

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>BRETT S., a Minor, By and Through</b>	:	<b>CIVIL ACTION</b>
<b>His Parents, CHARLES S. and SUSAN</b>	:	
<b>S.,</b>	:	
	:	
<b>and</b>	:	
	:	
<b>CHARLES S. AND SUSAN S., Adults</b>	:	
<b>Individually, and On Their Own Behalf</b>	:	
<b>Plaintiffs,</b>	:	<b>NO. 04-5598</b>
	:	
<b>vs.</b>	:	
	:	
<b>THE WEST CHESTER AREA</b>	:	
<b>SCHOOL DISTRICT,</b>	:	
<b>Defendant.</b>	:	

**DuBOIS, J.**

**March 13, 2006**

**MEMORANDUM**

**I. BACKGROUND**

Brett S., who is thirteen years old, has been enrolled in Stratford Friends School (“Stratford Friends”), a private school, since the beginning of his second grade year in the fall of 2000. Prior to that time, Brett attended school in the West Chester Area School District (“the District”), the defendant in this case. **Pursuant to a Settlement Agreement between the District and Brett’s parents,** the District paid for Brett’s tuition at Stratford Friends for his second, third and fourth grade years. In the spring of 2003, the end of Brett’s fourth grade year, the District proposed a public school placement for Brett’s fifth grade year. Brett’s parents rejected the educational placement offered by the District and kept Brett at Stratford Friends. Pursuant to the Individuals with Disabilities Education Act (“IDEA”) and Section 504 of the Rehabilitation Act

of 1973, Brett's parents then requested a due process hearing seeking reimbursement for Brett's tuition at Stratford Friends. The administrative hearing officer denied Brett's parents' request for tuition reimbursement, and this decision was upheld by the Pennsylvania Special Education Appeals Panel.

Brett's parents have appealed that decision to this court with a Motion for Judgment on the Administrative Record and Additional Evidence, seeking a determination that: (1) defendant failed to develop an appropriate Evaluation Report ("ER") and Individualized Education Plan ("IEP") for Brett as mandated by the IDEA and the Rehabilitation Act; and (2) plaintiffs are entitled to tuition reimbursement for the private education they have continued to provide for Brett at Stratford Friends since the 2003-04 school year. The District has responded with a Motion for Disposition on the Administrative Record in Accordance with 20 U.S.C. § 1415(i).<sup>1</sup> After reviewing the entire administrative record, as well as the supplemental evidence offered by plaintiffs, the Court concludes that defendant offered Brett an IEP reasonably calculated to offer Brett a meaningful educational benefit and thus met the requirements of the IDEA.

## II. LEGAL FRAMEWORK

**In order to receive federal education funding under the IDEA, a state must provide disabled children<sup>2</sup> with a "free appropriate public education" ("FAPE").** 20 U.S.C. § 1412(a)(1).

---

<sup>1</sup> 20 U.S.C. § 1415(i) provides that the findings of a special education due process hearing may be appealed to a United States district court.

<sup>2</sup> The IDEA defines "children with disabilities" as children who need special education because of "mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." 20 U.S.C. § 1401(3)(A).

“Free appropriate public education” means “special education and related services” that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the state involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(8).<sup>3</sup> The primary mechanism for delivering a FAPE is through an individualized education program (“IEP”), which tailors educational services to meet the child’s specific needs. 20 U.S.C. § 1414(d); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999).

Aside from these statutory definitions and requirements, the IDEA has left the task of interpreting what constitutes a FAPE to the courts. Ridgewood Bd. of Educ., 172 F.3d at 247. The statute is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Bd. of Educ. of the Hendrick Hudson Central School. Dist. v. Rowley, 458 U.S. 176, 203 (1982).<sup>4</sup> The Third Circuit has defined a FAPE to require an education “that would confer meaningful benefit” upon the child. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3d Cir. 1988). “The IEP

---

<sup>3</sup> “Special education” is defined as “specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child.” 20 U.S.C. § 1401(25). “Related services” are defined as “such developmental, corrective and other supportive services . . . as may be required to assist a child with a disability to benefit from special education.” § 1401(22)

<sup>4</sup> Rowley goes on to state that “[s]uch instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. In addition, the IEP, and therefore the personalized instruction . . . should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” 458 U.S. 176, 203-04 (1982)

must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential.” Shore Regional High School Bd. of Educ. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (Alito, J.) (internal citations omitted). However, the IDEA does not require that a School District provide the best imaginable education to the child or create an ideal IEP. Rowley, 458 U.S. at 197 n.21 (“Whatever Congress meant by an ‘appropriate’ education, it is clear that it did not mean a potential-maximizing education.”); Lenn v. Portland Sch. Cmty., 998 F.2d 1083, 1086 (1st Cir. 1993) (“The [IDEA] . . . emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP.”).

If the parents of a disabled child do not agree with the IEP offered by a school district, they may request a due process hearing. 20 U.S.C. § 1415(f)(1). Any party “aggrieved by the findings and decision” of the administrative hearing may appeal the decision to a state educational agency. 20 U.S.C. § 1415(g). If a party disagrees with the final result of the administrative review process, they may appeal that result to federal District court. 20 U.S.C. § 1415(i)(2)(A).

The issue of which party bears the burden of proof in challenging an IEP is currently in flux. Previously, the Third Circuit placed the burden of proof on the school district. Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1219 (3d Cir. 1993).

However, the Supreme Court recently held that the burden of proof in IDEA administrative hearings is on whichever party is seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). In a recent opinion, the Third Circuit noted that Schaffer changed the burden of proof analysis, and held that “appellants bear the burden of proof when challenging the appropriateness of the

relevant IEPs.” L.E. v. Ramsey Bd. of Educ., \_\_ F.3d \_\_, 2006 WL 156827, at \*6 (3d Cir. Jan. 23, 2006). Ramsey did not specify, however, whether this rule applied to the burden of proof at the administrative hearing level, the only issue addressed by Schaffer, or whether it applied to challenges of an IEP at all levels.<sup>5</sup>

The few courts to address this issue post-Schaffer have applied its rule – that the burden of proof is on the party seeking relief – to both the administrative hearing process and to the district court appeal. See Viola v. Arlington Cent. Sch. Dist., \_\_ F. Supp.2d \_\_, 2006 WL 300449, at \*8 (S.D.N.Y. Feb. 7, 2006) (“According to a recent Supreme Court decision affecting the burden of proof in IDEA actions, the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. This Court can only assume, then, that the same party bears the burden throughout any judicial appeals process.”) (internal citation omitted); Mr. I. v. Maine Sch. Admin. Dist. 55, \_\_ F. Supp.2d \_\_, 2006 WL 224318, at \*24 (D. Me. Jan. 30, 2006) (“The recently decided Supreme Court opinion of Schaffer establishes a strong presumption that in the ordinary case the plaintiff bears the burden.”). In this Court, Judge Savage ruled that “the burden of proof in this challenge to a decision of the Pennsylvania Special Education Due Process Appeals Panels lies with the parent rather than the school district.” Greenwood v. Wissahickon Sch. Dist., 2006 WL 279085, at \*1 (E.D. Pa. Feb. 3, 2006).<sup>6</sup> This Court agrees with Judge Savage, and concludes that the parties challenging the IEP – plaintiffs in

---

<sup>5</sup> Ramsey also did not address whether the burden of proof rule expressed in Oberti remained good law.

