

*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

DUE PROCESS HEARING

Name of Student: D.H.

ODR #13341/12-13KE

Date of Birth:  
[redacted]

Dates of Hearing:  
January 21, 2013  
March 4, 2013  
March 5, 2013  
April 26, 2013

CLOSED HEARING

Parties to the Hearing:  
Parents

Representative:  
Margaret Cowley, Esquire  
Michael Cowley, Esquire  
Cowley Law Offices  
114 North Abington Road  
Clarks Green, PA 18411

Abington Heights School District  
200 East Grove Street  
Clarks Summit, PA 18411

Mark Walz, Esquire  
Sweet, Stevens, Katz & Williams  
331 E. Butler Avenue  
New Britain, PA 18601

Date Record Closed :

May 25, 2013

Date of Decision:

June 8, 2013

Hearing Officer:

Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is a high-school-age student who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the current classification of emotional disturbance<sup>2</sup>, and consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504] as well as the federal and state regulations implementing those statutes.

This matter concerns a due process request from the Parents who are seeking tuition reimbursement for Student's unilateral placement at an out-of-state private residential school [hereinafter PRS]. The District maintains that it has offered Student a free appropriate public education [hereinafter FAPE] in its public school and that tuition reimbursement should be denied.

## Issue

Must the District reimburse the Parents for tuition and associated costs for an out-of-state private residential placement?

Specifically, did the District offer Student an appropriate program and placement for the 2011-2012 and the 2012-1013 school years?

If the District did not offer Student an appropriate program and placement for one or both of the school years in question, was the program and placement unilaterally chosen by the Parents appropriate?

If the District failed to offer Student an appropriate program and placement for one or both years, and the Parents' unilateral placement was appropriate, are there equitable considerations that would remove or reduce the District's obligation to provide tuition reimbursement for the private school placement?

## Findings of Fact

1. Student's parents reside within the boundaries of the District. Student currently attends an out-of-state private residential school.
2. Student first attended a private home-based preschool, and experienced issues around aggression and tantrums and separation from mother. Student next attended kindergarten in a parochial school where the teacher saw Student as

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

<sup>2</sup> Student also has Asperger's Disorder. [NT 56]

- “bad”, “defiant” and difficult to manage, but noted no physical aggression in school. [NT 34; S-4<sup>3</sup>]
3. From about age 6 onwards Student received private psychiatric and psychological services, as well as private occupational therapy services; Student was tried on a variety of psychotropic medications. [NT 35-36; S-4]
  4. Student moved to another parochial school for 1<sup>st</sup> grade and remained there through 7th grade. [NT 34]
  5. While at the parochial school Student may have received some supplemental academic assistance for math and English. [NT 74]
  6. The Parents did not inform the parochial school that Student was diagnosed with Asperger’s Disorder; Student did reasonably well there. [S-11]
  7. Student did not exhibit physical aggression towards peers or staff while in the parochial school. From February 2007 to February 2010<sup>4</sup> Student “was difficult at home but [Student] was going to school, doing okay, and not causing major problems. [Student’s] academics were average or above-average and [Student] reportedly had one friend”. [NT 75; S-4]
  8. In 7<sup>th</sup> grade Student spoke about an inappropriate topic one day at school, seemed to become more anxious, expressed somatic complaints, and became isolated. Student refused to attend school for the last three weeks of 7<sup>th</sup> grade. [NT 37; S-4]
  9. In contrast to school behavior during 7<sup>th</sup> grade, at home Student displayed escalating verbal and physical aggression as well as oppositional behavior. [S-4]
  10. A May 22, 2010 psychiatric evaluation written by Student’s treating psychiatrist noted behavioral issues in the home and missing days of school because of school refusal. However, the evaluation noted a decrease in previously overwhelming anxiety with the use of medication. [P-3]
  11. The May 2010 psychiatric evaluation recommended placement in residential treatment with school-based partial psychiatric hospitalization and in-home therapeutic services to be provided in the meantime. The psychiatrist also noted that Student would benefit from social skills groups. [P-3]

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<sup>3</sup> District exhibits are marked as S and Parent exhibits are marked as P. Counsel cooperated with one another such that many of the S or P exhibits are jointly offered.

