

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

# PENNSYLVANIA

## Special Education Hearing Officer

Decision

File # 8955/07-08 LS

Due Process Hearing

For

KB

Date of Birth: xx/xx/xx

Date of Hearing: August 18, 26, 27, September 19, 24, October 7, 2008

Open Hearing

Parties to the Hearing:

Mr. and Mrs.

Pennsbury School District  
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Representative:

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Record Closed: October 28, 2008

Date of Decision: November 7, 2008

Hearing Officer: Max Wald, Ed.D.

### Background

Student, a late teen age eligible student (herein after Student) resides with Student's parents, Mr. and Mrs. (herein after Parent[s]) within the boundaries of the Pennsbury School District (hereinafter District).

In July, 2006 the Parents completed an application for enrollment of their student in the District. Prior to that date the family had lived in [a neighboring state] where the Student had attended only private schools. The Parents alleged that at the time of their visit to the administration building they were told that their student was not eligible for special education.

The Parents and the Student met with a high school guidance counselor late in July 2006 and developed a schedule of classes for September 2006. The issue of special education or the need for services was not raised. The student did not attend the District high school that September and had already been enrolled earlier to attend a private school.

In February 2007 the Parents arranged for the Student to be evaluated by a private learning consultant and arranged for a private psychological evaluation in April of the same year.

During the summer (July 2007) the Parents met with Pennsbury's supervisor of Special Education to discuss enrollment. When the Parents learned that the Student would not be evaluated until September, they continued with plans to enroll their student in a residential private school.

In September 2007 the Parents signed a "Permission to Evaluate" form and subsequently notified the District that Student might require special education services. The Student was evaluated and found to be not eligible. The results of the evaluation were reviewed with the Parent in November 2007. The Parent provided additional documentation of the Student's disability and the District agreed to perform another psychological evaluation. The evaluation was done on 1/7/08 when returned home from Student's residential school. The report was completed on February 28, 2008 and found the Student to be eligible for special education services.

The District convened a meeting of Student's IEP team and an Individualized Education Program was crafted on March 25, 2008. The Parents rejected the Notice of Recommended Educational Placement (NOREP), returned the Student to Student's

residential private school in September 2008 and filed a request for mediation and a subsequent Due Process Hearing.

#### Issues

1. Did the District fail in its Child Find responsibility to the Student?
2. Are the Parents entitled to reimbursement for the cost of independent educational evaluations undertaken on behalf of the Student?
3. Are the Parents entitled to reimbursement of tuition costs for the 2007-2008 school year and tuition payment for the 2008-2009 school year?
4. Is the Student currently receiving a free appropriate public education (FAPE) in the least restrictive environment?

#### Findings of Fact

1. The Student is a resident within the boundaries of the District. Student is late teen age and was born on xx/xx/xx. Student has been identified as being an eligible student with a Specific Learning Disability and Other Health Impairment. (S-2, S-15 at 9)
2. The Student was hospitalized for 7-10 days in 2004 after being diagnosed as suffering from depression. The Student's pediatrician indicated that the Student was or had been suicidal. Following this hospitalization the Student returned to the Private School for two more years after which Student was not invited to return. No attempt was made to enroll Student in the [neighboring state] District in which the family lived. (NT 46, 48-49, 103-104, P-1)
3. Teachers at the Private School perceived the Student as being able to perform at a higher level than Student was demonstrating. (NT 49, P-2 at 2)
4. The Student during grades one through five was outgoing. "[Student] got along with other children and was considered social." (NT 52, P-2 at 2)
5. The Parents completed a registration form to enroll the Student in the District on July 6, 2006 after moving to Pennsylvania. At the time of registration the Parents

offered little information regarding Student's educational needs other than in the past Student had been given extra time on tests.  
(NT 54-55, 108, 482-484, S-2)

6. The Parents "checked" on the 7/6/06 Registration Form that their student had received "special education" at the Private School explaining that Student had been given extra time for tests and assignments. No supportive documents were provided, nor was an evaluation requested.  
(NT 57, 109, S-2)
7. The Parent was unable to identify the name of the person with whom they said they spoke regarding special education. They indicated that they came to a desk after making two ninety degree turns in the corridor. The District was unable to identify this person. No documentation i.e. school records or reports were brought to school by the Parents. No information about the student was shared including a 2004 psychological evaluation. Allegedly, the parents were asked whether their student had a diagnosis. When they replied that Student did not, they were allegedly told that their student was ineligible. (NT 60, 121, 478-479, 481-482,682-683)
8. After attending The Private School for five years the student was not "invited" to return for the 2006-2007 school year because of some behavioral issues. During Student's attendance at Private School the student had been enrolled in some honors courses but had difficulty with timely homework, and completion of assignments. (NT 67, 73)
9. The District produced an Evaluation Report crafted by a District Psychologist. The ER was issued on 10/10/2007 and was prepared without the participation of the Student who was in attendance at a residential school. The ER contained information from an Educational Assessment 3/4/07, (S-7) , Psychological Evaluation 4/13/07 (p-15), Program information from [redacted] Academy, "[redacted] Academy 502 Plan, (S-9)" as well as information submitted by the Parent (P-16), a report card (1/29/06) from the Private School, (S-1), SAT scores (3/2000), (S-3). The Parent packet (P-16) contained grades from [school redacted] and Private School, and email from some of the Student's former teachers and comments regarding Student from Student's father. All of the preceding material was reviewed by the District's psychologist along with a telephone conference with the father. (NT 722-27, S-1, S-3, S-4, S-7, P-15, P-16)
10. A permission to evaluate form was sent to the Parents on 9/11/07 by the District. The Student was evaluated in October 2007. The report was issued on October 10, 2007 and indicated that "Student was able to access the general education curriculum and perform successfully as demonstrated by academic performance that is within the average to above average range." Under the Federal criteria and Chapter 14 Regulations the District concluded that the Student was not in need of specially designed instruction. There had been no information in any of the

- reports suggesting emotional disturbance or non-verbal learning disability. The Evaluation Report consisted only of information and reports supplied by the Parents. The Student had not been made available for testing.(NT 87, 198, 730-732, S-7 at 4)
11. The Student was not enrolled in the [District's] High School for the 2006-2007 school year, though a schedule had been developed by the Parent and the District. (NT 76)
  12. The Student was enrolled at the [redacted] High School for the 2006-2007 school year because Student had not been invited to return to the Private School which meant that "[Student] was then basically shut off from attending any other private school..(until) Student had...a clean record for at least one year. (NT 76, 117)
  13. The Student was evaluated by Dr. C, a private learning consultant, who administered a battery of tests as part of a "Cognitive Educational Assessment" for the purpose of obtaining additional time for the Student in school test taking and SAT's, as well as to identify learning disabilities. The evaluation was completed on February 17, 2007 and reported to the District in late September 2007. (NT 80-81, S-4 at 1)
  14. A private Psychological Evaluation was completed by Dr. G on April 13, 2007. (NT 81-82, P-15 at 1)
  15. The Parent met with Ms. L, Supervisor of Special Education, on July 31, 2007 in regards to dual enrollment. No evaluation reports about the Student were shared at that time. (NT 84, 340-342, P-5 at 2-3)
  16. When The Parents learned that they would need to wait until September 2007 to "begin the process for evaluation for a potential IEP" they determined that it would be best to unilaterally enroll the Student at [redacted] Academy. (NT 85)
  17. On September 28, 2007, after the Student was enrolled at the Academy, the Parents wrote to the District indicating that their student required special education services. The Parents provided supportive materials and requested an evaluation. The request was made "in case things did not work out at the Academy. (NT 74,86, 130, P-16, 1-4)
  18. The Academy is a residential school that places "tremendous emphasis on basic skills, life skill, skills such as oral hygiene, appropriate personal boundaries, homework completion and social skills are emphasized. (NT 92-93)
  19. The Parents contracted with Dr. G to provide a neuropsychological evaluation of the Student. The evaluation was conducted over three sessions. 12/17/07, 12/18/07, and 12/24/07. The report was issued on 2/1/2008. (NT 98, S-14 at 1)