<sup>6</sup> Judge Savage also found that Schaffer “effectively overturned” the holding of Oberti. Greenwood v. Wissahickon Sch. Dist., 2006 WL 279085, at \*1 (E.D. Pa. Feb. 3, 2006).

this case – have the burden of proof.<sup>7</sup>

If a court finds that the school district has failed to provide a child with a FAPE, the court may order the district to reimburse the child’s parents for a private school placement. 20 U.S.C. § 1412(a)(10)(C)(ii); Sch. Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 369 (1985). When a disabled child’s parents seek reimbursement for private school tuition, the court must first determine whether the IEP offered by the school district afforded the student a FAPE. Shore Regional High School, 381 F.3d at 198.

In reviewing an appeal of an IDEA administrative decision, the court “shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” § 1415(i)(2)(C). “The fact that § 1415 requires that the reviewing court receive the records of the state administrative proceedings carries with it the implied requirement that due weight shall be given to those proceedings.” Rowley, 458 U.S. at 206. The Third Circuit, adopting the language of other circuits, has described the “due weight” standard as “modified de novo review.” S.H. v. State-Operated School Dist. of Newark, 336 F.3d 260, 270 (3d Cir. 2003). However, even under modified de novo review, “[f]actual findings from the administrative proceedings are to be considered prima facie correct.” Id. If the reviewing court fails to adhere to these factual findings, it must explain why. Id.

If a court finds that the IEP created by the school district did not provide the child with a FAPE, the court must then decide whether the parents’ decision to place the child in private

---

<sup>7</sup> This decision is consistent with the reasoning of Schaffer, which based its holding on the general rule that plaintiffs in civil cases bear the burden of persuasion. Schaffer v. West 126 S. Ct. 528, 534 (2005).

school was an appropriate action. Shore Regional High School, 381 F.3d at 199. Parents are entitled to tuition reimbursement only if the court concludes both that the school district placement violated the IDEA and that the private school placement was proper under the IDEA. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993); T.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572, 582 (3d Cir. 2000) (Alito, J.).

### **III. FACTS**

In order to determine whether the placement and IEP offered by defendants for Brett for the 2003-2004 school year was appropriate, the Court must consider Brett's educational history prior to the development of the 2003-2004 IEP along with the District's evaluations of Brett and the IEP itself.<sup>8</sup> It is necessary to set forth such evidence in some detail in order to explain the court's reasoning.

#### **A. Brett's Educational History**

Brett began kindergarten at Chesterbrook Academy, a private school, in 1997. N.T. at 22. Based on the recommendation of his teacher at Chesterbrook, he repeated kindergarten at East Bradford Elementary School, a public school in the West Chester Area School District, where he also attended first grade. N.T. at 247. Brett's first grade year was a "very difficult year," according to his mother; he performed poorly in school and was frequently depressed. N.T. at 248. In November of that year his parents requested that he be evaluated for special education services. Brett was determined eligible for such services, and in February he was placed in a

---

<sup>8</sup> The parties have submitted the administrative record from the state administrative hearing process. Testimony in the due process hearing will be cited as N.T. at [page number]. The opinion of the administrative hearing officer will be cited as H.O. Op. at [page number], and the opinion of the Special Education Appeals Panel will be cited as A.P. Op. at [page number].

learning support classroom. N.T. at 250.

In the summer after Brett's first grade year, his parents enrolled him in a summer program at Stratford Friends School, a private school where all of the children have special education needs. N.T. at 198, 248. Along with academic programming, the school provides psychological services as well as speech and language support for each child. Id. Class sizes are small, ranging from six to twelve students. N.T. at 200. The school serves students between the ages of 5 and 13, and has approximately 70 students. N.T. at 197, 202. Most of Stratford's teachers are state certified and have training in the Stratford multisensory reading program. N.T. at 198, 201.

During the six-week summer program, Brett's parents noticed a positive change in his attitude toward school. N.T. at 249. Based on this experience and Brett's previous difficulties in public school, Brett's parents enrolled him at Stratford Friends for his second grade year. N.T. at 23. Defendant paid Brett's tuition at Stratford Friends for the 2000-2001, 2001-2002, and 2002-2003 school years (Brett's second, third, and fourth grade years) pursuant to a Settlement Agreement with Brett's parents. N.T. at 23-24. According to his mother, Brett has done well at Stratford Friends, both academically and socially, and is happy there. N.T. at 252-54.

#### B. The 2001 and 2003 ERs

Brett was evaluated by defendant in the spring of 2001 to create an Evaluation Report ("ER"). 2001 ER, D-1. Near the end of Brett's fourth grade year, in the spring of 2003, the District re-evaluated him. N.T. at 107; 2003 ER.

The 2001 ER begins by recounting Brett's educational history through first grade. 2001 ER at 1-2. It then recites information obtained from Brett's parents about Brett's strengths and needs, as well as what kind of learning environments have best served his needs. Id. at 3. Brett's

parents rated his behaviors in various areas, such as inattention, hyperactivity, and anxiety. Id. The ER also includes a psychologist's observations of Brett in several different settings at Stratford Friends, including the school playground, a music class, and his standard class placement. Id. at 4.

Next, the ER recounts numerous assessment results. Brett was given the Wechsler Intelligence Scale for Children, where Brett obtained a full scale IQ of 97, which is in the average range.<sup>9</sup> Id. at 5. Brett's verbal and performance subtest results were broken down into specific categories, such as information, vocabulary, and picture arrangement. Id. at 6. To gauge Brett's perception skills, the Beery-Buktenica Developmental Test of Visual-Motor Integration was administered, and he scored average or near average for the perceptual skills assessed by the District. Id. at 7. To determine Brett's current functioning academic levels, the Wechsler Individual Achievement Test was administered. Id. at 7. While his total language skills were ranked high average, his math skills were considered low average or borderline, as were his reading skills. Id.

The 2001 ER also included an interview with Brett's primary teacher at Stratford Friends, who was asked to rate his academic skills. Id. at 8. Considerable portions of the ER were devoted to interviews with other teachers at Stratford Friends and their observations of Brett's academic, social, and psychological skills. These observations were then compared to the various behavioral tests administered to Brett. Id. at 8-9, 10-12.