<sup>4</sup> This was the period of time Student worked with a Dr. W and is cited in the February 2010 CHOP report. [S-4]

12. From June 2010 [end of 7<sup>th</sup> grade] through December 2010 [8<sup>th</sup> grade] Student was placed in a partial psychiatric hospitalization program<sup>5</sup>; the Parents withdrew Student from this placement against medical advice at the end of December because they did not see improvement, with the intent to enroll Student in the public school or in a residential treatment facility. Student and the family were receiving in-home services during the time Student was in the partial hospitalization program. However, the Parents stopped these services at the same time they withdrew Student from the partial program. [NT 33, 36-37, 51, 587; S-1, S-4]
13. Notes from an Interagency meeting held on January 5, 2011 with mental health providers, the District's school psychologist and behavior analyst, and the Parents in attendance state, "Parents indicated their desire for [Student] to participate in a Residential Treatment Facility [RTF] due to [Student's] daily anger, depression, sadness, difficulty transitioning from home to school and back home again, and twice a week averages" of physical and verbal aggression in the home setting. [S-1]
14. An Addendum to the interagency meeting notes reflect in summary that Student had made improvements with regard to anxiety and social interaction, and that Student did not have any crisis behaviors while in the partial hospitalization program, although the program was aware that behavioral difficulties were being displayed at home. [S-1]
15. At the interagency meeting of January 5, 2011 Student's primary therapist noted that "a concern lies with the parent's [sic] desire for residential placement and that while pursuing that placement, they are decreasing the amount of services and supports for [Student]." [S-1]
16. On February 4, 2011 Student began attending a District public school. During the evaluation for special education eligibility process, prior to an initial IEP, Student was placed in a small autistic support setting for purposes of transition to a public school setting for the first time. [NT 401, 481, 595-596; S-4]
17. In the autistic support setting Student was respectful and compliant and showed no adverse behaviors. [NT 597; S-5]
18. On February 7, 2011 Student received a psychiatric evaluation from Children's Hospital of Philadelphia [CHOP], requested as a second opinion, for purposes of diagnostic clarification and medication review. Provisional diagnoses conferred after this evaluation were Asperger's Disorder, Anxiety Disorder not otherwise

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<sup>5</sup> Generally partial hospitalization programs run during school hours on weekdays and the students are home in the evenings and on weekends. The exact schedule is not in evidence.

- specified, and Oppositional Defiant Disorder, with a rule-out diagnosis<sup>6</sup> of Encopresis. [S-4]
19. At the February 7, 2011 CHOP psychiatric evaluation the Parents reported that although they did not want [Student] to go to a residential program, they wondered if a therapeutic school would be good for [Student]. Although Student had just begun attending school in the District three days earlier, the Parents told the psychiatrist that the public school “does not know what to do with [Student]”. [S-4]
  20. The CHOP psychiatrist noted that Student had “attended a regular school<sup>7</sup> from kindergarten through 7<sup>th</sup> grade and did well there in terms of [Student’s] academics. [Student’s] difficulties appear to have been primarily with relatedness and social interactions”. The CHOP psychiatrist opined that “It would be interesting to see if [Student] can manage [self] in a mainstream classroom with pullout supports and social skills training”. This report was not shared with the District until May 2011; this is notable as in February 2011 the District was conducting its initial evaluation as the report or information about the consult would have been helpful. [S-4]
  21. At the recommendation of the CHOP psychiatrist Student’s array of medications was significantly reduced. Although this medication change was taking place during the time Student attended in the District, the Parents did not inform the District of this fact. The District believes that knowing this information would have been important for its behavior planning for Student. [NT 112-113, 342, 594-595; S-4]
  22. On February 15, 2011 the District provided its Evaluation Report (“ER”) to the Parents. The evaluation found Student to be eligible for special education services under the classification of emotional disturbance, and a recommendation followed for emotional support programming and behavioral support. [S-3]
  23. When being interviewed as part of the District’s initial evaluation Student’s mother indicated that she was having difficulty handling Student at home. She and the behavioral analyst discussed various techniques she had tried. The behavioral analyst talked with her about other techniques, and offered parent trainings as well as an invitation to call him if there was anything he could do to assist her. He also noted that he could make referrals for mental health services but since the Parents had withdrawn Student from the partial program and had stopped home therapeutic services he did not make new referrals at that time. [NT 537-538]

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<sup>6</sup> “Rule-out” means that the diagnosis is under consideration but that more information is needed to either confirm or discard the diagnosis.

<sup>7</sup> The parochial schools noted earlier.