20. The District conducted a psychological evaluation of the Student and issued its report on 2/28/2008. (NT 99, S-15 at 1)
21. The District's IEP team met on 3/25/2008. An IEP was developed and a NOREP which the Parent did not approve was issued on the same date. The Student was invited but did not attend this meeting. (NT 97, 146, 485, S-17, S-19)
22. The Student was initially assessed in a psychological evaluation on 11/19/2004 and 11/20/2004. This evaluation, conducted by Dr. B was provided to the District in 2007. (NT 106, P-2)
23. On July 26, 2006 the Parents and the Student met with Ms. C, a high school guidance counselor and crafted a schedule to be implemented in September 2006. No documentation of past work or student needs was likely brought to the meeting. The issue of the need for special education or special services was not raised with the guidance counselor. (NT 112, 115, P-3 at 1)
24. At the time of the meeting with The Counselor on 7/26/2006 the Student had been accepted to attend the [redacted] High School and did not attend the meeting with Student's parents at The [District] High School. (NT 116, 480-481)
25. At the time that the Parent signed and returned the "Permission to Evaluate" form to The District on 9/17/07 and "Parental Report" on 9/28/07 the Student had already been enrolled and sent to the Academy. Prior to enrollment during the spring of 2007 the Student had been brought to visit the Academy. (NT 125-126, S-5, P-16)
26. "The Student suffers from Learning Disorder, NOS (DSM-IV 315.9), which include Student's Non-Verbal Learning Disorder, Major Depression-Recurrent (DSM-IV 296.30), ADHD-Primarily Inattentive Type (DSM-IV 314.00), and given Student's documented inability to do well in a regular school setting...should Student become a classified student and receive an IEP." (NT 139, S-10)
27. The Student has not seen Student's IEP and did not attend the March 25, 2008 IEP Team meeting at which Student's IEP was crafted. (NT 147-149, S-17 at 2)
28. The Parents would return the Student to the District only if the District offered a program comparable to the Academy, the private residential school currently attended by the Student. (NT 151)
29. The Staff at The Private School, which the Student attended for five years (up to 2006), at no time suggested to the Parent that the Student might require special services or special education. This, despite the fact that the Parent conferred with teachers and administrators three to four times a week. (NT 165)

30. A second evaluation report was completed by the District on February 28, 2008. This report considered reviewed information from the District's first evaluation (10/10/07, S-7), as well as private reports from Dr. C (3/4/07, S-4), and a psychological evaluation from Dr. G (4/13/2007, P-15), along with information from [redacted High School] and Private School. The Neuropsychological Report from Dr. G was not yet available. This second evaluation included new additional information provided to the District by Dr. G and Dr. G. (NT 173-174, 345, 349, 352-353, S-10, S-11 S-15)
31. "meets the Pennsylvania Chapter 14 eligibility criteria to receive special education and related services under a classification of Specific Learning Disability (Written Expression) and other Health Impairment (Organization, Time Management, Processing Speed, Social Skills). (NT 177-178, S-15 at 9)
32. The Evaluation Reports (10/10/2007, 2/28/08) of the Two District Psychologists are in agreement when factoring in the information available at the times of the assessments. (NT 194-195, S-7, S-15)
33. During the five years that the Student attended Private School Student achieved primarily "A's" and "B's". Student's cumulative average for the period from 2001 to 2006 was 2.98. This was a lower average from the previous year's cumulative score of 3.14. The average was lowered during the 2005-2006 school year by a C+ in U.S. History, a C+ in Algebra II, a B- in Honors Latin IV, and a C- in Honors English II. (NT 195-196, S-1 at 1-2)
34. The Student "has the reading and math skills to do the work. Student just cannot do it quickly." Basic skills of reading, comprehension, oral language, writing, spelling, and mathematics are more than age appropriate. (NT 200, S-4 at 25)
35. In the Wechsler Adult Intelligence Scale – 3<sup>rd</sup> Edition, the Student earned a Verbal IQ of 127 (Superior) and a Performance IQ of 122 (Superior), Verbal Conceptualization 138 (Very Superior), Perceptual Organization 11 (High Average), Working Memory 111 (High Average), Processing Speed 114 (High Average). This high average level of overall achievement was corroborated by the results of The Woodcock-Johnson III tests of achievement. (NT 203-2204, P 15 at 3-6, S-4 at 8)
36. In the Wechsler Individual Achievement Test- 2<sup>nd</sup> Edition (WIAT II) the Student scored at 12<sup>th</sup> grade equivalent or above in every category. (NT 24, S-15 at 15)
37. In the School District's Evaluation Report dated 2/28/2008 the Student is identified as having a "Specific Learning Disability" as well as "Other Health Impairment." The OHI identification was based upon a "longstanding history of organizational difficulties, time management (issues), transition issues, and processing speed." An IEP meeting was scheduled for 3/25/08 and resulted in the crafting of an IEP. (NT 224-225, 356, S-15 at 10, S-17)

38. A Cognitive Educational Assessment performed on 2/17/07 and reported on 3/4/07 reported the Student's general Intellectual ability to be in the average range (108) - 71<sup>st</sup> percentile) and Student's total overall achievement score in the high average range (113 - 82<sup>nd</sup> percentile). "Specific results on the cognitive portion of this evaluation indicate that " has well developed Verbal and Thinking Ability. Auditory processing of sound and phonemic detail is a considerable strength. Processing capacity of a more "executive" nature like working memory, attention, and word retrieval are considerably less fluid and impede 's timely and efficient demonstration of Student's superior thinking and verbal skills...specific results on the WJ-III indicate the basic skills of reading, comprehension, oral language, writing, spelling, and mathematics are more than age appropriate." A summary of diagnosis include: Impaired Processing Speed, Impaired Cognitive Efficiency, and Learning Disability in Written Expression, Reading and Math Fluency. Recommendations for remediation include extra time for key exams with frequent breaks, use of recording devices, tutoring, etc. No mention is made of Special Education or specially designed instruction. (NT 280, 291-293, 297, S-4 at 24-26)
39. The Parents' learning consultant testified that the Student "is a type of learner who really needs to be provided with strategies to break..or to change..over reliance on auditory processing. And that can only be done by someone who is a skilled special education teacher." (NT 282)
40. It is important that the Student, who is in Student's late teens, be involved in the IEP process and in the development of Student's program. The Student, however, was not involved. (NT 304-305, 357-358-359)
41. The recommendations of the family's learning consultant need not necessarily be carried out in a residential facility. (NT 315)
42. The high school utilizes block scheduling so that students have four classes of 90 minute duration each day. Students also travel between two buildings once each day. This information was shared with the Parents at the 3/25/2008 IEP Team meeting. The Parents expressed no concern about this arrangement. Aides are strategically and inconspicuously placed during Student transition times so that support for Students in need is available. (NT 365-367)
43. A one on one classroom aide was available for the Student if desired. The decision to assign an aide, however, would be determined by whether or not the Student would agree to this support. The Parents and District agreed to wait until the Student was present to make this decision. The Student, however, was not made available to the District and the NOREP was rejected by The Parents. (NT 368-369)
44. The Academy serves students with non-verbal learning disabilities. It is accredited by the New England Association of Schools and Colleges. Academy is

