered program and placement were inappropriate and requesting tuition reimbursement for the 2007-2008 school year. (NT 16-2 to 17-12.)

The District asserted that its July 2008 offered program and placement was appropriate. (NT 20- 10 to 18, 22-10 to 18.) It requested that tuition reimbursement be denied for that reason. Ibid.

The hearing was convened before Special Education Hearing Officer Deborah DeLauro, Esquire, on September 10, 2009. Hearing Officer DeLauro withdrew from the matter for medical reasons, and the undersigned hearing officer was assigned after reading the transcript of the first session, Hearing Officer DeLauro's extensive notes, and the entire documentary record. The undersigned convened five subsequent hearing sessions, for a total of six sessions. The last session was on May 6, 2010. Written summations were received on May 25, and the record closed on that day.

ISSUES

1. Did the District make a free appropriate public education available to the student through an appropriate program and placement for the 2008-2009 school year, including necessary Extended School Year services in the summer of 2008?

2. Was Center an appropriate placement for the Student for the 2008-2009 school year?
3. Should the hearing officer order the District to pay the cost of tuition and transportation of the Student on account of Student's attendance at Center for the 2008-2009 school year?

FINDINGS OF FACT

THE STUDENT'S NEEDS AND SKILLS

1. The Student is severely developmentally delayed, with severe deficits in learning, speech and language. (P-25, 34.)
2. The District's reevaluation report dated December 2007 found the Student to be in need of special education services, identifying the Student with autism and speech and language impairment. (S-5.)
3. The Student exhibited substantial difficulties with prosody and articulation, along with deficits in social speech skills. (P-13 p. 20, 24, 29, 43, S-9 p. 97 to 107.)
4. The Student was in need of speech/language services. (P-13 p. 34.)
5. The December 2007 reevaluation report identified social skills, expressive language, speech, vocabulary and play skills as significant areas of need. (S-5.)
6. A December 2007 evaluation report from the [redacted] Clinic recommended that the Student have opportunities to follow instruction in a group and opportunities to socialize with peers; it recommended that 50% of instructional time consist of natural environment training. (S-8 p. 4.)
7. November 2007 ABLLS data indicated skill in a broad range of self care, communicative, social and academic skills. (S-3 p. 6 to 11, S-7, S-9 p. 91 to 95.)

8. As of February 2009, the Student was able to shower with supervision and brush teeth with prompting at home. (P-13 p. 17.)
9. The Student was the highest functioning member of the class at the District public school. (P-13 p. 24.)

PROGRAMMING HISTORY

10. The Student transferred from another school district in a neighboring state to the District in June 2007. (NT 197-18 to 19; S-1 p. 15.)
11. While in the other district, the Student attended special education settings for preschool, kindergarten and first grade, including a home program and a self-contained autistic support classroom. Instruction in many of these settings emphasized a behavior analytic approach to teaching that the Parent understood to be a Verbal Behavior educational system. The Parent believed that the District would replicate these services when the Student enrolled. (NT 198-14 to 199-11; S-5 p. 2 to 3, 14 to 16, S-10 p. 1 to 3, 13.)
12. The other district's IEP did not address any specific unwanted behaviors of the Student or any home program needs during the regular school year. (S-1.)

HOME PROGRAM

13. In the other district in a neighboring state, the Student had a privately-funded home program that delivered what the Parent understood to be a Verbal Behavior teaching system as recommended by the Clinic. This program ended in April 2007 and the Student's school program, which also utilized Verbal Behavior, ended in June 2007. The home program was not replaced when the Student moved into the District. (NT 208-13 to 14; P-25, S-8 p. 1 to 4.)
14. After moving into the District, the Parent obtained home consultation services, but not an attendant, until April 2008, when she hired an attendant privately. (NT 288-24 to 290-20; P-33.)

