

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.

SPECIAL EDUCATION HEARING OFFICER

DECISION DUE PROCESS HEARING

Name of Child: S.M.

ODR #15378/14-15 KE

Date of Birth:
[redacted]

Dates of Hearing:
October 17, 2014
December 12, 2014
December 15, 2014

CLOSED HEARING

Parties to the Hearing:
Parent[s]

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Date Record Closed:
Date of Decision:
Hearing Officer:

January 16, 2015
January 31, 2015
Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is a pre-teen aged student in 6th grade who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] and Pennsylvania Chapter 14 under the classification of autism [redacted]. Since the beginning of the 2013-2014 school year, Student has been attending a private school [Private School] in a neighboring state, a placement which the Parents unilaterally made but is now pendent and funded by the District pursuant to the order of a previous hearing officer. In summer 2014 the District proposed an IEP designed to be implemented in a District middle school. Believing the proposed IEP to be inappropriate the Parents filed this complaint and are requesting continued tuition reimbursement at Private School.

Issue[s]

Was the IEP the District offered to Student on September 2, 2014 appropriate, and can it be implemented in the proposed District middle school?

Findings of Fact²

Description of Student

1. Student is a pre-teen aged 6th grade student who has been enrolled in a Private School located in a neighboring state since the beginning of the 2013-2014 school year. [NT 25]
2. The family resides in the District. Prior to attending the Private School Student attended a District elementary school. [NT 26]
3. When Student was in Pre-K Student was diagnosed with Attention Deficit Hyperactivity Disorder [ADHD]. [NT 26]
4. When Student was in Pre-K Student was also diagnosed with a Speech/Language disorder. [NT 26]
5. [Redacted.]
6. When Student was in second grade Student was diagnosed with Autism. [NT 26]

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² Counsel for the parties are commended for collaborating on exhibits, thus helping to streamline the hearing.

7. Student has deficits in social skills, is not able to “read” other people including peers, and cannot follow what's going on in the classroom by observing others. [NT 27, 214]
8. Student has deficits in self-regulation demonstrated, for example, by not being able to stay seated in a chair, not being able to refrain from fidgeting, and not being able to sustain attention. Student is easily distracted by lots of noise and too much happening around Student. [NT 28, 30, 41, 841-843]
9. Student has difficulty transitioning and is highly argumentative when asked to go from a preferred task to a non-preferred task. Student becomes disrespectful, will not do the new task, or will procrastinate as long as possible before doing it. Student is inflexible. [NT 29, 641]
10. Anxiety underlies some of Student’s behavioral problems. When behavioral needs are unmet they intensify and Student becomes particularly anxious when faced with new or open-ended activities, transitions even to a preferred activity, changes in plans, or during non-preferred assignments. [NT 640-641, 656, 687-688]
11. Student’s speech articulation issues include rapid speech and inaccurate tongue placement making it difficult for others to understand Student. Student has language deficits in the area of pragmatics. [NT 29, 562-564]
12. Student has sensory processing, visual/motor and motor planning issues. [NT 30, 841-843]
13. Student has profound behavioral needs, especially involving social interaction with adults and peers. The inappropriate behaviors and social skills deficits associated with autism subjected Student to ridicule and bullying when Student was previously enrolled in the District’s public school. [NT 665; P-2]
14. All the above difficulties have been present throughout Student’s academic career starting in Pre-K. [NT 31]
15. Although in first grade Student was ahead of peers, Student has fallen behind. While Student has strong reading decoding, reading fluency, and vocabulary skills, Student currently has difficulty with reading comprehension, math and written expression. [NT 30-31, 226, 562-564, 649, 661; P-17]

What Student Needs to Receive FAPE

16. Student requires a small, structured class with a low student-to-teacher ratio and minimal distractions [NT 643, 659-660; P-21, P-25]
17. Student needs a highly specialized academic setting that is individualized to Student’s specific learning needs – a setting that is self-paced and data driven. [NT 676; P-23]

18. Objective data collected regularly and systematically is critical for assessing what is working or not working so that the program can be modified as needed. Student needs daily tracking for each specific goal so that teachers can discern progress and modify Student's program accordingly. [NT 573, 657-660]
19. Applied Behavior Analysis, for example, is an approach to effective data collection. [NT 196, 659-660; P-21, P-23]
20. Student requires explicit and direct social skills instruction with opportunities to generalize these skills. [NT 205-206, 565-566; 643; P-21, P-28]
21. Student requires a behavior support plan that includes guidance towards appropriate behaviors and reinforcers throughout the day. [NT 643]
22. Student requires occupational therapy to address self-regulation, sensory processing, motor planning, and visual motor skills, with sensory modifications and movement activities throughout the day. [NT 226-227, 483-488, 645; P-28]