---

<sup>9</sup> The school psychologist who conducted the assessments noted that some of Brett's scores, specifically his arithmetic scores, may have underrepresented his abilities. This was due to the fact that when Brett gave an incorrect answer to simple addition and subtraction problems, the psychologist would ask the question again. After some reflection Brett often provided the correct response. 2001 ER at 5.

The 2001 ER ends by listing Brett's specific strengths and needs. Among Brett's needs were "difficulties comprehending multistep directions," "reading decoding problems," and "number reversals." 2001 ER at 12.

The 2003 ER contains the results of numerous additional tests administered to Brett in the spring of 2003, at the end of his fourth grade year, including an Oral Reading Fluency Assessment, second, third, and fourth grade word lists, a writing assessment, and a third grade midterm math assessment.<sup>10</sup> 2003 ER at 1-2. Brett's oral reading fluency was assessed at a second-grade level, his writing skills were rated below second grade, and his math skills were rated at a beginning third grade level. Id. at 2. Additional detailed observations of Brett in a classroom setting at Stratford Friends were included, as well as written comments by several of his teachers there. Id. at 9-11. An occupational therapy evaluation noted that Brett had difficulty with fine motor control, specifically when writing. Id. at 13-14.

The 2003 ER includes a lengthy speech and language evaluation of Brett, based both on observations of Brett at Stratford Friends and on language assessments administered to Brett. Id. at 15-18. Brett's language scores were below those expected for his age, especially in the areas of auditory memory skills and short-term recall. Id. at 18. He was observed to have a limited vocabulary for his age, and had significant difficulties expressing himself. Id. at 19.

### C. The 2003 IEP

Based on the two ERs, the District developed an IEP that recommended placing Brett in

---

<sup>10</sup> These additional tests were administered to Brett pursuant to a Settlement Agreement between his parents and the District, which required that the District re-evaluate Brett. N.T. at 39.

public school. N.T. at 109; IEP. Brett's parents actively participated in developing the IEP.<sup>11</sup>  
N.T. at 110.

Portions of the IEP repeat and summarize the testing results of Brett from the 2001 and 2003 ERs. IEP at 6-7. The main body of the document lists eleven goals for Brett's educational and behavioral progress during the 2003-2004 school year:

1. Improving reading fluency and expression;
2. Reading passages at the appropriate age level;
3. Improving encoding and decoding skills;<sup>12</sup>
4. Composing a Level 3 writing piece (under the Pennsylvania Writing Assessment Domain Scoring guide);
5. Improving mathematical skills;
6. Improving functional classroom skills;
7. Improving learning behaviors and attention to task;
8. Improving expressive language skills;
9. Improving receptive language skills;
10. Improving short term memory strategies; and
11. Improving social skills.

Id. at 8-21. Each of these goals includes three to eight short-term instructional objectives to further the overall goal.

Under the IEP section entitled "Special Education/Related Services," numerous

---

<sup>11</sup> According to Sarah Hudgings, the elementary special education liaison for the District who participated in the development of Brett's IEP,

The Parents were great participants at the IEP meeting. They participated in every line and every section of the IEP. We did go word-for-word to make sure that all of the needs were addressed. And we facilitated either at the gathering of input or asked the Parents and the people who had worked with [Brett] at Stratford Friends line-by-line if they had things to add.

N.T. at 110. Ms. Hudgings testified that any suggestions made by Brett's parents were included in the IEP. N.T. at 110.

Mrs. S., Brett's mother, did not dispute this account of the IEP meetings. N.T. at 275.

<sup>12</sup> Encoding and decoding skills help students to break down unfamiliar words into syllables for pronunciation purposes. IEP at 10. These skills are also known as "phonics." N.T. at 72.

educational program modifications are listed for Brett's teachers to use in facilitating Brett's learning.<sup>13</sup> Id. at 22. Specific modifications to promote Brett's learning behavior and attention to task, social skills, transition difficulties, and feelings of anxiety are also included. Id. at 23.

The IEP would have placed Brett in a learning support classroom for a majority of the school day, with direct instruction in reading, writing, math, social studies, and science. Id. at 24. Under the IEP, Brett would also have received speech therapy, occupational therapy, psychological services, and social skills group sessions. Id.

Brett's parents rejected the finalized IEP, and asked the District to continue to pay for Brett's education at Stratford Friends. The District denied this request, but Brett's parents kept Brett at Stratford Friends and paid his tuition themselves. Brett's parents then asked for a due process hearing to seek reimbursement for Brett's tuition during 2003-2004 school year at Stratford Friends. H.O. Op. at 4.

#### D. The Administrative Hearing

##### 1. Evidence Presented at the Hearing

The following witnesses testified at the administrative hearing, which took place on November 14, 2003, and January 5, 2004:

- Michelle McCann-Glennon, Supervisor of Elementary Special Education, West Chester Area School District;
- Sarah Hudgings, former Elementary Special Education Liaison, West Chester Area School District;
- Barbara Liberi, School Psychologist, West Chester Area School District;
- Dr. Sheryl Somerville, child psychologist;
- Cecily Selling, Assistant to the Director, Stratford Friends School; and
- Sue S., Brett's mother.

---

<sup>13</sup> Modifications include multi-sensory instruction and encouraging Brett to read aloud to himself or sub-vocalize when working. IEP at 22.

The testimony from the School District employees focused on the District's evaluation of Brett and development of Brett's ER and IEP. The employees described in great detail the services and instruction that Brett would receive in the public school and elaborated on these services and goals outlined in the IEP.

Dr. Somerville and Ms. Selling testified on behalf of plaintiffs. Ms. Selling described the environment at Stratford Friends and the instruction and services Brett received there. N.T. at 195-244. Dr. Somerville, who spent two 45-minute sessions with Brett, gave her opinion of Brett's emotional and psychological needs. N.T. at 161-95.

Finally, Mrs. S., Brett's mother, testified about Brett's experiences in both public and private schools and about her experiences in developing Brett's ERs and the IEP with the School District. N.T. at 246-64. Mrs. S. stated that her greatest concerns about the IEP were the lack of a behavior management plan ("BMP") and the lack of transition planning, although she mentioned numerous other concerns. N.T. at 257-60.

The following documents were also presented at the administrative hearing and are found within the administrative record submitted to the Court by the parties:

- Evaluation Report (dated May 7, 2001) (D-1);
- Evaluation Report (dated May 30, 2003, and revised June 19, 2003) (D-2);
- Notice of Recommended Educational Placement ("NOREP") and Individualized Education Plan ("IEP") (D-3);
- Correspondence between plaintiffs' and defendant's lawyers (D-4);
- Settlement Agreement between plaintiffs and defendant (D-5);
- Psychiatric evaluation by Dr. Somerville (P-1); and
- Second semester report card for Brett S., June 2003 (P-2).