15. The District did not provide services in the home. District employees did offer to coordinate with any home program, and they did provide some instruction at school directed toward ameliorating some behaviors that were occurring only at home. (NT 219-8 to 17, 221-16 to 24, 227-18 to 228-1, 275-15 to 276-4, 352-1 to 353-8, 409-11 to 411-10, 583-12 to 585-9, 682-2; P-6, P-22, P-23, S-10 p. 76.)
16. Center did not provide direct services in the home. They did provide consultation with home care providers to establish a home program for the Student. (NT 75-1 to 6, 190-3 to 21.)
17. In July 2008, the Student had a program at home, provided by consultants. (P-5, 19.)

UNWANTED BEHAVIORS

18. On October 8, 2007, the District's psychologist observed a number of inappropriate behaviors, including stamping feet, banging on a table, turning over a chair, rocking, biting own hand, flicking fingers, rolling on the floor, banging head on floor, beginning a tantrum and spitting on own hand. (S-5 p. 4 to 5.)
19. The Student's teachers reported that the observed behaviors were mild in severity and low in frequency, and that they did not impede learning. This was consistent with the Student's history of not exhibiting unwanted behaviors that interfered with learning. (S-6 p. 1, S-10 p. 1 to 2.)
20. The Student's teachers reported that the unwanted behaviors were mild and easily redirected, and that they did not interfere with Student's education or interaction with others. (NT 219-1 to 5, 319-16 to 320-12, 321-8 to 23, 321-24 to 322-7; P-7, P-13 p. 28, 46, P-22, P-23, P-25 p. 4, S-6 p. 3, S-10 p. 41 S-9 p. 91 to 93.)
21. The Student's home behavior consultant reported that the unwanted behaviors were mild and infrequent. (NT 770-14 to 771-11; S-5 p. 4.)
22. The December 2007 Clinic report indicated escape motivated behavior was observed at a low rate. (S-8 p. 14.)

23. On December 5, 2007, the Parent reported to an Assessor at the Clinic that she had no problem behavior at home. (S-8 p. 4.)
24. Parent reported to the District in December 2007 that the Student was exhibiting behaviors at home including running, shrieking, and dropping to knees and elbows. These behaviors were not observed in school. (S-6 p.1.)
25. In December 2007 the District and Parent exchanged emails in which the behaviors of concern were defined and shared with the IEP team. The District began data collection on the Student's behaviors at school and at home in January 2008. (S-5 p. 2, 5 to 8, S-10 p. 25 to 46.)
26. In February 2008, the Student was exhibiting behaviors at home and at an after-school program, including head banging, finger-biting, non-contextual vocalizations and falling to the floor in angry tantrums when upset. Student also spent inordinate amounts of time aimlessly wandering about the house and the Parent considered Student to be at risk for elopement. (NT 26-4 to 21; P-13 p. 15, 20.)
27. These behaviors were more prominent in settings that were unstructured. (NT 178-4 to 21, 213-2 to 5; P-13.)
28. The Parents did not exhibit the training needed to control the Student's behaviors at home. (P-13 p. 30.)
29. From February 2008 through May 2008, the Student began to exhibit new unwanted behaviors, and more severe behaviors, at home; Student had one toileting accident at school, but did not exhibit any of the other, more severe problematic behaviors being reported from home at that time. (NT 272-13 to 21, 277-6 to 11; P-3, P-4, P-22, 23, S-10 p. 109.)
30. In July 2008, in a classroom setting, the Student exhibited some unwanted behavior that was easily redirected and did not interfere with Student's learning or social relationships. (S-9 p. 94.)
31. In December 2008, after Student's father tragically passed away, the Student exhibited unwanted behaviors at home, though far less so at Center. (NT 188-13 to 189-12.)