Previous Hearing

23. Believing that the District was failing to provide Student a free appropriate public education [FAPE] the Parents enrolled Student at the Private School for the 2013-2014 school year and filed a request for a due process hearing on December 11, 2013 seeking tuition reimbursement for Private School placement. [NT 25; P-2]
24. On July 22, 2014 the previous Hearing Officer issued his Decision and Order, finding the District's IEP inappropriate, the Private School appropriate, and the equities to favor the Parents and awarded the Parents tuition reimbursement with pendency at Private School. [P-2]
25. Student has made progress at the Private School, and has met many of the goals set forth on the October 11, 2013 Private School IEP. [NT 64, 76-77, 214-216, 230-232; P-9]

September 2014 Proposed IEP: Program

26. The previous hearing officer ordered the IEP Team to reconvene to offer Student an IEP on or before September 5, 2014. [P-2]
27. Without convening an IEP team, the District's Director of Special Education drafted an IEP for Student during summer 2014. [NT 87, 91, 290, 339-340, 390, 463, 522, 532-533, 619]
28. In the September 2014 proposed IEP for school year 2014-2015, the Director of Special Education almost without exception copied and pasted the present levels information from the October 11, 2013 Private School IEP, information that was nearly one year old. The District was in possession of Student's more recent and

- relevant records from Private School before the date of the September 2014 proposed IEP. [94, 135-137; HO-1, P-3, P-4, P-19]
29. For the September 2014 proposed IEP for school year 2014-2015, the Director of Special Education took goals and short-term objectives from the October 11, 2013 Private School IEP, goals and objectives that had been addressed during nearly the entire previous school year, thus ignoring all Student's progress during the intervening year. [[NT 94, 135-137; P-3, P-4, P-21, HO-1]
 30. None of the goals in the District's proposed September 2014 IEP have baselines and therefore progress is not measurable. [NT 295-299, 301, 305, 573; P-4]
 31. Many of the IEP goals are not measurable for additional reasons: target percentages make no mathematical sense, e.g. solving 18 out of 20 math problems with 8 out of 10 probes at 85% accuracy; are vague, e.g. Student will complete academic tasks to the best of [Student's] potential; method of progress monitoring contrary to goal, e.g. Written Language progress assessment is instructional leveled text passage read aloud with ten possible questions to be answered orally or in writing by the student. [NT 301, 305; P-4]
 32. In his testimony the itinerant Special Education Teacher who would be assigned to Student in the proposed placement acknowledged the lack of information necessary to implement the IEP with regard to academic goals, e.g. reading comprehension goal does not indicate the type of text Student would be expected to read, reading comprehension and listening goals failed to specify how long the text would be, the listening goal failed to specify the instructional level or grade level, the math goal did not specify the amount of time given to each math probe or how many digits the math problems will involve and whether they will involve regrouping, the writing goal failed to identify the type of composition expected to achieve the goal [which is problematic as the level of difficulty varies based on type of writing]. [NT 122 290, 294-300; P-4]
 33. The District's Special Education Teacher did not understand what the stated measurement of the behavior goal, "This [behavior goal] can be measured by anecdotal notes and/or oral feedback between regular education teacher and special education teacher," meant. [NT 304; P-4]
 34. The District's Special Education Teacher acknowledged that information needed for implementation of SDIs was missing, for example he did not know what "cooperative learning technique" involves, he did not know what devices were referenced by, "AT: Access to electronic devices, i.e. computer, calculator, word process with writing supports." [NT 306-312; P-4]
 35. Because the District's Director of Special Education grafted parts of Private School's IEP onto the District's proposed IEP, supports and services essential to Student's progress that are embedded in Private School's programming, but not