## 2. The Hearing Officer's Opinion

The hearing officer began her opinion by recounting the testimony regarding Brett's

transition difficulties, since much of the hearing focused on this subject. The officer concluded that Brett's transition difficulties were not so great as to prevent Brett from enrolling in public school, and that he would benefit by working through these issues. H.O. Op. at 7. Furthermore, the officer found that the IEP provided sufficient plans to enable Brett to transfer from Stratford Friends to the public school, including a tour of the new school, meetings with his teachers, a schedule to alert Brett to any changes, participation in a social skills group, and placement in a small group learning support classroom. Id.; IEP at 23.

The hearing officer found that the District provided "ample evidence" that the IEP could be appropriately implemented by the District, and that it offered Brett a "level of services reasonably calculated to enable [Brett] to make meaningful educational progress." H.O. Op. at 8. The officer then noted that many of the services and plans offered by the District's IEP were not available at Stratford Friends,<sup>14</sup> and concluded that the IEP offered by the District met the requirements of the IDEA. Id. at 8-9.

### 3. The Appeals Panel's Opinion

Brett's parents appealed the decision of the Hearing Officer to the Special Education Appeals Panel for the Commonwealth of Pennsylvania. A.P. Op. at 2. The Appeals Panel found that the curriculum-based evaluations performed by the District were appropriate measures of Brett's educational abilities, since the District included the results of previous standardized assessments of Brett within the IEP. Id. at 5-6. The panel addressed several of Brett's parents' objections, including the lack of a BMP, the reading program used by the District, and the lack of

---

<sup>14</sup> "In short, the Parents seek reimbursement for a program that lacks many of the services and supports provided for in the program offered by the District and rejected by the Parents." H.O. Op. at 8.

a transition plan. The panel found that the IEP contained sufficient goals and strategies for dealing with Brett's behavioral issues. Id. at 8. Regarding the District's reading program, the panel found that it was based on research-proven procedures and techniques. Id. Finally, the panel found that the transition provisions with the IEP were sufficient under the IDEA. Id. at 9. The Appeals Panel thus concluded that the District offered Brett a FAPE. Id. at 10.

#### **IV. DISCUSSION**

##### **A. Admissibility of Supplemental Evidence**

Before the Court can determine whether the District's IEP met the requirements of the IDEA, it must decide whether to admit evidence offered by plaintiffs to supplement the administrative record.

##### **1. Legal Standard for Admitting Supplemental Evidence in IDEA cases**

In reviewing the decision of a special education administrative hearing, a district court may consider additional evidence beyond that found in the administrative record. 20 U.S.C. § 1415(i)(2)(B)(ii).<sup>15</sup> The decision to admit or exclude supplemental evidence is within the court's discretion. Susan N. v. Wilson School Dist., 70 F.3d 751, 760 (3d Cir. 1995). A court should only consider supplemental evidence that is "relevant, non-cumulative and useful in determining whether Congress' goal has been reached for the child involved." Id. If the supplemental evidence offered is the type of evidence that a court might exclude in a conventional civil case, it

---

<sup>15</sup> This section of the IDEA provides that in any appeal of an administrative hearing, the District court:

- (i) shall receive the records of the administrative proceedings;
- (ii) shall hear additional evidence at the request of a party; and
- (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(i)(2)(B).

should not be admitted. Id. at 759, citing Town of Burlington v. Dept. of Educ., 736 F.2d 773 (1st Cir. 1984).<sup>16</sup>

## 2. Supplemental Evidence Offered by Plaintiffs

Plaintiffs seek to introduce into evidence the report of Andrew Klein, “a special educator and supervisor with decades of experience in the public schools.” Pl. Motion at 4. In May 2005, Mr. Klein reviewed Brett’s educational records.<sup>17</sup> Klein Report at 1, Pl. Ex. 1. Most of his report is spent analyzing what he perceives as the District’s “failings” in creating Brett’s IEP. Id. at 6.

First, Mr. Klein disagrees with the District’s refusal to conduct a sensory assessment and behavioral assessment before Brett began the 2003 school year. In his opinion, because the District performed three evaluations of Brett beyond the assessments required in the Settlement Agreement, the District could have performed the sensory and behavioral assessments. Id. at 6. Without these assessments, Mr. Klein believes that the 2003 ER is insufficient, which in turn makes the IEP insufficient. Id. He further opines that the IEP is inadequate because it does not include a baseline determination of Brett’s social, behavioral, and emotional functionality. Id. at 7. Mr. Klein recognizes that two of the IEP goals address Brett’s social issues, specifically, his attention-deficit problems and social skills, but finds insufficient detail in the IEP to meet Brett’s needs, concluding that the guidance provided to teachers amounts to “boilerplate items that we would expect of any child.” Id. at 7-8. Mr. Klein describes the “lack” of a transition plan in the

---

<sup>16</sup> As an example of what type of supplemental evidence that would not be admitted under 20 U.S.C. § 1415(i)(2)(B)(ii), the Burlington court said that the statute did not authorize “witnesses at trial to repeat or embellish their administrative hearing testimony.” Town of Burlington v. Dept. of Educ., 736 F.2d 773, 790 (1st Cir. 1984)

<sup>17</sup> The documents reviewed by Mr. Klein essentially comprised the Administrative Record from the due process hearing, which the court has received into evidence.

IEP as a “flagrant failing,” and lists various steps the District could have taken to ease Brett’s transition. Id. at 8-9. Finally, Mr. Klein finds the IEP inadequate because it does not specify how frequently Brett’s regular and special education teachers will consult. Id. at 9.

Mr. Klein also identifies a number of “concerns” in the Notice of Recommended Educational Placement (“NOREP”) and administrative hearing process. Id. First, he states that the NOREP demonstrates no other options, including Brett remaining at Stratford Friends, were considered for Brett’s placement. Id. Mr. Klein also notes that the District did not consider the fact that the timing of Brett’s transition would result in his placement in three different schools in three years. Id. at 10. Finally, he opined that there was insufficient testimony at the administrative hearing about the qualifications of the District’s learning support teachers who would be working with Brett. Id. In conclusion, Mr. Klein found “. . . the ER, IEP and NOREP to be inadequate to provide a free appropriate public education in the least restrictive environment for Brett S. for the reasons enumerated supra.” Id.