PROGRAM IMPLEMENTED BY THE DISTRICT

32. The Student attended the District's ESY program at one of its elementary schools, which appropriately addressed Student's needs. Student was found to be higher functioning than the students in that program. Consequently, the Student was assigned to another elementary school for a part time autistic support placement. (NT 201-15 to 24, 488-3 to 489-23; S-5 p. 3, S-11.)
33. The October 2007 IEP provided a placement of part time autistic support. The program included activities in the community. (NT 548-12 to 555-21; S-2 p. 15.)
34. The October 2007 IEP provided inclusion with typical students for part of the Student's day, including reverse inclusion; inclusion was supported by supplementary aids and services provided through instructional assistants in the regular classroom or other inclusive setting. (NT 343-5 to 344-6, 344-25 to 346-3, 559-7 to 561-11, 563-9 to 564-5.)
35. The October 2007 IEP provided measurable goals for engaging in appropriate activities with peers, telling others about events, answering questions, verbal communication, conversation, and working independently. Among other things, elimination or control of the Student's problematic behaviors would be necessary for success in these goals. (NT 397-7 to 402-9, NT 463-3 to 478-18; S-2 p. 12, 15.)
36. The October 2007 IEP and District program provided specially designed instructional curriculum for academics. (NT 567-4 to 577-6; S-15.)
37. The District's program services included fading of supports. (NT 562-20 to 563-8.)
38. The District's program was data driven. (NT 565-4 to 566.)
39. The October 2007 IEP provided speech and language services. This service was offered as part of the Student's program in each subsequent IEP. (S-2 p. 14, S-3, S-4.)
40. The October 2007 IEP provided an ESY program. (S-2 p. 14.)

41. The District provided an ESY program that provided the Student with sufficient opportunities to maintain skills between the end of school in 2008 and September 2008. (NT 577-7 to 579-4; S-16, 15 to 33.)
42. The District's October 2007 IEP recognized that the Student presents with behaviors that impede learning. However, the District did not perform a functional behavioral analysis or provide a positive behavior support plan until March 2008. (NT 546-8 to 16; S-2 p. 6.)
43. The October 2007 IEP recognized educational needs for increased communication and social skills, but did not recognize needs for learning behavioral control. (S-2 p. 8.)
44. The October 2007 IEP provided specially designed instruction to address the Student's problematic behaviors, including use of positive behavior support, redirection, token reinforcement, and teaching alternate behaviors. Behavioral consult was provided for teachers. (NT 320-8 to 321-18, 546-13 to 547-9, 641-19 to 23, 653-8 to 13, 673-18 to 674-7, 752-8 to 753-7; S-2 p. 13.)
45. In response to the District's December 2007 Reevaluation Report, the Parent wrote a letter dated December 17, 2007, insisting that the Student be taught through a Verbal Behavior system and requesting a functional behavior analysis and behavior support plan to deal with the behaviors observed in the October 2007 observation by the teacher. (S-5 p. 13 to 23.)
46. The Parent requested that the Student be transferred from the second elementary school back to the first one in January 2009, because she believed that the Student's educational program should be based upon a Verbal Behavior approach, which was not available at the Student's then-current elementary school. (NT 205-23 to 206-11, 209-19 to 22; P-13 p. 5, P-25 p. 3, S-9 p. 5 to 6.)
47. The District transferred the Student as requested, maintaining the same placement and revising the IEP present levels, goals and specially designed instruction. It provided a research-based program that included one-to-one direct teaching based upon a broad spectrum behavior analytic model. (NT 334-1 to 335-16, 692-19 to 697-17; S-3.)

48. The District reinitiated data collection on unwanted behaviors after the Student's transfer. (S-5 p. 2, 8 to 10.)
49. The February 22, 2008 revision of the Student's IEP addressed a need for teaching in natural environments in socialization skills and generalization skills, as well as the use of contrived situations to expand functional language. (S-3 p. 13.)
50. The February 22, 2008 revision of the Student's IEP provided revised goals in academics, social and play skills, group instruction skills, receptive and expressive language skills, working independently, communication and articulation. (S-2 p. 16 to 20.)
51. The February 22, 2008 revision of the Student's IEP provided specially designed instruction addressing behavior including token reinforcement and positive behavior supports. (S-3 p. 21 to 22.)
52. The February 22, 2008 revision of the Student's IEP provided specially designed instruction to fade supports and promote generalization of skills across environments. It also offered community based instruction and consultation with behavior analyst for teachers. (S-3 p. 21 to 22.)
53. The District provided a Functional Behavior Assessment on March 18, 2008, which concluded that a behavior support plan was not necessary because the Student's behaviors were not interfering with learning. (NT 271-7 to 12; S-6.)