- not a special education school. It does not provide or implement IEPs(NT 373, 378, 393, 448)
45. Academy divides its school year into five marking periods which are called “quints.” Each quint is five weeks long. Quints are separated by two, two week intersessions. The first intersession is between Thanksgiving and the first holiday vacation (Xmas), and the second intersession is during the first two weeks of April. School is in session 6 days each week Saturday afternoon is sports day. All in all the school year is loosely constructed with the actual number of school days and hours somewhat obscure. (NT 142-143, 381-382, 408)
  46. Academy students navigate among four to nine buildings for classes and activities each day. All students have been diagnosed with non-verbal disability or Asperger’s Disability. There is no exposure to “typical peers.” (NT391-393, 461)
  47. The first five weeks of attendance at Academy is an evaluative time when the students’ needs are determined and adjustments in programs are made. (NT 414, 425)
  48. When the Student arrived at Academy Student was upset and distraught over the moving process. “[Student] was extremely anxious with the interaction Student was having with Student’s family in regards to setting up Student’s room. There was quite a bit of conflict.” The difficulty was resolved with the school counselor who helped the Student overcome this hurdle. (NT 414-415)
  49. Upon arrival at Academy the Student displayed problems in relationships with other students, threatening to hurt self, running away or “doing something that would elevate their (Parents) fear level... (NT427, 429)
  50. The Student feels comfortable in Student’s current school setting and would most likely be uncomfortable were Student to move to another school setting, as Student was uncomfortable in moving into the Academy setting. (NT 437, 438, FOF 52 and 53)
  51. The Student’s Draft 3/25/08 IEP was prepared by a certified special education teacher after reviewing reports including two District Evaluation Reports as well as reports and information provided by the Parents. The writer did not have the opportunity of meeting with the Student or reviewing work samples from Academy. The District preferred to gather their own information from the Student through testing, observation, and discussion when the Parents made Student available. The IEP was written so that adjustments could be made to reflect the Student’s input. The District issued the IEP without the Student’s input with the understanding that the Parents would be making Student available to plan more specifically for Student’s needs. (NT 508-510, 511, 521,553-554, 590, 645 S-7, S-15, S-17)

52. The purpose of the 3/25/08 IEP Team meeting was explained to the Parents as an opportunity to identify needed accommodations and to give them an opportunity to add to the process. (NT 514)
53. The importance of having the Student meet with Student's prospective teacher prior to the beginning of the 08-09 school year was emphasized to the Parents. There was no commitment from The Parents to make Student available for participation in planning, obtaining levels, testing or familiarization prior to the opening of school. The Student was not made available. (NT 522-524)
54. The IEP draft was reviewed with the Parents. Opportunities for adult support, assistance in completing assignments, participation in the "study and organization class(S & O), honors classes, appropriate seating, support from instructional assistants, were highlighted for the Parents. (NT 527-531, S-17A)
55. The Parents expressed concern that the Student might have to move between two school buildings for classes. Currently at the Academy students must navigate among four to nine buildings. (NT 391-393, 532)
56. The District intended to obtain baseline information relative to the classroom achievement of the Student after Student returned to the school where Student would be spoken to and tested. Measurable Annual Goals had been written, but baselines were to be determined. (NT 536, S-17 and S-17A at 10)
57. All of the Student's needs stated in the District's 2/28/08 evaluation are addressed in the IEP. Some needs were specifically addressed and others as part of the Specially Designed Instruction. (NT 541-544, S-15, S-17A at 11, 12.
58. The special education teacher who prepared the IEP opined that the Student was a good match to the District's Autistic Support program which is geared for students "who are capable academically, but maybe socially they have some problems getting things done". (NT 548)
59. The Parent received a copy of the "Procedural Safeguards Notice and a "Notice of Recommended Educational Placements" indicating that the Student would be part of the Autistic Support Program. The NOREP was returned by the Parent disapproving the assignment along with information explaining why the Academy was good. No information as to why the IEP and NOREP were not appropriate or suitable was provided by the Parent. (NT 550-53, S-18, S- 19)
60. The 3/25/08 IEP made no specific reference to emotional support for suicidal and depressive ideation. The Parent reported that the Student is not currently experiencing any depression since attending Academy. Four years ago, in 2004, Student had been hospitalized for suicidal ideation and depression. No information was provided to the IEP team before or during the crafting of the IEP that there was a present risk of suicidal ideation. (NT 555-557, 585-586)

61. There is no mention of depression or suicidal ideation in Student 's Academy's "504 Plan of Accommodation." (S-9)
62. The Parents were equal participants on the IEP team that met on 3/25/08. The team did not request work samples from the Academy and the Parents did not bring work samples to the meeting. the District preferred to meet with the Student, whom they had not met, and gather their own information. (NT 362-363, 562-563)
63. The High School Transition plan for Student was discussed at the 3/25/08 IEP team meeting. The team determined that specifics would be identified with the Student's input when Student was made available by the Parents. (NT 265)
64. The Student will have the opportunity of going to a "safe retreat" as needed in each of the buildings in which Student will be attending class. The District, has a safe retreat, known as a "resolve room." It is used for students that are either having meltdowns or are in crisis, can't conform to what's happening in the classroom. "It will normally be staffed by the two emotional support teachers and other professionals. The concept of this room, but not the specifics were discussed with the Parents. Goals, objectives, program modifications, specially designed instruction, and related services were spelled out. "To be determined" was noted where the Student's input was needed. This was crafted at the IEP meeting with no noted objection from the Parents though at a later time they rejected the IEP/NOREP. (NT 578, 637, 639, 641-643, S-17A at 10-12, S-19 at 2)
65. The District's speech and language pathologist drafted a goal for the Student based upon her experience with similar students and a review of present levels of academic and functional performance. The Student is scheduled to receive 30 minutes per week of service. Other teachers are consulted as the process continues throughout the year. The actual baseline for The Student's work would "need to be determined" after the opportunity of working with Student. There has to date been no opportunity to observe the Student. (NT 604, 610-611, S-17 at 12)
66. The Parents presented a privately obtained Speech and Language Evaluation to the IEP Team on March 25, 2008. The District's speech and language pathologist had not seen the report prior to that time. The Student's private evaluation took place on 8/9/07, 11/20/07, 2/19/08. The results indicate that the Student "has such a mild disorder, it would be addressed under the specially designed instruction, which would be used in all settings." Direct services would not be required. (NT 613, 617)
67. The Private Speech and Language Evaluation resulted in three formalized assessments: Expressive One Word Picture Vocabulary Test – 77<sup>th</sup> percentile and age equivalent of 19; Receptive One Word Picture Vocabulary Test – 84<sup>th</sup> percentile and age equivalent of greater than 19; the Student's receptive and