### 3. Analysis

Mr. Klein’s report is not the type of evidence that is categorically inadmissible in an IDEA case. See Susan N., 70 F.3d at 759. Nor is this the type of “after-acquired evidence” prohibited by Susan N.<sup>18</sup> Id. at 762. Likewise, the fact that Mr. Klein presumably could have testified at the administrative hearing is not dispositive. The latter objection to this type of

---

<sup>18</sup> For example, after-acquired evidence would be information about Brett’s progress at Stratford Friends during the 2003-2004 school year, the year after the District offered the IEP. See Susan N. v. Wilson School Dist., 70 F.3d 751, 762 (3d Cir. 1995). Mr. Klein’s conclusions are based on virtually the same evidence presented at the due process hearing, as well as the records of the hearing itself. Simply because this evidence was acquired after the due process hearing does not bar its admission.

evidence was rejected by the First Circuit which declined to presumptively bar testimony from individuals who could have testified at the administrative hearing, particularly when that individual is an expert. Burlington, 736 F.2d at 790.<sup>19</sup> “There could be some valid reasons for not presenting some or all expert testimony before the state agency. Experts are expensive—the parties at the state level may feel that their cases can be adequately made with less backup.” Id. The Court finds this reasoning persuasive.

As someone who may be considered an expert on special education based on his educational background and extensive employment experiences, Mr. Klein’s opinion provides a valuable counterpoint to the opinion of the hearing officer. See Burlington, 763 F.2d at 791 (“Our review of the cases involving the [IDEA] reveals that in many instances the district court found expert testimony helpful in illuminating the nature of the controversy and relied on it in its decisional process.”). Therefore, because this evidence is “relevant, non-cumulative and useful,” Susan N., 70 F.3d at 760, and because there is no reason to exclude it, the Court will consider Mr. Klein’s report in evaluating Brett’s IEP.

#### B. Plaintiffs’ Objections to the IEP

Brett’s parents have numerous objections to the IEP created by the School District. First, plaintiffs criticize the ERs for failing to address Brett’s “substantial emotional and behavioral needs.” Pl. Motion at 13-14. Specifically, plaintiffs complain that the District failed to conduct a Functional Assessment of Behavior (“FAB”) prior to Brett’s transition to public school, a “critical” and “glaring” oversight, since the District had ample time to perform a FAB. Id. at 15. “Instead the District determined that it would simply wait until the beginning of the school year

---

<sup>19</sup> The Susan N. court relied heavily on the Burlington opinion. 70 F.3d at 759-60.

to conduct the FAB, allow Brett to fail in his new large environment, and then develop a Behavior Management Plan at an undetermined time later in the school year.” Id. at 15-16 (emphasis original).

Plaintiffs also assert that the District failed to conduct any testing of Brett’s auditory processing delays despite being aware of Brett’s challenges with auditory processing. Id. at 16. Plaintiffs further object to the academic assessments performed by the District as insufficient.<sup>20</sup> Id. at 16-17. They contest that standardized testing required to develop meaningful educational goals for Brett, as opposed to the curriculum-based testing performed by the District. Id. at 17.

Regarding the IEP, plaintiffs contend that the it “was lacking in many goals, objectives, and services which were needed to provide FAPE to Brett.” Id. at 20. Because the District had not conducted a FAB, plaintiffs argue that the District was unable create a BMP prior to the beginning of the 2003-2004 school year. Id. at 21. Without a BMP, plaintiffs claim that Brett’s teachers could not consistently manage Brett’s behavior. Id. at 22. They also aver that the IEP failed to provide for a meaningful “Transition Plan” to help Brett move from Stratford Friends to the public school, a particularly glaring omission since Brett would have to move to a middle school the next year for sixth grade. Id. at 23-24.

According to plaintiffs, the IEP’s educational components were insufficient because the Present Educational Levels failed to provide a “meaningful description,” included goals which

---

<sup>20</sup> Plaintiffs argue that only one test was administered to establish Brett’s reading level, the Oral Reading Fluency Assessment. Pl. Motion at 16. They charge that the test failed to measure Brett’s “essential skills in all five basic areas of reading (phonemic awareness, phonics, fluency, vocabulary and comprehension), and did not evaluate crucial additional areas of Brett’s reading/language profile (i.e. language comprehension, background knowledge, linguistic knowledge, phonology, syntax, semantics, cipher knowledge, phoneme knowledge, and alphabetic knowledge).” Id.

failed to address Brett’s educational needs, and failed to provide goals for Brett’s self-esteem and anxiety issues. Id. at 24-25. Plaintiffs also take issue with the Reading, Math, and Written Expression goals, and they allege that Brett’s proposed reading instruction does not conform to the Pennsylvania Department of Education’s recommendations for reading instruction for children with learning disabilities. Id. at 25-26.

Finally, plaintiffs argue that the IEP was procedurally flawed because it failed to specify which public school within the District Brett would be attending. Pl. Reply at 7.

### C. Analysis of Brett’s IEP

After reviewing the entire administrative record and thoroughly examining the IEP offered to Brett, the Court concludes that the education offered by defendant to Brett met the substantive and procedural requirements of the IDEA.

As stated above, the IDEA requires that disabled children receive an education “that would confer meaningful benefit.” Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3d Cir. 1988); see also Shore Regional High School Bd. of Educ. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (Alito, J.). However, the IDEA does not require that a school district create the ideal IEP or provide the best possible education to the disabled child. Bd. of Educ. of the Hendrick Hudson Central School. Dist. v. Rowley, 458 U.S. 176, 197 n.21 (1982) (“Whatever Congress meant by an ‘appropriate’ education, it is clear that it did not mean a potential-maximizing education.”).

The Court will address each of plaintiffs’ major criticisms regarding the IEP.

#### 1. The IEP Served Brett’s Behavioral Needs

At the due process hearing, the District defended its decision not to conduct a FAB prior

to Brett's transition to public school. Michelle McCann-Glennon, Supervisor of Elementary Special Education, testified:

We also thought, which was very important, that a Functional Behavior Assessment and a Behavior Plan be completed. However, when looking at a Functional Behavior Assessment, you really need to take into consideration - a huge consideration - the setting that the child's going to be in because there's factors that when Brett would come to Penn Wood Elementary School that we don't know how he would react. So it would be more natural, more authentic if we did the Functional Behavior Assessment and the Behavior Plan at Penn Wood Elementary.

N.T. at 35. Similarly, Barbara Liberi, school psychologist for the District, testified that it was important to conduct the Functional Behavior Assessment within Brett's new school setting so that the school could determine what specifically in that setting would "trigger" inappropriate behaviors. N.T. at 146. "A Functional Behavior Assessment is setting embedded. It makes no sense to do it in one setting and apply it in another setting." Id.

The Court agrees with the reasoning of Ms. McCann-Glennon and Ms. Liberi.<sup>21</sup> Simply because the District could have conducted a Functional Behavior Assessment prior to Brett's transition does not mean it was required to do so, nor does it mean that this assessment would have been appropriate under the circumstances. Furthermore, the District conducted numerous other behavioral assessments of Brett, observing him at Stratford Friends and talking to his teachers there and asking his parents about his behavioral issues.