- explicitly written into its IEPs, are missing from the District's proposed IEP, for example, Private School addresses Student's sensory needs throughout the day by affording access to a standing desk, ball chairs, exercise equipment, stress balls, and tactile activities such as origami. [NT 205-206, 209-210, 226-227; P-21, P-28]
36. The District did not offer a program of systematic and explicit social skills training/instruction for Student. The previous hearing officer had found, with respect to the District's IEP in place when Student was withdrawn from the District, that "Of deepest concern is the lack of any substantive [speech and language] programming to address the student's needs in functional communication and social interaction . . . behavior, [and]... socially-oriented [behavior],..." [P-2, P-4]
 37. At Private School students take a social skills course once a week, and social skills programming is embedded throughout the day into its entire curriculum, including in speech/language and occupational therapy. [NT 205-206, 565-566; P-2, P-28]
 38. Without an OT re-evaluation or an IEP team recommendation, in its proposed IEP the Director of Special Education cut Student's related service of occupational therapy by 50%, offering 15 minutes weekly instead of the 30 minutes weekly Student was receiving at Private School.³ [NT 341; P-3, P-4]
 39. Although the District's proposed IEP offers 60 minutes of speech/language therapy per week, 30 minutes per week in the therapy room and 30 minutes per week in the classroom, the IEP does not specify whether the therapy will be individual therapy or group therapy. The IEP does not explain how the speech/language therapy in the 30-student classroom would be conducted with Student. [P-2, P-4]
 40. The only speech goal in the proposed IEP focuses on articulation. Student needs speech/language therapy not only to address deficits in articulation, but also deficits in receptive language and pragmatics. [NT 566-568; P-4]
 41. Based on descriptions of Student's behaviors the District's proposed IEP provides for a 1:1 aide for Student. Student does not want and has resisted this service. The Director of Special Education included an aide in the IEP for Student's safety. [NT 116-117, 129, 290-293; P-4, P-26]

³ Although the District's occupational therapist testified that if the Private School IEP stated Student needed 30 minutes of OT, she would start off giving Student the 30 minutes and would continue to do that until she re-evaluated Student, the standard for evaluating the appropriateness of an IEP is what is written, not what could have been done despite what it says. [NT 350]

42. At the previous due process hearing, Student's former 4th grade teacher at the District school testified that Student did not need a one-on-one aide and that it disturbed Student. Student's current teacher at Private School testified credibly that a one-on-one aide would likely trigger Student's behaviors as this would single out and stigmatize Student. [NT 228; P-26]
43. Student is unwilling to accept accommodations that make Student stand out and becomes so anxious about the proximity of another person that although Student has eloped three times at Private School a one on one aide is not provided; rather staff constantly monitor Student and can do so because of the small class /school size. [P-26]
44. One-on-one aides are not special education teachers who can differentiate schoolwork. [NT 648-649]
45. A one-on-one aide discourages independence in the classroom, encourages prompt-dependency, and impedes interactions with peers. [NT 668; P-21]
46. When constituting Student's IEP team for purposes of the September 2, 2014 IEP meeting the District recruited available teachers to attend the meeting. There were no teachers yet assigned to Student should the Parents accept the IEP and send Student back to the District on the first day of school. [NT 444, 652]
47. The September 2, 2014 IEP meeting convened to create/review a proposed IEP for Student's potential return to the District after a year in Private School. The team was able to get through only half the proposed IEP when, after an hour, the District ended the meeting even though the Parents had made themselves available for the whole day. The Parents did not ask for more time and the District did not offer to schedule another IEP meeting. [NT 33-34, 57; P-4]

September 2014 Proposed IEP: Location

48. The District intended that the location of the implementation of the proposed IEP be in a District middle school in a regular education classroom with 30 students through itinerant autistic support programming. Student has historically performed poorly in a classroom of this size. [NT 44-46]
49. The Parents' Educational Consultant testified credibly that this number of students per class would create insurmountable distractions for Student. [NT 642-643, 659-660; P-5, P-21, P-25]
50. Student's current teacher at Private School testified credibly that Student would fare poorly in an environment with such a high student-to-teacher ratio because Student could not receive the level of attention and individualization Student requires, which will, in turn, exacerbate Student's behaviors. [NT 228]