- expressive vocabulary skills are above average. On the Test of Auditory Processing Skills (TAPS) Upper Level, the Student “demonstrated areas of weakness. “This weakness, however, does not reflect a need for therapy or direct service. The private pathologist’s recommendation for remediation is “redirecting and rephrasing oral directions as well as preferential seating.” Direct speech and language therapy is not warranted. All of the Student’s speech and language issues are addressed in Student’s IEP. (NT 617-622, P 8 at 6-7, S-17)
68. The Student will receive as much support in the Asperger’s Support Program as Student needs. Because Student is coming from a private school Student will receive more support in order to smooth the transition. There currently are three assistants and a teacher for 6-7 students in the class. (NT 634)
  69. The information in the IEP about present levels of achievement was taken from evaluation reports and from the Parents. (NT 635-636)
  70. A review of the records from the Private School did not reveal any services regarding support for emotional needs. (NT 638, S-1, P-16 at 10-29)
  71. The Student’s need for Assistive Technology was discussed with the Parents/IEP team. An evaluation using a SETT (Student Environment Task Tools) framework was to be completed. No signed approval is necessary for this process. (NT 648-650)
  72. Emotional Disturbance and Other Health Impairment were not in Dr. G’s original report dated 4/13/07 but were noted in a subsequent letter dated 10/30/07. Depression, non-verbal learning disability, multiple disabilities, emotional disturbance and other health impairment are also noted. (NT 68, 740, S-11, P-15)
  73. The District made little, if any, effort to locate the person to whom the Parents might have spoken to at the time that they registered their son at the District Administration Building on 7/6/06. (NT 682-683)
  74. The District in preparation for a student’s attendance at college conducts a student survey and assessment, tours Bucks County Community College, links up with disability services, researches appropriate college programs, and conducts college expo; has a career night, and employs a transition coordinator. The Student would also be able to attend classes at [redacted] Community College. (NT 6966-698, S-17 at 8)
  75. The District is able to fulfill all of Dr. G’s recommendations noted in the report other than the residential setting. (NT 703-705, S-11 at 2)
  76. The District ruled out a learning disability in reading and math fluency (S-4 at 25) because the scores were all within the average to above average range across the testing measures used by the private evaluator. “[Student]’s achievement levels

- were obtained from the administration of the Woodcock Johnson III Tests of Achievement (WJ III Ach). [Student's] overall achievement of 113 falls within the high average range placing [Student] at the 81<sup>st</sup> percentile." (NT 734 , S-4 at 8.25)
77. The Student's private evaluator in tests administered on 4/13/07 showed a Performance IQ score of 122, a Verbal IQ score of 127 and a Full Scale IQ of 128 using the the Wechsler Adult Intelligence Scale. –Third Edition. The Performance IQ score of 122 is a very broad measure for non-verbal assessment. When "broken down into Perceptual Organization Index, Student's score was 111, which is in the high average range" or 77<sup>th</sup> percentile. This was supported by Student's score in the WJ III Test of Cognitive Abilities administered by another private evaluator.(NT 735-736, P-15 at 3, S-4 at 39)
  78. The Parent was asked by the District's psychologist whether there was any documentation of ADD or ADHD to support a diagnosis of Other Health Impairment. There was none. The Parent also did not share any information regarding the Student's past history of suicidal ideation nor was it mentioned in any of the reports reviewed. (NT 736-737, S-11)
  79. The 10/30/2007 Report indicated that the Student would "fit the category of multiple disabilities." There was no documentation for this diagnosis. (NT 740-741, S-11 at 1)
  80. The Student experienced social isolation at the Private School and High Schools/ Severe behavior problems caused Student to not be invited to return for the 2006-07 school year. Habitual social faux pas and the possibility of a non-verbal learning disorder were issues noted in a 10/26/07 letter to the District from the father. This information had not been previously brought to the attention of the District. A letter dated 10/24/07 from the Student's psychiatrist was also noted for the first time. This information was made available after the completion of the 10/10/07 Evaluation Report. After being made aware of this information the District and Parent agreed to an independent reevaluation. (NT 743-745, S-8)
  81. The District's psychologist in preparing her report became aware that Student had some tutorial support. The Parents were not questioned about the specifics nor did they volunteer information. The psychologist also had access to reports from the Student's previous private evaluators that noted a "disorder of written expression" and "weakness in open ended or more structured writing tasks, as well as completing assignment." The evaluator concluded that specially designed instruction was not needed because of Student's above average academic performance. (NT 749-751, 752, P 16 at 3, S-7 at 3)
  82. The Parent indicated to the District's psychologist in their initial telephone conversation that the Student had been diagnosed with depression and was

- currently taking medication and treatment. Requested documentation of this disorder was not provided by the Parent. (NT 756, 757)
83. The District's psychologist did not request additional information regarding the Student's depression from the Academy or permission from the Parents to speak with other mental health providers. The Parents, however, were asked to provide "any information that they had about Student and Student's weaknesses and struggles." The Parents responded with the 10/26/08 letter after the completion of the 10/10/08 evaluation report. (NT 756-759, 761, 772, S-8 at 3-6)
84. The Student received a "D" in an English II honors course during the 2005-2006 school year. Student's teacher at the Private School noted that the Student misses homework and is unprepared for class. The teacher wrote "this grade does not reflect ability to comprehend material – it does reflect [Student's] ability to keep up with the demands of the course." The grade was improved to "C" on the final report. Grades in English in previous years were A's and B's though not in honors courses. (NT 765-767, P 16 at 10-11, 20)
85. The evaluator that produced the 10/10/07 ER did not find a demonstrated need for specially designed instruction. A "a non-verbal learning disability is not a recognized disability under IDEA, and it is also not a disability that is in the DSM-IV, the Diagnostic and Statistical Manual of Mental Disorders." (NT 770-771)
86. The Parents met the teacher who would be responsible for the Student's program at the 3/25/08 IEP Team meeting. The teacher explained how the program would be individualized for the Student. The Parents returned to the teacher's room where an invitation was extended to the Student, who was not present, to visit during a school break to meet students, faculty, and administrators. The Student did not visit. (NT 791-6792)
87. The Pennsbury High School is divided into East and West buildings. The East building where The Student's homeroom is located is the center for mathematics, English and Art. Other subjects are in the West building. Each building has its own cafeteria, guidance suite, health suite, auditorium and offices. The school has a diverse student population racially, academically, and disability wise. Students who are different are well integrated into the population. (NT 835-838)
88. In April 2004 the Student had a plan for suicide. After meeting with the Student, Student's psychiatrist referred Student for hospitalization. Since the hospital stay Student has been in treatment to the present. (NT 864-865)
89. The Student's psychiatrist opined "[Student is] out of it now (depression), and I'd say the risk is significant that it would return if another situation didn't measure up to this one, another school situation." (NT 870)