Regarding the BMP, the IDEA does not require that an IEP contain a BMP. The statute

---

<sup>21</sup> In agreeing with Ms. McCann-Glennon and Ms. Liberi, the Court notes that the hearing officer found that these two witnesses had "extensive experience and displayed a thorough understanding of the Student's disabilities and needs." H.O. Op. at 8. "A District Court must accept the state agency's credibility determinations unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion." Shore Regional High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199 (3d Cir. 2004) (Alito, J.) (citing Carlisle Area Sch. v. Scott P., 62 F.3d 520, 529 (3d Cir. 1995)).

simply requires that “in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” 20 U.S.C. § 1414(d)(B)(3)(I). The Pennsylvania State Board of Education regulations on behavior support for special education students describe the types of behavioral measures that should and should not be used in a behavioral support plan, but do not require that every IEP include a specific behavioral support plan. 22 Pa. Code § 14.133.<sup>22</sup>

While the IEP lacked a formal BMP, it contained a wide variety of behavior management objectives and tactics for Brett’s teachers to use in addressing his behavioral issues. Two of the eleven IEP goals focused on Brett’s behavior: annual goal seven, with six separate short-term objectives,<sup>23</sup> focused on improving Brett’s learning behaviors to enable him to effectively participate in a fifth-grade class setting, and annual goal eleven, with eight separate short-term objectives,<sup>24</sup> focused on improving Brett’s social skills to improve his interactions with his peers.

---

<sup>22</sup> This statute provides, in part:

Positive rather than negative measures shall form the basis of behavior support programs. Behavior support programs include a variety of techniques to develop and maintain skills that will enhance an individual student's or youngchild's opportunity for learning and self-fulfillment. The types of intervention chosen for a particular student or young child shall be the least intrusive necessary.

22 Pa. Code § 14.133(a).

<sup>23</sup> Examples of short-term objectives include “[w]hen given a directive from a teacher regarding an assignment, Brett will rephrase the direction to ensure understanding and begin the task within 1 minute with teacher prompting fading over time” and “[w]hen discussing a topic with another person, Brett will stay on the topic of conversation with one verbal reminder fading over time.” IEP at 15.

<sup>24</sup> Examples of short-term objectives include “[g]iven adult models and verbal cueing/prompting faded to elimination, Brett will establish and maintain eye contact with familiar adults for 20 seconds during direct interaction” and “[g]iven adult models and verbal

IEP at 15, 20.

Furthermore, the IEP contains an entire section devoted to behavioral instruction, with goals too numerous to be listed in this Memorandum.<sup>25</sup> IEP at 23. There is also a section of the IEP which provides for specially designed instruction “relating to Brett’s feelings of anxiety as well as behavior,” which includes recommendations such as “[p]rovide positive reinforcement for appropriate behavior and approximations” and “[m]odel and facilitate coping strategies to deal with frustration/anxiety.” *Id.* These numerous and detailed instructions provided more than adequate guidance to the teachers who would work with Brett on how to address his behavioral and emotional issues.<sup>26</sup> Clearly, the IEP was designed to facilitate behavior that would enable Brett to achieve significant academic progress. Simply because the many behavioral techniques in the IEP were not organized as a separate document entitled “Behavior Management Plan” does

---

cueing/prompting faded to elimination, Brett will maintain a conversation with a familiar peer for 2-4 volleys while remaining on the topic.” IEP at 20.

<sup>25</sup> Examples include “[t]each him strategies to recognize and monitor his own levels of distractibility and inattention (strategies will be determined once teacher sees what works with him,” “[p]rovide support required in adapting to new situations and attempting new tasks,” and “[p]rovide frequent breaks to allow him to relax and then refocus his attention.” IEP at 23.

<sup>26</sup> Plaintiffs’ filings demonstrate a level of concern about the qualifications of the public school teachers who would have worked with Brett. For example, during the due process hearing, when Mrs. S. discussed her concerns about Brett’s placement, she stated that “we didn’t get any specifics on teacher qualification – you know, there wasn’t the opportunity to find out teacher qualifications, what percentage of time [Brett] would spend with an aide versus the teacher, what kind of training in behavioral management the teachers had had.” N.T. at 263. And Mr. Klein, plaintiffs’ education expert, finds that the “most concerning” omission from the due process hearing is the lack of evidence or testimony about the training and qualifications of the learning support teachers who would work with Brett. Klein Report at 10. However, according to Sarah Hudgings, elementary special education liaison for the District, the teachers and staff who would have worked with Brett in the public school setting had an extensive background and training in working with special education students. N.T. at 116.

not render the IEP inadequate. See Robert B. v. West Chester Area Sch. Dist., 2005 WL 2396968, at \*7 (E.D. Pa. Sept. 27, 2005) (“The IDEA does not require that the District . . . create a separate behavior intervention plan.”).

## 2. Defendant Conducted Adequate Testing of Brett

Plaintiffs object to the District’s lack of standardized norm-based testing as well as their failure to evaluate Brett’s auditory processing problems . Pl. Motion at 16-17.

According to the District, curriculum-based testing is more appropriate for developing day-to-day instruction and helps the District to develop an IEP that involves the student in the general curriculum.<sup>27</sup> Def. Response at 11. Furthermore, the District considered norm-based testing results from tests conducted at Stratford Friends in the spring of 2003. Id. at 12; IEP at 6-7; N.T. at 93-95. In addition, the District asserts that plaintiffs signed a Settlement Agreement where they agreed to the curriculum-based testing. Def. Response at 11. The Court finds defendant’s reasoning persuasive, and concludes that the curriculum-based testing of Brett was adequate in order to develop an appropriate IEP for Brett, particularly since it was reinforced by the standardized test results.<sup>28</sup>

---

<sup>27</sup> The IDEA requires that an IEP include goals related to “meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general education curriculum.” 20 U.S.C. § 1414(d)(1)(A)(iii)(II). Defendant saw curriculum-based testing as a means to help them meet this statutory requirement. Def. Response at 11.

<sup>28</sup> The settlement agreement between plaintiffs and defendant, which is included in the administrative record, declares that Brett’s parents agreed to have Brett reevaluated, and explicitly states that the reevaluation shall consist of “curriculum-based assessment of reading, writing, and mathematics.” D-5 at 2-3. The fact that plaintiffs are challenging a method of testing to which they previously acceded to weakens their criticism of this testing. See Robert B. v. West Chester Area Sch. Dist., 2005 WL 2396968, at \*6 (E.D. Pa. Sept. 27, 2005) (“While no provision in the Settlement Agreement represented that the District’s future Evaluation Reports would be agreed to constitute an appropriate evaluation, clearly the parents’ subsequent challenge

Regarding Brett’s auditory skills, plaintiffs do not specify exactly what type of “auditory processing delays” testing they believe defendant should have conducted. On this issue, the Court notes that the District did conduct a speech and language evaluation, including a hearing evaluation, of Brett in the 2003 ER. 2003 ER at 15.