GENERALIZATION OF SKILLS AND TRANSITIONING

54. The District's program for the Student included an emphasis on generalization of skills. The Student was and is able to generalize across stimuli, instructors and environments, and Student was and is able to transition well between settings and activities. (NT 284-1 to 4, 284-14 to 286-16, 317-14 to 19, 430-10 to 431-20, 513-9 to 12, 555-7 to 557-24, 581-24 to 583-21, 716-22 to 717-19; S-3 p. 9, 12, S-9 p. 91 to 95.)
55. The District took data on generalization of learning at home and found that the Student was able to generalize learning at home. Therefore, a home program was not necessary. (NT 604-13 to 605-5, 646-15 to 649-22, 728-16 to 730-13; S-13 p. 14 to 58.)

EDUCATIONAL PROGRESS

56. A May 2008 report of evaluation from Clinic indicated that the Student had regressed from some skills previously attained through Verbal Behavior programming in 2007. This was observed by the Parent. (NT 231-8 to 231-24; P-31 p. 2.)
57. Between June 2007 and December 2007, the Student maintained most of Student's skills, but regressed in some intraverbal skills. Nevertheless, Student made significant, documented progress in IEP goals. (NT 329-15 to 18, 491-9 to 501-10, 585-10 to 603-5, 614-14 to 615-13, 722-10 to 723-18; S-8 p. 4, S-11, S-13.)
58. In July 2008, in a classroom setting, the Student exhibited independence in self care activities and schoolwork, ability to request items using complete sentences, and ability to play with another student. In the requesting and social activities, Student needed verbal prompting. (S-9 p. 91 to 93.)

WITHDRAWAL FROM DISTRICT

59. By letter dated June 27, 2008, the Parent notified the District that she would withdraw the Student from the District on July 11, 2008, and place Student in Center. (P-20, S-9 p. 74, 75.)
60. The Student entered Center on July 14, 2008. (NT 117-13, 241-21; S-9 p. 77.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two

contending parties must bear the risk of failing to convince the finder of fact.¹ The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence² to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student’s Parents, who initiated the due process proceeding. If the evidence is in “equipoise”, the Parent will not prevail.

APPROPRIATENESS OF THE DISTRICT’S PROGRAM

This dispute comes down to two different and apparently irreconcilable perspectives on how best to deal with the student’s prominent areas of educational need. The record makes clear that the Student has serious and global educational needs that must be addressed through special education, with structured programming, specially designed curriculum, speech and language services and behavioral controls. Both parties agree that the techniques of Applied Behavior Analysis are essential components of such a program. Yet, the parties disagree on how to apply these techniques and principles to best educate the Student. The District employs

¹ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

² A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

what it characterizes as a “broad spectrum behavior analytic” approach, which incorporates a variety of approaches in a varied public school setting. The Parent, I find, is convinced that the approach she has learned and that has succeeded for the Student in the past – which she calls Verbal Behavior – must be continued and built upon. The Parents invited me as an administrative hearing officer to decide on the best answer to this question.

I cannot make this choice for the Student, nor should I. As an administrative hearing officer, my only decisional authority is to determine whether or not the District has complied with its legal obligations. I find that it has complied with the law with regard to the educational program that it provided to the Student in the 2007-2008 school year. Therefore, I decline to order the District to pay for the private programming that the Parent requests at Center. In a situation such as this, the law does not authorize an administrative hearing officer to decide what he or she thinks is best for the Student, but limits the issue to whether or not the District obeyed the law. I find that it did.

Legal Standard

When a parent unilaterally withdraws a student from the public setting, (FF 59, 60), he or she does not forfeit an eligible child’s right to FAPE, to due process protections, or to any other remedies provided by the IDEA statute and regulations. However, the parent does accept a financial risk in doing so. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student’s needs, public funding for that choice is available only under limited circumstances.

The Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private, unilateral placement. Burlington School Committee, above. First, was the district’s program legally adequate? Second, is the parents’ proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007). I find that the program offered by the District in this case was adequate under the

minimal standards of the law, and therefore I do not reach the second and third questions above.