90. The last time that the Student's psychiatrist heard about suicidal ideation "I think was 2005-2006. There was one in 2005, I believe, and one in 2006 I believe." (NT 874)
91. The Student's psychiatrist recommends that the Student be placed in an appropriate school setting but does not state his opinion as to what an appropriate school setting would be for Student. The Student's psychiatrist is not familiar with the program at the High School (NT 879, S-10)
92. The Student's depression began to improve with Student's psychiatrist's treatment and continued to improve while attending Student's current school. (NT 885)
93. There is a 1.5 standard deviation discrepancy between the Student's verbal conceptualization index and Student's conceptual organization index, working memory index, and the processing speed index as measured by the Wechsler Adult Intelligence Scale – Third Edition. This, opined, the Student's psychologist is significant "because the variability in [Student 's] strength and weaknesses makes it difficult for Student as well as difficult for the people around Student in our culture..." Because Student's vocabulary, language form and structure, and [Student's] ideas are so advanced, people assume that all of [Student's] skills are at a higher level than they are. In this particular assessment the Student achieved a Verbal IQ Score of 127, a Performance IQ score of 122, and a Full Scale IQ score of 128. The weaknesses are in actuality relative to other scores. (NT 907-908, 924-925, P -15 at 3)
94. The first psychological evaluation administered on April 13, 2007 was for the purpose of determining the Student's need for additional time on standardized tests and no other reason. The Student, in a recent SAT without extra time, scored 720 in Reading, 610 in Mathematics, and 580 in Writing. The Parents wanted The Student to take the test again with more time. There was no indication of either a non-verbal learning disability or an emotional disturbance. (NT 920-921, 923, 926-927, 929, P-15)
95. A previous private evaluation conducted in 2004 determined that the Student was not eligible for services under IDEA and that Student's academic skills were commensurate with Student's cognitive skills. (NT 921, P-2)
96. The October 30, 2007 letter to the District from the Student's psychologist was the result of the Parents asking for an additional opinion at a later time. The letter was written in response to Student's being found ineligible for special education. There was no additional testing to prepare this October 30, 2007 letter. The disabilities added in the letter were based on a telephone conversation with Student and Student's parents and not the result of formal assessments or objective testing. (NT 927-929, 931, S-11)

97. In stating in her October 2007 Evaluation Report that the Student was “multiply disabled” the psychologist meant that the Student had “multiple areas of difficulty that require intervention.” The psychologist, however, was not using IDEA criteria or definitions yet indicate that she believed Student was eligible for special education. (NT 930, S-11 at 1)
98. The psychologist opined that Student is “unable to receive an appropriate education in public school” and acknowledged that she did not know the programs available at High School. (NT 932-933, S-11 at 1)
99. The witness, Dr. G, required a twenty minute recess after which she explained that she was recovering from a relapse of a chronic illness and that fatigue prevented her from continuing her testimony. The hearing was continued to October 7, 2008 at 4:00 PM. (NT 947-949, 951)
100. The Student’s psychologist opined that the Student needed to be in a residential school so that Student could spend time with similar peers who would understand Student so that Student could feel that Student was part of the community. (NT 963)
101. The primary reason, opined by Student’s psychologist, for needing a residential school is to obtain social skills displayed in a relaxed setting outside of school. “Social skills in school are not the same as social skills in a more relaxed setting.” (NT 971, 977-978)
102. The skills referred to as weak in the 10/30/2007 letter from the Student’s psychologist were “weak relative to the Student’s much greater verbal strengths.” (NT 976)

#### Credibility of Witnesses

A hearing officer is charged with the task of assessing the credibility of witnesses. The witnesses who testified at this hearing were credible, with the exception of the Student’s psychologist who wrote in her report that the Student was multiply handicapped and that he was eligible for classification as a special education student. Upon questioning, the witness acknowledged that she was not utilizing IDEA criteria in making this determination. It is not this Hearing Officer’s intention to not utilize any of the information provided by this witness but to take into consideration that this witness, by her admission, is not a licensed school psychologist and is not familiar with the criteria and standards of IDEA.

#### Discussion and Conclusions of Law

Special education issues such as identification, program, and placement are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), which took effect on July 1, 2005 and amends the Individuals with Disability Education Act (“IDEA”). 20 U.S.C. § 1400 et seq. (as amended, 2004).

The issues that are being addressed in this “Decision” focus on several issues which have been previously identified as matters within the broad categories of “Child Find,” “Reimbursement for the cost of Independent Evaluations,” “Reimbursement for Tuition costs,” and “the providing of a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE).”

These issues received extensive review over six hearing sessions and the evidence, both testimony and exhibits were carefully studied by this Hearing Officer. Each issue will be addressed in this decision.

The decision at which I arrived after considerable reflection, research and study is that the District met its’ Child find responsibility and appropriately evaluated the Student so that there is no entitlement on the part of the Parent for reimbursement. The unilateral placement of the Student in a private school is the right of the Parents. In this matter, however, there is no evidence that the program needed by the Student to address the needs identified in both the District and Independent Evaluation Reports could not be provided within the program being offered by the District. Thus, there is no entitlement to tuition reimbursement. In addition there is a strong commitment, and indeed a legal requirement, to provide special education to students in the least restrictive environment. Attending a private residential school is undoubtedly the program of choice of the Parent and most likely, the Student. But in this matter, in the opinion of this Hearing Officer, it is not the least restrictive environment in which the Student’s program can be delivered. The demands of the Parents are denied.

Did the District fail in its Child Find Responsibility to the Student?

**§ 300.111 Child find.**

- (a) General. (1) The State must have in effect policies and procedures to ensure that —
- (i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and
  - (ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

Local school Districts are responsible for conducting child find activities for children residing within the state. This responsibility extends to all children “whether a child has never attended or will never attend public school. (34 CFR 300.125(a)(1)(i).

Pennsylvania has addressed these requirements and has special instructions as to how these matters are to be handled. These instructions are as follows:

When a parent who has unilaterally chosen to place their child in a private school requests an evaluation to determine eligibility for special education from their local school district, Child Find responsibilities under IDEA 2004 are mandated. Under IDEA 2004 the school district must either:

- 1) Issue the Permission to Evaluate and upon receipt of the signed Permission to Evaluate conduct an evaluation; determine eligibility for special education and, if determined eligible, offer a free and appropriate public education (FAPE) in the public school as well as notify the parent of the child's right to receive an offer of EP services from the IU based on the school district's evaluation if the child remains in private school; or
- 2) Issue the Notice of Recommended Educational Placement (NOREP) explaining why the school district is declining the parent's request for evaluation (which denial cannot be based on the availability of an evaluation from the IU) and issue the Procedural Safeguards notice to insure the parent's knowledge of their right to due process.

The additional responsibilities described below regarding EP under IDEA 2004 do not diminish or lessen the Child Find responsibilities of a local school district regarding the identification of students with disabilities who reside in their district, regardless of whether those students attend public or private schools. A school district that does not respond to a parent's request for evaluation as outlined above and simply refers the parent to their local IU has failed in their Child Find responsibilities under IDEA 2004.