51. On September 10, 2014, Student's father visited the proposed placement with Parents' Educational Consultant, a doctoral level psychologist offered and accepted without opposition as an expert in autism, behavior intervention and psycholinguistics. [NT 632-637]
52. During the visit, the consultant observed a 6th grade literacy class and a 6th grade math class. After the observations, the consultant met with the school's School-Based Teacher Leader and the Principal to discuss the school's special education supports. [NT 637-638; P-21]
53. The consultant had observed during the first week of school when the teachers were not yet differentiating their instruction, so the school invited the consultant back for another observation. [NT 652]
54. Among available dates offered to her by the school, the consultant returned on September 29, 2014 and observed a different 6th grade literacy class and a different 6th grade math class.⁴ [P-21]
55. Student requires individualized instruction for the entire school day. The District proposes that an itinerant Special Education Teacher would be available in the classroom for 45 minutes per day for math and 45 minutes per day for literacy. He has approximately 21 special education students on his caseload. [NT 287-288, 290, 306, 396, 428; P-21, P-23]
56. The Special Education Teacher would consult with the regular education teachers during breaks, prep periods, or at a weekly grade group meeting wherein the teachers of the specific grade meet to discuss students' needs and modifications that need to be made for each student. (N.T. 306, 331, 334)
57. The Special Education Teacher would modify the curriculum for Student, including utilizing teacher made tests, modifications of the text book materials, use of on-line materials, and guided reading. [314-316, 325-326]
58. During this visit, the consultant observed only one clear example of differentiated instruction during reading, in the 6th grade literacy class. The method the Regular Education Teacher uses for reading as well as writing is organized, requires the children to collaborate independently and cooperate with the set structure. Although this likely works very well for the children in that class, this method would be ineffective for Student because of Student's deficits in pragmatic speech, social skills, and communication with peers and disparate levels of academic functioning in literacy skills. [NT 225, 226-228, 423, 431-433, 445-446, 642, 649, 673-674, 676; P-17, P-21]

⁴ To the extent that the District argues that it was still early in the year and the teachers were not yet differentiating, notice is taken that this was one of the dates the District offered to the consultant.

59. During the meeting, the school's leadership informed the consultant that, at that time, the school did not track student data based on interventions in any systematic way. [P-21]
60. The proposed school collects and analyzes general education data such as DRA reading assessments, reports cards, and PSSA scores, which is different than special education data collection. [NT-585-587; 609-612, S-1]
61. The District tries to give a benchmark test quarterly to measure the progress a student has made for math and reading. The District will be moving from quarterly benchmarks to biweekly benchmarks. These benchmarks are in addition to the standard benchmarks given by the School District. [NT 317]
62. The District's Special Education Teacher testified that he and the regular education teachers employ a subjective standard for progress by "making a judgment call" and also by assessing progress through IEP goals and objectives but did not explain how this could be done without baselines provided in the IEP. [NT 319-320, 326-327]
63. The District's Special Education Teacher has never received training on data collection, and this past year he attended just the AIMSWeb training that involved data collection for AIMSWeb academic probes. One regular education teacher testified that she did not have any data collection training to assist her in IEP progress monitoring. Another regular education teacher testified that she did not do IEP progress monitoring. [NT 321-322, 412, 458]
64. Nothing in the District's IEP indicates that AIMSWeb is aligned to Student's IEP goals. None of the goals in the IEP mention AIMSWeb. [NT 333; P-4]
65. The Educational Consultant offered the observation, and it is here accepted as a fact, that even though the District utilized Private School's IEP as a template, "the similarities erode with the acknowledgement by [the proposed District placement] that data collection, graphing, and data based intervention are not part of the academic paradigm currently used, and present levels assessments are given at the discretion of the teacher, about three times a year." [P-21]
66. The proposed school has a school-wide positive behavior support program. Teachers can give out tickets to students at their discretion. Rather than direct behavior/response reinforcement Students use tickets to enter a lottery to win a tangible reward. [NT 517, 603-605; P-21]
67. The proposed school's curriculum does not include a program of structured social skills instruction, other than anti-bullying and anti-drug use programs. In general, the counselors are responsible for implementing the social skills program which has "variety of forms" depending on the needs of the student, e.g. it could be a pull-out, or a small social skills group during lunch, or a whole class instruction.

At times counselors sometimes provide an “organizational goal-setting” curriculum. [NT 595-596; P-21]

68. As of the time of the consultant’s observation, Student would be the only student in the proposed school identified as autistic. [P-21]

[Other] Programming

69. [Findings of Fact Nos. 69-74 redacted.]

Legal Basis and Discussion

Burden of Proof: The burden of proof is composed of two considerations: the burden of going forward (introducing evidence first) and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer). In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁵ that the other party failed to fulfill its legal obligations as alleged in the due process complaint. *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). In this case the Parents asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. 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); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014).