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

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to 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. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

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

Application of Legal Standard to Findings in This Matter

I find that the program implemented by the District in this matter satisfied these minimal requirements of the law. The program was individualized to address the educational needs of the Student. (FF 1 to 9, 32 to 53.) It was based upon a thorough and timely re-evaluation. (FF 2.) The District's program addressed educational needs throughout a broad range of academic, social, and cognitive educational needs. (FF 32 to 53.) These goals generally were measurable and research based. (FF 32 to 53.)

The Parent argues that the District's program fell below the minimal legal standard set forth above, for several reasons. I find none of these reasons supported by a preponderance of the evidence.

First, Parents assert that the District did not provide a "home program" that would address both the need to generalize learning in the home and the need to control serious unwanted behaviors that were occurring in the home. (FF 15.) The preponderant evidence of record proves that the Student was making adequate progress and experiencing meaningful educational benefit without a home program. (FF 56 to 58.) Moreover, the District showed that the Student generalized educational gains across settings and individuals, and, in fact, at home also. (FF 54, 55.) The evidence shows also that the Parent could have had a home program through the Pennsylvania social service system, but she delayed this because she was seeking a highly specialized Verbal Behavior practitioner to try to replicate the programming that the Student had received in the neighboring state. (FF 13 to 15.) If she had obtained an aide to work with the Student at home, the District would have coordinated its services with the home program. (FF 15.)

Second, Parent asserts that the Student experienced unwanted behaviors at school that interfered with learning, and that the District did not address this need. (FF 18, 24, 26, 29.) The record overwhelmingly disproves this argument. The Student, like many autistic students, did exhibit some unwanted behaviors, but they were mild and easily overcome by the District's program. (FF 19 to 23, 27, 28, 30.) Moreover, the District did address these behaviors effectively. (FF 20, 25, 30, 35, 44, 48, 51, 53.)

The Parent argues that the IEP team erred when it noted on the IEP that the Student had interfering behaviors. (FF 42.) In this she may be

correct; data and an eventual functional behavior analysis showed that this was not the case. Parent also argues that there should have been an immediate FBA and Positive Behavior Support Plan, and again this argument is supported by present law and policy. I concur that, in hindsight, this should have been done, but I also find that this procedural omission did not deprive the Student of a FAPE.

Third, the Parent asserted a number of additional criticisms of the District's program, largely through the report and testimony of her independent expert. This expert opined that there were inadequate hours of speech and language therapy, occupational therapy and ESY services. I find that the expert's observations and opinions were unconvincing and unreliable and thus find that they do not undercut the adequacy of the District's services.

Experts' Testimony

Parents' expert witness was highly qualified and experienced, with degrees and certifications in education and related areas of expertise. (P-13 p. 6 to 9.) His base of information about the District's program, however, was limited to one visit of about two hours at the public school only and a few documents. (NT 56-20 to 58-10; P-13 p. 9 to 11, 22 to 29.) He did not test or evaluate the Student, but relied upon what he could infer from observation of the Student – observation that was extensive and occurred across school and home settings. (NT 28-2 to 16; P-13 p. 42 to 45.) He did not review any curriculum based assessments or any of the data that was being taken on the Student's progress. (NT 59-15 to 61-22.) In fact, he asserted that that would be unnecessary. (NT 62-23 to 63-13.) Nor did he review any data from the Student's program at the other District elementary school. (NT 61-23 to 63-13.) He did not know any details of the Student's academic or inclusion program. (NT 63-14 to 64-17.)) He had not seen the student in any inclusive setting. (NT 66-23 to 67-5, 82-19 to 83-7, 925-10 to 926-12.)

On this thin reed of data, the expert demonstratively recommended sweeping changes in the Student's educational program. (P- 13 p. 37 to 38.) Among the more sweeping judgments the expert made were that the Student could not tolerate more than one week of absence from school without

regressing³ – that the Student is incapable of learning from observation of typical children, because Student has not learned from Student’s own sibling, and that the only kind of program that could help the Student was the “orthodox” ABA program at a school like Center. (NT 29-24 to 31-9; P-13 p. 37 to 41.)