In Pennsylvania the IUs serve as the local educational agency (LEA) for specific statewide responsibilities. In Pennsylvania, therefore, the IU is the agency that is responsible for the EP requirements in their geographical region. When a parent who has unilaterally placed their child in a private school requests an evaluation of the IU in which the private school is located to determine eligibility for special education, the IU must either:

- 1) Issue the Permission to Evaluate and upon receipt of the signed Permission to Evaluate conduct an evaluation; determine eligibility for special education and, if determined eligible, inform the parent of the services available under EP in their IU as well as notify the parent of the child's right to get an offer of FAPE based on the IU's evaluation from the local school district or,
- 2) Issue the Notice of Recommended Educational Placement (NOREP) explaining why the IU is declining the parent's request for evaluation (which denial cannot be based on the child's residency or availability of an evaluation from the local school district) and issue the Procedural Safeguards notice to insure the parent's knowledge of their right to due process.

The District has met its child find responsibility in regard to these regulations and special instructions.

The Parent completed a Registration form for the Student on July 7, 2006. The Parent testified that he took the form to the Special Education Office and spoke to someone seated at a desk who noted that the parent had indicated “Yes” to the question “Has your child ever received any Special Education Services?” (NT 54-55) The Parent stated that his student had been given extra time on tests.

The Parents allege that they were told by the person at the desk that the Student would not qualify for special education without a diagnosed disability.

The Parents left and returned with the Student on July 26, 2008 (NT 112, 115) to meet with a high school counselor. Together, a schedule for September, 2006 was crafted. No documentation of past work or Student needs was brought to the meeting. The issue of special education or special needs was not raised with the guidance counselor. The Student by this time had been enrolled at the High School which he attended for the 2006-2007 school year.

The issue of tuition reimbursement for the 2006-2007 school year was not raised at the hearing. When questioned about who was spoken to, the Parents could not remember the name or description of the person at the desk. This was somewhat disappointing to this Hearing Officer because without any identification of this person it would be difficult to thoroughly investigate this situation. Additionally, the Parent, despite having notes regarding many of the conversations regarding the Student had no documentation referencing this incident. The supervisor of special education, who was not in the District, at the time was unable to determine who the specific employee might have been.

In any event, since the Student did not attend District for the 2006-2007, but was enrolled at a private school, any issues for that year, other than the matter of future evaluations, are moot.<sup>1</sup>

The issue of “Child Find,” however, continues. The child find obligation is an affirmative one, a parent is not required to request that a school district identify and evaluate a child. A parent’s failure to so request does not relieve the district of its child find obligation.

In this situation the Parents brought materials to the counselor’s office that profiled a child who had been doing well academically. Since the Parents, or for that matter the Student, made no mention of the need for special services, the Student was assumed to be typical and a regular schedule was prepared without any objection by the Parents.

It must also be noted that the Parents obtained an Independent Educational Evaluation in December, 2004 (NT 105, P-2). This report described a student “who is apparently very bright, struggles with the organization and completion of homework..maintaining social

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<sup>1</sup> There is no question that a parent may orally request an evaluation. However, as pointed out in §14.123(d), “The oral request for evaluation must be made to any professional employee or administrator of the school entity.” It is important when visiting a school building to discuss something as important as evaluation or placement that an appointment be made with a person responsible for that task

connections, [and] a significant history of depression.” In summary, the private evaluator concluded that “[Student] is a xx-year old who is functioning within the high average to superior range of intelligence. [Student] appears to be an auditory learner and has many strengths,....including very superior academic skills.” The Parents did not present this report to the District. It must also be noted that nowhere in this report is the need for special education, specially designed instruction, or for that matter accommodations mentioned. The District could not have known during the Parents’ visits in 2006 that the Student had a need for special education.

The District’s child find responsibility actively continued when the Parent returned to the District on July 31, 2007 to meet with the supervisor of special education in regards to “dual enrollment.” (NT 83, 340-342) The Parents shared no evaluation reports at the time. When the Parents were told that a District evaluation would have to wait until September, they determined it would be best to continue their plans for a residential school at which the Student had already been accepted.

On September 28, 2008 the Parents wrote to the District and indicated that their student required special education services. The Parents provided some of their previously obtained evaluation reports. The District scheduled and completed an Evaluation Report on October 10, 2008. (NT 722-27). The Parents disagreed with the conclusions of this report. They requested a re-evaluation and produced additional information provided by the Student’s independent psychologist and Student’s psychiatrist (S-10, S-11). The District agreed to the re-evaluation request and employed an independent evaluator to perform the assessments. Because the Student was in attendance at a residential private school, the evaluation could not take place until January 7, 2008. The ER was issued on February 28, 2008 and the Student was found eligible for services.

An initial evaluation must be completed within 60 days of receiving parental consent for the evaluation. §300.301(c) (1) (i) The initial evaluation was conducted well within the allowable time.

The District, in this matter, has met its child find responsibility.

Are the Parents entitled to Reimbursement for the cost of Independent Educational Evaluations undertaken on behalf of the Student?

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

The Parents obtained the Student's first IEE on December 21, 2004(P-2). The Student's second independent evaluation, an educational assessment, was obtained on March 4, 2007(P-4). The third IEE was on April 13, 2007 (P-15).

None of these evaluations identified a need for special education, special services, or specially designed instruction. The most recent of these reports recommended added time for standardized tests, [the writing psychologist testified that the evaluation was undertaken for the purpose of providing the Student additional time when re-taking the SATs. (NT 920,923)], Additional recommendations were for further evaluation by a Speech and Language Pathologist, and incorporation of organizational, planning, and study skills in preparation for college into Student's current tutoring program. No mention of special education.

An October 30, 2007 letter from the same psychologist indicated that the Student had multiple disabilities, but acknowledged that her conclusion was not based upon IDEA criteria. In addition the letter contained no additional assessments, but relied on a telephone conversation between her and the family. (NT 927-929, 931, S-11)

All of these evaluations were conducted before the District's first evaluation on October 10, 2007. (S-7) This evaluation was based upon material furnished by the Parents. The Student was not made available because Student was in attendance at a private residential school located a significant distance from the District. The District's conclusion was that the Student did not qualify for special education services.

It was at this point that the Parents presented the October 30, 2007 letter to the District. The District agreed to a re-evaluation of the Student using an independent evaluator who had earlier retired from his position as a school psychologist in the District. This psychologist attempted to schedule an appointment to evaluate the Student, but was not able to obtain this appointment earlier than January 7, 2008. The Student was evaluated on this date and found to be eligible for special education services.

In the meantime the Parents had arranged for an additional IEE, a neuropsychological evaluation with their private psychologist. This evaluation took place on 12/17/07, 12/18/07, and 12/24/07. This evaluation resulted in a first time diagnosis of Asperger's Disorder, a disability that was not noted in the same psychologist's report of April 13, 2007.

The Student now qualified for special education services. The District had agreed to the re-evaluation of the Student that was completed on January 7, 2008. The District's ER was issued on February 28, 2008. The IEE showed no date of issuance other than a "faxed" date of 2/01/2008. (S-14)

The District's ER and the IEE resulted in similar conclusions. The Parents could have made the Student available to the District during the very days on which Student was engaged in the IEE. They chose instead to have the Student participate in a three day evaluation that was not necessary for the acquiring of special education services.