In general, the Court is impressed by the number and variety of assessments conducted by the District. To declare Brett’s IEP inadequate because plaintiffs wanted even more tests performed would place unreasonable demands on school districts in evaluating special education children. For these reasons, the Court concludes that the evaluations of Brett were more than sufficient to develop an appropriate IEP.

### 3. The IEP Provided an Appropriate Transition for Brett

One of plaintiffs’ most significant complaints focuses on the IEP’s lack of an appropriate transition plan to assist Brett in moving from Stratford Friends to public school.<sup>29</sup> The Court finds that the District included sufficient measures within the IEP to ease Brett’s transition.<sup>30</sup>

To deal with Brett’s transition issues, the District planned, through the IEP, to give Brett

---

based on the content of the reevaluation is weakened by the fact that the parents previously consented to exactly such content.”).

<sup>29</sup> In her testimony at the due process hearing, Mrs. S. described “the lack of transition planning” in the IEP as one of plaintiffs’ two greatest concerns. N.T. at 259. And, as the hearing officer noted in her opinion, “much was made” at the hearing about Brett’s difficulties with transitions. H.O. Op. at 7.

<sup>30</sup> In support of this argument, plaintiffs cite to several opinions of the Pennsylvania Special Education Appeals Panel. Pl. Reply at 2-3. The Court does not question the competency of the Appeals Panel to interpret the IDEA. However, a **federal court is not bound to follow an interpretation of federal law announced by a state court, much less a state administrative agency. See United States v. Bedford, 519 F.2d 650, 653 n.3 (3d Cir. 1975) (“It is a recognized principle that a federal court is not bound by a state court’s interpretation of federal laws.”).**

a tour of his new school, allow him to meet with his new teachers prior to the beginning of the school year, and a provide him with a schedule of his classes. Once Brett was at the school, he was to be placed in a small learning support classroom and participate in a social skills group. IEP at 23.

According to Mr. Klein, the District should have done much more to assist Brett’s transition.<sup>31</sup> Klein Report at 9. The Court rejects this conclusion. It is relatively easy at this time, more than two years after the proposed IEP was developed, to look back and brainstorm additional ways in which the District could have helped Brett transition to his new school. But the Court is mindful of Judge Garth’s warning that a court reviewing an IEP should not engage in “Monday Morning Quarterbacking.” See Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993) (“Neither the [IDEA] nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement”). The Court finds that the District’s transition plans were reasonably calculated to ensure that Brett’s transition would not interfere with his ability to obtain a meaningful educational experience.<sup>32</sup>

The Court also finds that the transition desired by plaintiffs would have been unworkable

---

<sup>31</sup> Mr. Klein suggests a peer escort, a tour of the new school with trusted staff from Stratford Friends, a map of the school, or a color-coded schedule and map. Klein Report at 9.

<sup>32</sup> In reaching this conclusion, the Court notes that both Dr. Somerville, who testified for plaintiffs at the due process hearing, and Barbara Liberi, the District’s psychologist, thought it was valuable for Brett to “work through” his transitions issues. H.O. Op. at 7; N.T. at 135, 193. The Hearing Officer also noted that Brett has managed, albeit with some difficult, to make other transitions, such as leaving home for two weeks in the summer to attend a hockey camp. H.O. Op. at 7; N.T. at 187. The Court further notes that the District consulted with Brett’s teachers at Stratford Friends about the transition, and they found that the District’s transition plans, such as a tour of the school and meetings with teachers, would be adequate to help Brett make the transition. N.T. at 114.

for the District. Based on the statements of plaintiffs and their witnesses at the due process hearing, plaintiffs' ideal transition for Brett would have taken twelve to eighteen months, and would have involved various types of closure at Stratford Friends.<sup>33</sup> N.T. at 175, 262; Pl. Reply at 4. **It would be unreasonable to require the District to spend eighteen months transitioning Brett to his new school and to order the District to coordinate extensive activities to give Brett "closure" at Stratford Friends. Moreover these actions are not required by the IDEA. "The IDEA guarantees an education that is "appropriate" and "meaningful," not one "that provides everything that might be thought desirable by 'loving parents.'"** Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 (2d Cir. 1989) (internal citation omitted).

Plaintiffs also object that the transition proposed by the District would require Brett to move between three schools in as many years, because once Brett completed his fifth grade year at an elementary school within the District, he would move to a middle school for sixth grade. Pl. Motion at 24 ("Thus, the District proposed that Brett attend three (3) schools within fifteen (15) months – a clearly inappropriate series of moves for a child with Brett's emotional needs."). However, the District defended the decision to transition Brett at the beginning of his fifth grade year as opposed to later. Michelle McCann-Glennon, the Supervisor of Elementary Special Education, testified that having Brett at a District school for fifth grade would help him make the transition to middle school in the District. "[T]o have him transition in and to be part of a group of students who will be moving naturally on to sixth grade together I think would give him the support that he would need to be even successful in middle school." N.T. at 45. This testimony

---

<sup>33</sup> During the due process hearing, Mrs. S. complained that "We had no closure with [Brett's] classmates from Stratford Friends. We had no celebration of his accomplishments there." N.T. at 262.

demonstrates that the District did consider the potential problem of the middle school transition at the end of the 2003-2004 school year, and concluded that it was best addressed by moving Brett to public school at the beginning of the school year. The Court concludes that the District's approach was appropriate.

#### 4. The IEP Provided Appropriate Goals for Brett

Plaintiffs assert that the IEP's goals failed to address Brett's educational as well as his self-esteem and anxiety needs. Pl. Motion at 24-25. Given the multitude of educational and behavioral goals within the IEP, the Court disagrees with plaintiffs' claim that these goals "were not measurable and failed to address Brett's actual educational needs." Id. at 24. Among the eleven (11) goals in the IEP were objectives such as improving Brett's reading comprehension (goal #2), further developing his encoding and decoding skills (goal #3), and improving his math skills (goal #5). IEP at 9-10, 13. Each of these goals is broken down into tangible sub-goals.

For example, to improve Brett's math skills, the IEP details that:

- Brett will pay attention to operation signs by choosing the appropriate sign while he is solving addition and subtraction problems.
- Brett will pay attention to operation signs by choosing the appropriate sign as he solves multiplication and division problems.
- Brett will complete 100 problems composed of mixed addition and subtraction facts within 3 minutes with 85% accuracy to improve fluency.
- Brett will complete 100 multiplication facts (for 1s, 2s, 5s, 7s, 9s, and 10s) within 5 minutes with 85% accuracy to improve fluency.
- Brett will solve simple word problems requiring multiplication.
- Brett will solve simple word problems requiring division.