The expert stated that the Student should have structured programming “every waking hour” of Student’s day, (NT 41-8 to 12); the District’s school psychologist found this to be an overstatement. (NT 349-4 to 6.) The expert further opined categorically that, regardless of an autistic student’s learning in the classroom, it is meaningless unless it is generalized to the home and the community. (NT 36-13 to 24; P-13.) Again, the District’s psychologist disputed that suggestion. (NT 349-15 to 351-18.) The expert also declared that social skills can only be taught through “scripting.” (NT 37-8 to 40-1.)

I find that the expert’s factual basis for these recommendations was insufficient, and this raises doubt in my mind about his methodology. Indeed, his factual assertions were inaccurate in significant respects. For example, his thesis that the Student cannot tolerate more than one week’s hiatus in classes was flatly contradicted by the Student’s experience at Center. (NT 182-16 to 183-19.) His assertion that the Parents visit Center regularly every two weeks was plainly incorrect. (NT 190-22 to 192-3.)

I found the expert’s testimony to be self-contradictory. He waxed eloquent on the need to give children “like [the Student]” various experiences across multiple settings to help them learn; yet he was adamant that the Student needs the highly restrictive “orthodox” ABA approach, in a small highly structured, self-contained setting like Center, to learn. (NT 30-6 to 33-2.)

The expert also rendered an opinion to a “professional certainty” that the Student would not be able to transition back to a District program at the present time. (NT 68-2 to 10.) He asserted that information on previous transition experiences in changing school districts and schools would “be

³ The District’s school psychologist contradicted this assertion based upon her own experience with children with autism. (NT 375-19 to 376-6.)

useless.” (NT 68-11 to 15.)⁴ Yet he admitted that he had no information at all regarding the consequences of the Student’s previous transfers from one district or school to another. (NT 71-1 to 72-16.)

I find that the expert’s opinions were based on a strong presumption in favor of “orthodox” ABA programming, in which the student is controlled and scripted at every moment, and learning is designed to be completely linear and sequential. (NT 30-1 to 35-1, 46-21 to 48-1, 49-23 to 25; P-13 p. 37 to 38.)

I also found the Parents’ expert from Center to be, though sincere, less reliable than the District’s expert witnesses. Her testimony was based entirely upon her knowledge of the Center program. When asked to opine about the Student’s ability to transition from one program to the next, this witness initially indicated that behaviors observed at Center indicated that Student had experienced difficulty transitioning; then on cross examination, when reminded that she had no data at all on the Student’s behaviors at the public school, the witness substantially receded from her previous assertion. (NT 154-5 to 14, 166-7 to 167-18.) The witness further had little understanding of how educational services are delivered outside of Center. (NT 169-23 to 174-14.)

I find that the Parent was and is a fierce advocate for her child, and that she has had to endure inconceivable trials and tragedies that elicit great sympathy. While admiring her fortitude in the face of relentless adversity, I must evaluate her testimony dispassionately. In so doing, I conclude that the Parent’s advocacy has been driven by a single-minded devotion to a singular educational model, which she calls the Verbal Behavior model, allegedly a subset of ABA. (FF 10 to 17.) I believe that this, along with her powerful determination to get all the help she can muster for her child, has skewed her perception of the relative obligations of the parties in this matter. No matter how much I empathize with her tragic experience, the record forces me to conclude that the Parent’s account of her relationship with the District is not entirely reliable, and I accord less weight to her testimony as a result.

⁴ The District’s school psychologist, whom I find credible, contradicted this opinion. (NT 347-1 to 20.)

Central to this matter is the fact that there was no home program during the period in question. (FF 15.) A preponderance of the evidence shows that the Student's regressive behavior at home was directly related to the lack of a structured program there. (FF 26 to 29.) The record also clearly shows that this gap in services was to a significant extent the choice of the Parent: upon moving to Pennsylvania, the Parent decided that it would be best to accept only consultation services at home, while searching for a direct care provider who would provide verbal behavior services with the strict orthodoxy that the Parent embraces as the only strategy for educating the Student. (FF 13 to 17.)