The independent speech and language evaluation was a direct result of a recommendation in the 4/13/07 IEE. Though the speech and language evaluation showed some relative weaknesses, there were none that rose to the level of a need for direct services. In any event, the Student had not been made available to the District for evaluation. Indeed, the evaluation itself was first made available to the District at the IEP Team meeting on March 25, 2008 (NT 613), and did not identify any need for direct services. (NT 616-621)

The District's speech and language pathologist developed goals for the IEP based upon other students similar to Student and from information available to her. It was her intention to personally evaluate and observe the Student when Student returned to the District. In any event, the services called for in the independent evaluation had already been addressed by the District's Speech and Language Pathologist in the IEP.

The Parents preemptively obtained this evaluation before ever making the Student available to the District.

The District's evaluators, school psychologists and speech and language pathologists proved themselves to be credible witness who are appropriate trained and certified within the Commonwealth of Pennsylvania. They competently produced reports that were based upon information available at the time, and information obtained on the one time that the Student was made available to the District. The Parents had they been willing, could have made the Student available to the District on the very days that they were paying for an independent private evaluation. Testimony indicated that the Student had at least two, two week intersessions, along with traditional school holiday recesses that allowed for travel home.(NT 382)

There is no justification for the Student to be provided an Independent Educational Evaluation at public expense. The Parents' request for reimbursement is denied.

Are the Parents Entitled to Reimbursement of Private School Tuition Costs for the 2007-2208 School Year and Tuition Payment for the 2008-2009 School Year? Is the Student Currently receiving a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment?

The issues of tuition reimbursement, FAPE, and least restrictive environment are so intertwined that I will address these issues together.

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d

171, 183 (3<sup>rd</sup> Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3<sup>rd</sup> Cir. 1986) held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in Polk held that educational benefit “must be gauged in relation to the child’s potential.” This was reiterated in later decisions that held that meaningful educational benefit must relate to the child’s potential. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3<sup>rd</sup> Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999); S.H. v. Newark, 336 F.3d 260 (3<sup>rd</sup> Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit). The appropriateness of an IEP must be based upon information available at the time a district offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. Delaware County Intermediate Unit v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993); Adams v. State of Oregon, 195 F.3d 1141 (9<sup>th</sup> Cir. 1999); Rose *supra*.

Districts need not provide the optimal level of service, maximize a child’s opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1998); Lachman, *supra*. In creating a legally appropriate IEP, a School District is not required to provide an optimal program, nor is it required to “close the gap,” either between the child’s performance and his/her untapped potential, or between his/her performance and that of non-disabled peers. In Re A.L., Spec. Educ. Opinion No. 1451 (2004) ; See In Re J.B., Spec. Educ. Opinion No. 1281 (2002)

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 (2<sup>d</sup> Cir. 1989). Under the IDEA parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. M.M. v. School Board of Miami - Dade County, Florida, 437 F.3d 1085 (11<sup>th</sup> Cir. 2006); Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7<sup>th</sup> Cir. 1988) If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” Polk, Rowley. The purpose of the IEP is not to provide the “best” education. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3<sup>d</sup> Cir. 1993).

As per the IDEIA regulations, the IEP for each child with a disability must include a statement of the child’s present levels of academic achievement and functional performance, a statement of measurable annual goals including academic and functional goals designed to meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum and meet the child’s other educational needs that result from the child’s disability; a description of how the child’s progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual

goals will be provided; a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.320(1-4)

Parents who believe that a district's proposed program is inappropriate may unilaterally choose to place their child in an appropriate placement. The IDEA's implementing regulations at 34 C.F.R. §300.148 ( c ), which are identical to the regulations in effect earlier, make it clear that tuition reimbursement can be considered only under a specific condition:

“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...”

It bears repeating that the Parents did not complete the first time enrollment of the Student before they returned Student to a private school. Student had not been identified as eligible for special education services. Student remained a student in private school throughout the 2006-2007 school year and returned to a more restrictive residential environment for the 2007-2008 and 2008-2009 school years.

The IDEA states that tuition reimbursement is possible only for students previously receiving special education services. The District evaluated the Student in a timely manner for these services but the Student was not available in the District to receive them.

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

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

same provision:

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

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

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

Prong one of this analysis is to determine whether the District's proposed program was appropriate.

As previously stated:

As per the IDEIA regulations, the IEP for each child with a disability must include a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and meet the child's other educational needs that result from the child's disability; a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided; a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.320(1-4)

The Student had never attended school in the District. As a matter of fact the Student had never attended a public school anywhere. Student had moved to the Commonwealth of Pennsylvania from [neighboring state] where Student attended only private schools, none

of them schools providing special education. In 2006 when the family moved to District Student was a late teen age Student, and had done well academically based on records provided by the Parents.

The Student, after evaluation by the District, was diagnosed by the District as having a Specific Learning Disability and Other Health Impairment. The diagnosis prompted the scheduling of an IEP Team meeting and subsequent crafting of an Individualized Education Program on 3/25/2008.

The Notice of Recommended Placement was rejected by the Parents on April 14, 2008 though the Parents had expressed no disagreement during the development of the IEP nor did they express any specific disapproval in their written comments accompanying the rejection of the NOREP.

This leads to an examination of the program offered to the Student. This Hearing Officer finds the program appropriate and designed to offer the Student more than minimal educational benefits. It must be understood, however, that the IEP, as written, has parts that require further development. It contains the Student's "Current Levels of Achievement," from the High School, but not the levels of achievement that are possibly available from the Student's current residential school placement. When asked why, the District stated that they preferred to obtain their own levels. Information in this portion of the IEP indicated solid scores in SATs (S-17 at 4) and a statement that the Student was "experiencing various levels of success in honors level classes." This minimal amount of information was due to at least two issues. One, the District did not obtain academic progress levels from Student's current school. Two, the Parents did not make the Student available to the District for assessment.

This Hearing Officer would have preferred that the IEP be more complete, but is understanding of the fact that the Student did not have the opportunity to participate in its development. This is essential for a student of this age and demonstrated ability. Several sections of the IEP contain the letters "TBD," to be determined with the involvement of the Student.

A school district's failure to provide a fully completed IEP does not substantially harm this student. (Systema ex re. Systema v. Academy School District No. 20, (CA.10)(Colo.)) It was because of his unavailability when availability was possible that held up the process.

This IEP varies from most IEPs, as it should. There is little notation regarding academics which is primarily why high school students attend school. The IEP states (S-17 at 8) "Course of Study – grades 9-12 honors and challenging courses/2008-2009 SY." The Student has demonstrated that Student is able to succeed academically and on occasion distinguish self. To select courses Student needed to be available to the District.

The IEP addresses the areas of the Student's needs appropriately. Speaking in broad terms, the Student's needs revolve around organization skills, executive functioning if

you will, work and study habits, and social skills that sometimes cause the Student difficulty with peer level social relationships.

This Hearing Officer has been convinced through the testimony and the reading of the IEP that all of the supports that are necessary and that were recommended to enable the Student to successfully participate in a high school program are contained in the IEP and have been offered to the Student.