All testimony was reviewed and considered, but special mention is made of the following witnesses. I found the testimony of the father reliable based on his day-to-day familiarity with Student. For similar reasons I found the testimony of Student’s current teacher at Private School reliable as to Student’s needs in an educational setting and gave it a great deal of weight. Of particular import was the testimony of the Parents’ Educational Consultant. Her level of expertise in autism and behavioral analysis is considerable, but what I found most helpful were her precise explanations of what Student requires as a

⁵ 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. *See, Comm. v. Williams*, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. *Comm. v. Walsh*, 2013 Pa. Commw. Unpub. LEXIS 164.

learner with autism coupled with her observations of the District's proposed placement/location. Without undue criticism or hyperbole she was able to demonstrate convincingly that Student cannot receive FAPE in the proposed program. I was also impressed by her objectivity, demonstrated by her praising the proposed District location, although not for Student, and her having recommended it as a good school for others of her clients to consider. Of the District's witnesses, the 6th grade literacy teacher stood out as an outstanding example of a smart, dedicated educator who would benefit a great many students fortunate to be in her classes. The fact that Student would not do well there is completely a reflection of the deficits Student currently displays, and not any lack of skill on the part of this teacher. Among the District's witnesses the testimony of the Director of Special Education was given very little weight, starting with the incomprehensible fact that she used data one year old as Student's present levels, going on to her basically adopting the Private School's IEP without seeming to think through how it could be implemented in a District setting. The Special Education Teacher candidly acknowledged areas in which he is not trained or is not familiar, and his honesty was appreciated. Not for any lack of special education expertise generally, I find that it would be impossible for him to provide Student with the individualization Student requires given the entire constellation of Student's complex needs, class size, his caseload, limited structured time for consultation with regular education teachers, and limited time in the classroom assisting Student.

FAPE: School districts and other LEAs provide a free appropriate public education [FAPE] by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan (IEP). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" at the time it was created to enable the student to receive "meaningful educational benefit", a principle established by over 30 years of case law. *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); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist*, WL 2682741 (E.D. PA. July 8, 2011) *aff'd*, 2013 U.S. App. LEXIS 11091 (3d Cir. 2013).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, an LEA is not required to provide an eligible student with services designed to provide the best possible education to maximize educational benefits or to maximize the child's potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995). 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).

Tuition Reimbursement: 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. Parents who believe that a district's proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement. The IDEA's implementing regulations at 34 C.F.R. §300.148 (c), make it clear that tuition reimbursement can be considered under specific conditions:

“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 a 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 had not made FAPE available to the child in a timely manner prior to that enrollment...”

Before becoming a matter of statute, 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).

Then, in 1997, a dozen years after *Burlington*, the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEA, 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.

Discussion

The issue in this hearing is straightforward: Was the IEP the District offered to Student on September 2, 2014 appropriate, and can it be implemented in the proposed District middle school?

Student is a pre-adolescent child with autism who displays many of the characteristics of autistic individuals. Student has deficits in social skills and in self-regulation, has sensory sensitivity, is inflexible and has difficulty transitioning, experiences bouts of anxiety when faced with new or open-ended activities and has difficulty with the pragmatics of language. When anxious or when required to be flexible Student acts out with disrespect and noncompliance, and occasionally elopes from the situation. Compounding Student's autism are speech articulation difficulties that can at times lead to utterances that are incomprehensible to the listener. Furthermore Student has academic deficits in reading comprehension, math and written expression. [Redacted.]

To address Student's multiplicity of significant and intertwined needs Student requires a small, structured class with a low student-to-teacher ratio and minimal distractions, a highly specialized academic setting that is individualized to Student's specific learning needs, and progress monitoring on each specific goal through data collected regularly and systematically so Student's program can be modified as needed. Student requires explicit and direct social skills instruction with opportunities to generalize these skills and a behavior support plan that includes reinforcers throughout the day. Student needs speech/language therapy to address both speech [articulation] and language [pragmatics, receptive] issues and Student requires occupational therapy to address self-regulation, sensory processing, motor planning, and visual motor skills, with sensory modifications and movement activities throughout the day.

Believing that the District was failing to provide Student a free appropriate public education [FAPE] the Parents enrolled Student at the Private School for the 2013-2014 school year, filed the previous request for a due process hearing, and won tuition reimbursement with pendency at Private School where Student has made progress.

Without convening an IEP team, during summer 2014 the District's Director of Special Education drafted an IEP for Student. Almost without exception the Director of Special Education copied and pasted present levels, goals/short-term objectives, and SDI's from an IEP put in place at Private School back in October 2013, nearly a year earlier. The use of information from a one-year-old IEP in and of itself rendered the IEP inappropriate because present levels would have changed, and progress could have been and was made during the time between October 2013 and September 2014. Further adopting material from an IEP that was designed to be implemented in Private School

was inappropriate as the District did not have the same underlying structure as the Private School in terms of accommodation possibilities and a behavior support system.