Upon examining the documentary evidence, I found inconsistencies in the Parent's statements about the Student's behaviors, a central issue in this matter. (FF 23, 24.) I also detected areas of what appeared to be tactical vagueness during the Parent's testimony. I am forced to conclude that the Parent, in her otherwise admirable zeal, shaped some of her account of the Student's behavior to support her theory that the District failed to respond to a crisis at home.

I gave weight to the testimony of the District's school psychologist. I found her answers to be straightforward and dispassionate, without evidence of bias. More than once, she was willing to admit points made on cross examination that did not necessarily favor her employer. While her knowledge of the underlying facts of the Student's case was limited, she constrained the sweep of her answers to the limits of her knowledge.

Similarly, I credit the testimony of the District's speech and language therapist. I found her response to the examination, as indicated by her demeanor, to be devoid of the tactical awareness seen in many witnesses; she simply answered the question to the best of her ability.

The District's teacher witness was also credible. I noted that she hesitated to answer some questions from her own attorney until she first checked the record for herself. She also admitted a mistake under cross examination. Her demeanor was professional and without any apparent investment in the result.

Progress

There is a preponderance of evidence that the Student made meaningful educational progress during the 2007-2008 school year. (FF 54

to 58.) The speech and language therapist described documented progress in articulation and pragmatic language skills. (FF 57.)

The Parents' main argument was that the student was unable to generalize in-school learning to the home setting. The record is mixed in this regard, with the parent reporting forcefully that she was seeing regression from gains made prior to coming to Pennsylvania, and with Clinic data supporting this assertion. (FF 57.) However, there was credible testimony from the District witnesses, also backed by data, that the Student had indeed demonstrated generalization to home. (FF 55.) Moreover, there was substantial evidence that the Student was easily generalizing to multiple settings outside of home. (FF 54.) Finally, there was credible expert testimony that the generalization to the home environment is not the appropriate measure of meaningful educational benefit; gains made by an autistic student in the school setting can be a valid measure of FAPE. (NT 719-16 to 720-18.)

The Parent made much of an evaluation by the Clinic that found that the Student had regressed on some goals, as measured by the Assessment of Basic Language and Learning Skills (ABLBS) system. (FF 56.) While I give some weight to these findings, I do not find them determinative. I note that the ABLBS system tracks skill development in extremely small increments, as the testimony in this case and a review of the ABLBS charts confirms. (NT 541-19 to 542-13, 687-10 to 690-19; S-13 p. 246 to 252.) Given the level of detail, it appears likely that a child would regress in one or more of the skills measured by ABLBS. This is especially so where, as here, there has been a change in expectations for the child – an abandonment of the Clinic's strict adherence to the ABLBS as a curriculum, and the substitution of a different curriculum, setting goals and objectives involving a different set of skills, and changing from a rigid application of applied behavior analysis to a broad spectrum approach with less emphasis on one to one table work and less reliance on ABLBS. (NT 687-10 to 690-19, 692-19 to 697-17.) Since ABLBS skills were not systematically addressed in the District's program, it is not surprising that some previous ABLBS skills were lost.

In considering the entire record, therefore, I have had to consider whether there is evidence that the District's different curriculum yielded progress in other skills that offset any loss in the ABLBS skills. I conclude

that a preponderance of the evidence demonstrates such a tradeoff, one that on balance yielded meaningful educational benefit.

Appropriateness of the Center Program

I find that the above findings render the controversy about the appropriateness of the Center's program moot. Therefore I do not reach the issue.

Section 504 Claims

I decline to address these claims. There is no evidence or argument addressing those claims and whether or not they are distinct from the IDEA claims in the matter.

CONCLUSION

For the reasons set forth above, I find that the program and placement offered by the District on July 2009 is appropriate.

ORDER

1. The District did make a free appropriate public education available to the student through an appropriate program and placement for the 2008-2009 school year, including necessary Extended School Year services in the summer of 2008.
2. The appropriateness of the Center placement and program is moot and therefore I do not reach this issue.
3. The District will not be ordered to pay the cost of tuition and transportation of the Student on account of attendance at Center for the 2008-2009 school year.

William F. Culleton, Jr. Esq.

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

June 9, 2010