The Student's psychologist expressed concern that Student would not be able to generalize what Student has learned to other social situations unless Student attended a private residential, twenty-four hour, seven day a week school. Though this might be the ideal, the IDEA does not require a school district to provide the ideal program that every parent would like for their child.

An IEP that is reasonable calculated to enable a student to make some progress toward Student's goals satisfies the requirement of the IDEA. Generalization across settings is not required by the IDEA so long as the child can be said to be making some progress in school. (Thompson R 2-J School Dist. V. Luke P., ex rel. Jeff P., (C.A>10 (Colo.))

It is perplexing to this Hearing Officer that the process of serving this Student has been made so difficult for reasons that are difficult to explain. The Parents have not made it easy to meet with this Student who appears to come home for private evaluations, but is not available to the public school. It is clear to me that when attempting to serve a student in late teen years, a student who is intelligent and who is capable of participating in and succeeding in honors courses, and in contemplating attendance at college for the next school year, an IEP should not be constructed without this Student's participation. Despite the strong interest of Parents in this youngster's education, the Parents alone should not be responsible for the development of the IEP. This thought is supported in a statement in the IEP (S-17 at 5): "Mr. (father) has also expressed that is a sensitive [Student] who would want to be a valued member of this IEP team. The team has agreed that Student's participation in the process is imperative in the development of an appropriate and challenging program. The team will meet again with prior to or at the start of the 2008/2009 school year to revisit and refine the IEP."

This did not happen. The Student was not made available to the District during the summer of 2008.

With this in mind this Hearing Officer finds this IEP appropriate with the need for the Student's input.

Prong two. Was the Parent's unilateral placement appropriate?

***Least Restrictive Environment (LRE)***

**§ 300.114 LRE requirements.**

(a) General. (1) Except as provided in § 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures

to ensure that public agencies in the State meet the LRE requirements of this section and §§ 300.115 through 300.120.

(2) Each public agency must ensure that —

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(Authority: 20 U.S.C. 1412(a)(5))

This requirement, as stated in the Pennsylvania Basic Educational Circulars, has been part of disability education law for over thirty years and is often referred to as the “Least Restrictive Environment (LRE) mandate.” By law it is the IEP team that decides on the educational placement for an individual student. The law and PDE policy require that each local education agency and IEP team make decisions based on the general principles outline below:

IEP teams are required to adhere to the following when making educational placement decisions:

1. A Free and Appropriate Public Education (FAPE) must be provided to every student with an IEP; moreover, FAPE must be delivered in the LRE as per the IEP team.
2. Students will not be removed from regular education classrooms merely because of the severity of their disabilities;
3. When students with disabilities, including students with significant cognitive disabilities, need specially designed instruction or other supplementary aids and services to benefit from participating in regular education classrooms, as required in their IEP, local education agencies are obliged to ensure that those services are provided;
4. IEP teams must determine whether the goals in the student’s IEP can be implemented in regular education classrooms with supplementary aids and services before considering removal from the regular education classroom;
5. School districts will consider the full range of supplementary aids and services in regular education classrooms, based on peer-reviewed research to the extent practicable, including modification of curriculum content, before contemplating placement in a more restrictive setting.

(22 Pa. Code § 14.102 (a)(2)(xxiv))

Past records and testimony clearly indicate that the Student can achieve in the regular classroom with supports. The fact is that academic achievement has not been a problem. The Student’s private psychologist testified that the Student needed to be in a residential school so that Student could spend time with similar peers who would understand Student so that Student could feel that Student was part of the community. (NT 963) The testimony went on to state that the primary reason for (the Student) needing a residential

school is to obtain social skills displayed in a relaxed setting outside of school. Social skills in school are not the same as social skills in a more relaxed setting.” (NT 971, 977-978)

Another reason, as previously discussed, for recommending a residential school was the “Student’s difficulty generalizing what you learn to different situations. (Student needs) to learn that this facial expression means anger, and this facial expression means disappointment, and this facial expression means happiness....” “He needs to be in situations throughout the day, throughout the night, school situations, social situations, etc.... Within the residential school Student can also get instruction and life skills, such as how to maintain your personal area.” (NT 914-916)

The concerns noted by the Student’s psychologist are specifically addressed in the offered 3/25/08 IEP (S-17 at 10). Additionally, the Student will be attending school in the regular classroom with typically developing peers. Opportunities for academic and social engagement will be provided through a variety of programs available at the school. (NT 839-840,843-844)

The Student’s current school is located in [another state] and has as its mission “to serve students with non-verbal learning disability and Asperger’s and get them ready for a career and college.” (NT 373) The school focuses on skill development in three areas: living skills, learning and executive functioning skills, and learning and social and emotional skills. (NT 379-380) The school, however is not a special education school. (NT393) However, all students have been diagnosed with either Asperger’s disability or non-verbal learning disability. There is no exposure to typically developing peers. Students do not go into the community for classes. (NT393-394).

The Student’s private learning consultant testified that the kind of instruction that the Student requires “can only be done by someone who is a skilled special education teacher.” The Academy does not require teachers to be certified in special education and do not prepare or implement IEPs. The school’s web-site solicits teacher applicants who “share our passion for serving students with special needs. Previous work with this population of students is not a pre-requisite for employment.”

Though the Parents clearly prefer this school for its exclusivity and focus on certain of the Students needs, it is clearly a significantly more restrictive environment than a local public school or even a local private school which was not explored.

Because of this restrictive environment this Hearing Officer has determined that this facility is not providing the Student a FAPE. Testimony throughout this hearing has demonstrated to this Hearing Officer that the District is able to meet the needs of this Student in a less, indeed the Least Restrictive Environment. While the private school is providing the Student with what the family feels is a superior education, the District is not required to pay for this preference.

The request for tuition reimbursement is denied.

In the meantime, it remains for the District to provide the Student with a Free Appropriate Public Education which is not available at the private school because it is not the least restrictive environment (LRE).

This can be accomplished in many ways. The program offered with the addition of Student input is appropriate. The discussion of alternative programs in the community is viable, as is the exploration of other settings as the IEP team deems appropriate.

In summary, the District has met its child find responsibility. The District is not required to reimburse the Parents for either the Independent Educational Evaluations or the tuition for the private residential school. The District has offered the Student a Free Appropriate Public Education in the Least Restrictive Environment and should meet with the Parents and the Student in order to allow the IEP to reflect the direct involvement of both Parents and Student.

Order

It is hereby ordered that:

1. The District did not fail to offer the Student a free appropriate public education by means of an IEP that was scheduled to be implemented with Student input for the 2008/2009 school year.
2. The Parents are not entitled to reimbursement for their privately obtained evaluations.
3. The Parents are not entitled to tuition reimbursement or payment for either the 2007/2008 or 2008/2009 school years.
4. Since the District did not fail to offer an appropriate IEP there is no need to consider the issue of equitable considerations.
5. The District is to invite both the Parents and the Student through separate invitations to participate as equal members of the IEP team to meet and complete the portions of the IEP that require input from the Student.

*Max Wald, Ed.D*

November 7, 2008

Max Wald, Ed.D.  
Hearing Officer