Id. at 13. These sub-goals were to be measured by teacher evaluation as well as evaluation of Brett's performance on the problem sets. Id. The other goals within the IEP contain similarly specific and measurable sub-goals. The Court concludes that the educational goals in the IEP

were reasonably calculated to assure Brett would make meaningful educational progress.<sup>34</sup>

Regarding Brett's self-esteem and anxiety problems, the Court notes that there is no specific goal addressing either of these issues. However, there is a section within the "specially designated instruction" section of the IEP devoted to "Brett's feelings of anxiety" with recommendations for Brett's teachers for dealing with Brett's anxiety issues.<sup>35</sup> IEP at 23. The IEP also provides that Brett would see a school psychologist for thirty minutes two times a week and as needed. *Id.* at 22. It is difficult to conceive what more the District could have done to improve Brett's self-esteem and anxiety problems. Therefore, the Court concludes that the IEP contained sufficient measures to address Brett's anxiety and self-esteem problems so that he could make meaningful educational progress.

##### 5. The District's Failure to Specify a School Is Not Fatal

In the IEP, in the section entitled "Location of Program," the IEP simply states "regular public school." IEP at 24. Plaintiffs contend that the failure to specify which public school within the District is significant enough to deny Brett a FAPE. Pl. Reply at 7.

There is some confusion in the record as to whether plaintiffs were truly unaware of what school Brett would be attending. Michelle McCann-Glennon, the Supervisor of Elementary

---

<sup>34</sup> Plaintiffs complain that the IEP's reading goal "did not address all five areas of Brett's reading needs," which are phonemic awareness, phonics, fluency, vocabulary and comprehension. Pl. Motion at 16, 25. However, the IEP does have goals and sub-goals which address phonics (goal #3 – encoding and decoding skills), fluency (goal # 2), vocabulary (goal #9), and comprehension (goal #2). The Court finds that these reading objectives and their respective sub-goals were reasonably calculated to enable Brett to make meaningful progress in his reading skills. The omission of a goal directly addressing "phonemic awareness" does not alter this finding.

<sup>35</sup> Recommendations include "model and facilitate coping strategies to deal with frustration/anxiety." IEP at 23.

Special Education for the District, testified at the due process hearing that, although the IEP did not state the specific school where Brett would be placed, Brett's parents were told in an IEP meeting that he would be placed at Penn Wood Elementary. N.T. at 52-53. Brett's mother initially testified that she did not know what school Brett would be at for the 2003-2004 school year. N.T. at 261. However, when pressed, Mrs. S. admitted that the placement at Penn Wood "was probably mentioned." N.T. at 265.<sup>36</sup>

Given that Brett's parents were probably aware that Penn Wood was the likely placement for Brett, the Court will not find the IEP inadequate because it did not specify the Penn Wood placement. At most, the confusion over placement amounts to a miscommunication between plaintiffs and defendant.

## **V. CONCLUSION**

The Court does not doubt that Brett has and will continue to make significant progress at the Stratford Friends School. This does not mean, however, that the District is required to pay for Brett's tuition there. The education offered by the District to Brett for the 2003-2004 school year was reasonably calculated to provide him with a meaningful educational benefit. It may not have been the maximum possible benefit, or the same education he was receiving at Stratford Friends, but that is not what is required by the IDEA.

The Court concludes that the IEP offered by the District provided Brett with a FAPE.

---

<sup>36</sup> Mrs. S. explained that while the District had told her that Penn Wood would be the placement, other schools had also been mentioned, and because Brett's IEP was still being adjusted, she assumed that the school placement could change. N.T. at 265-66.

Thus, plaintiffs are not entitled to tuition reimbursement.<sup>37</sup>

An appropriate Order follows.

---

<sup>37</sup> Even if the Court were to conclude that the IEP did not provide a FAPE, plaintiffs would only be entitled to tuition reimbursement if the Court found that Brett's placement at Stratford Friends was proper under the IDEA. T.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572, 582 (3d Cir. 2000) (Alito, J.). Given that the Hearing Officer found that Stratford Friends did not offer many of the services and supports offered by the District, placement there may not have been proper under the IDEA. H.O. Op. at 8. Because the Court concludes that the District offered Brett an IEP which provided a FAPE, it need not address this question.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>BRETT S., a Minor, By and Through</b>	:	<b>CIVIL ACTION</b>
<b>His Parents, CHARLES S. and SUSAN</b>	:	
<b>S.,</b>	:	
	:	
<b>and</b>	:	
	:	
<b>CHARLES S. AND SUSAN S., Adults</b>	:	
<b>Individually, and On Their Own Behalf</b>	:	
<b>Plaintiffs,</b>	:	<b>NO. 04-5598</b>
	:	
<b>vs.</b>	:	
	:	
<b>THE WEST CHESTER AREA</b>	:	
<b>SCHOOL DISTRICT,</b>	:	
<b>Defendant.</b>	:	

**ORDER**

**AND NOW**, this 13<sup>th</sup> day of March, 2006, upon consideration of Plaintiffs' Motion for Judgment on the Administrative Record and Additional Evidence or Alternatively for Summary Judgment (Document No. 8, filed August 15, 2005), Motion of Defendant, West Chester Area School District, for Disposition on the Administrative Record in Accordance with 20 U.S.C. § 1415(i) (Document No. 10, filed September 15, 2005), and Plaintiffs' Reply to the Defendant's Motion for Disposition on the Administrative Record (Document No. 11, filed September 30, 2005), for the reasons stated in the attached Memorandum, **IT IS ORDERED** as follows:

**A. Plaintiffs' Motion for Judgment on the Administrative Record and Additional Evidence or Alternatively for Summary Judgment.**

1. That part of Plaintiffs' Motion which seeks the admission of supplemental evidence is

**GRANTED;**

2. Plaintiffs' Motion for Judgment on the Administrative Record and Additional Evidence is **DENIED**; and,

3. Plaintiffs' Alternative Motion for Summary Judgment is **DENIED AS MOOT**.

**B. Motion of Defendant, West Chester Area School District, for Disposition on the Administrative Record in Accordance with 20 U.S.C. § 1415(i).**

1. That part of the Motion which seeks disposition on the Administrative Record without consideration of the supplemental evidence offered by plaintiffs is **DENIED**. The supplemental evidence offered by plaintiffs is **ADMITTED** and was relied upon by the Court in deciding the pending Motions; and,

2. Defendant's Motion for Judgment on the Administrative Record, as supplemented by the additional evidence offered by plaintiffs, is **GRANTED**.

**IT IS FURTHER ORDERED** that **JUDGMENT IS ENTERED** in **FAVOR** of defendant, West Chester Area School District, and **AGAINST** plaintiffs, Brett S., a minor, by and through his parents, Charles S., and Susan S., and Charles S., and Susan S., adults individually, and on their own behalf.

**IT IS FURTHER ORDERED** that the Clerk of Court shall **MARK** the case **CLOSED FOR STATISTICAL PURPOSES**.

**BY THE COURT:**

---

**JAN E. DUBOIS, J.**