Other things plagued the proposed IEP, chief among these was the non-measurability of the goals based on lack of baselines, and vague and/or nonsensical criteria for assessing progress. In his testimony the Special Education Teacher who would be responsible for implementing/ensuring implementation of the IEP acknowledged the lack of information necessary to implement the IEP, did not understand what one method of progress monitoring meant, and did not understand what some of the SDIs referenced.

Inexplicably not taking a cue from the previous Hearing Officer's decision, the District failed to offer a program of systematic and explicit social skills training/instruction and language goals to address communication/social skills deficits. Finally, without an OT re-evaluation or an IEP team recommendation, the Director of Special Education cut Student's related service of occupational therapy by 50%.

After an IEP is crafted, the very next consideration must be where the IEP will be implemented. Although Students are entitled to be educated in the least restrictive environment, that environment must be appropriate. The District intended its IEP to be implemented in a middle school in a regular education classroom with 30 students through itinerant autistic support programming. Student's complex constellation of disabilities render this setting inappropriate both in terms of the physical setting and in term of the District's inability to implement the IEP with fidelity. The classrooms are too large, Student would not receive individualized instruction for the entire school day, the district does not collect robust data on all IEP goals, and the persons who would be responsible for collecting such data are not trained to collect it. The school's school-wide positive behavior support program does not address Student's need for frequent daily behavior/response reinforcement. The proposed curriculum does not include a program of structured social skills instruction. Student would be, as of the date of the IEPs creation the sole autistic child in the school.

Student has many needs [redacted]. The information the District provided is not sufficient for me to tell one way or another whether what it was offering Student [in a specific area] would be appropriate. [Redacted.] While this is a flaw in Private School's program for Student and should be corrected, it does not render the Private School inappropriate under the IDEA.

Conclusions

The testimonial and documentary evidence brought forth in this hearing clearly established that the September 2014 IEP the District offered to Student is inappropriate. The Private School was found to be an appropriate placement for Student by the previous hearing officer and additional evidence provided in the current hearing established that Private School continues to be appropriate for Student. Equitable considerations favor the Parents; there is nothing that would remove or reduce the District's obligation to reimburse tuition and related costs for the Private School. The District must reimburse the

Parents for tuition and costs related to Student's attendance at the Private School, and the Private School remains the Student's pendent placement.

The Parents met their burden of proof under the IDEA. In their complaint, but not in their opening arguments, the Parents also raised general claims under Section 504 and the ADA. The Parents again raised general claims under 504 and ADA in their closing arguments. In the interest of judicial economy, although the directions to counsel were to raise all issues in opening statements that they wished to be addressed, I will here dispose of claims under Section 504 and under the ADA so the Parents can fulfill their exhaustion requirements. *See Batchelor v. Rose Tree Media School District et al.*, 759 F.3d 266 (3d Cir. 2014) (retaliation claims related to the enforcement rights under the IDEA including Section 504 must be exhausted before a court has subject matter jurisdiction over those claims).

With respect to the Section 504 claims, the obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm.w. 2005). Because all the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

With respect to claims under 42 U.S.C. 12101 *et seq.* [ADA], IDEA, 20 U.S.C. §1415(l), requires exhaustion of ADA claims under limited circumstances. This section preserves all rights under the ADA, "except that [in any action seeking] relief that is also available under [the IDEA], the procedures under subsections (f) and (g) shall be exhausted ..." In *Swope v. Central York Sch. Dist.*, 796 F.Supp.2d 592, 600-602 (M.D. Pa. 2011), the court interpreted this section to "sugges[t]" – and the court went on to hold – that administrative hearing officers can "rule on facts falling under claims that are concurrent with IDEA claims, where, as here, the relief sought is available under the IDEA". The court described the ADA claims as to which exhaustion was required as "derivative" – that is, encompassing only claims that are also brought under the IDEA and as to which all requested relief is also available under the IDEA. *Id.*

The parents adduced no evidence that the District's inappropriate IEP was discriminatory under Section 504 or the ADA, and I find no grounds upon which to find such. Insofar as the Parents wish to challenge this finding, administrative remedies should be considered as having been exhausted.

Order

It is hereby ordered that:

1. The IEP the District offered to Student on September 2, 2014 was not appropriate, and it cannot be implemented in the proposed District middle school.

2. The District is ordered to reimburse the Parents for tuition and related costs for Student's attendance at Private School.
3. Private School remains Student's pendent placement unless and until the District proposes an appropriate IEP.

Any claims not specifically addressed by this decision and order are denied and dismissed.

January 31, 2015

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official