24. On March 14, 2011, the District convened an IEP team meeting and crafted an initial IEP with a Positive Behavior Support Plan [PBSP] to be implemented in an itinerant level special education program for the remainder of 8<sup>th</sup> grade. The March 2011 IEP carries an academic goal addressing math, and provides for specially designed instruction including test/quiz-specific study guides, adapted assessments, writing organizers, help with all writing assignments, use of calculator for math, classwork reduced in length and difficulty, permission to leave classroom and go to a designated safe area [resource room, counselor's office] to calm down if feeling overwhelmed, frustrated or angry, individual counseling services up to weekly, daily direct explicit instruction in strategies/skills for self-monitoring, self-assessment, and coping with anxiety, instruction in pro-social coping skills through social stories; and self-advocacy strategies. [NT 601-602; S-5, P6, P6a]
25. The initial IEP called for a change from the autistic support classroom where Student had been situated during the transition/eligibility evaluation/IEP development phase to the less restrictive itinerant special education support placement because Student was doing well in the District so far, and the Parents and Student desired this change. The classroom and the resource room were in close physical proximity to one another. [NT 599-600]
26. In the school setting, although the special education teacher saw some anxiety, the behavioral analyst did not observe any anxiety in multiple observations in multiple settings. Likewise, although the Parents reported behavioral outbursts at home, they were not seen in school nor had they been seen in the partial hospitalization program. Nevertheless, based on reports from the Parents that anxiety was present, and behavioral outbursts reportedly were issues at home, the PBSP included these areas as potential interferences to learning should they begin to occur in the school setting. [NT 512-513; S-3, S-5]
27. Because Student was brand new to the public school setting, the initial PBSP was based among other things on a one-year-old psychiatric report [the Parents did not share the very recent CHOP report with the District until several months later], and interviews with the Parents. The PBSP therefore called for further functional behavior assessment as deficits in self-regulation and social skills were suspected but not yet clearly manifested. The District wanted to get to know Student a bit and wanted to conduct a formal Functional Behavior Analysis [FBA] through observations in multiple settings and multiple situations to accurately assess any behaviors of concern. In the area of social/emotional functioning, it was unclear at the time whether Student had a skill deficit [did not have the behavioral control skill at all] or a performance deficit [had the skill but could not or chose not to exercise it]. [NT 521-524, 602; S-5, P-3]
28. On April 29, 2011 the IEP team reconvened and created an IEP with a PBSP for Student's coming 9<sup>th</sup> grade year. A new IEP was created so soon after the initial one solely because the District followed a uniform schedule and held all its

- special education pupils' annual IEP meetings in the same time frame. [NT 603-608]
29. Because entering 9<sup>th</sup> grade would involve a change in school buildings and a change in curriculum for Student, the emotional support teacher from the high school participated in the April 29, 2011 IEP meeting to ensure an appropriately planned transition. [NT 606]
  30. The April 29, 2011 IEP added a new academic goal addressing written expression and a goal addressing organizational skills; the math goal remained. The specially designed instruction remained substantially the same as did the PBSP. [S-12]
  31. The emotional support teacher and the behavior specialist were frequently consulting with one another and making adjustments to the PBSP strategies that were in place. Neither saw the need for a revision of the PBSP in late April since the March PBSP was only six weeks old. [NT 606]
  32. The itinerant special education teacher followed Student to two of Student's classes daily, to the pre-algebra and to the reading class. The special education teacher also worked with Student in a study group setting every Monday, Wednesday and Friday for 45 minutes a day. [NT 453]
  33. When Student was first placed with the itinerant special education teacher Student was a little bit withdrawn, not engaged with peers. However within a week or so of Student's joining the teacher's study hall, Student met a peer, was very social with that peer, sitting with the peer at lunch every day. Student formed a relationship with one other peer as well. [NT 457]
  34. While Student had some spotty lateness and absences, the emotional support teacher and the behavior specialist wanted to understand the reasons for this behavior better and ascertain whether it was related to home issues and/or outright school refusal before putting a goal regarding attendance in the IEP/PBSP. [NT 608-609]
  35. Although anxiety was addressed in the April PBSP, behavioral outbursts were not addressed since there had been no evidence of these in the school setting. Likewise attendance was not addressed as an issue because Student had only 6 unexcused absences as of the April IEP meeting date. [NT 531-535; S-8, P-6]
  36. Notably, at the time of the late April 2011 IEP/PBSP preparation, the Parents still had not given the District the CHOP psychiatric evaluation from February 7, 2011. [NT 536; S-4]
  37. Although they had confirmed their attendance beforehand, the Parents did not attend this April IEP meeting to plan for high school and offered no comments on

- the IEP that ensued. The Parents did not return the NOREP associated with the April IEP. [NT 603-605, 608; S-7, S-13, P-6]
38. From the time of the March 14, 2011 IEP meeting to the middle of May 2011, Student was fully integrated into the regular education curriculum, was able to complete grade level work in all academic classes, and earned passing grades on curriculum based assessments. [NT 482-484]
  39. Although Student displayed some indications of anxiety in school during that time period as noted by the special education teacher, this was not to a marked degree; when the behavioral analyst observed Student in multiple settings anxiety was not readily apparent. Student did demonstrate the need for the available accommodations including extra help, breaks, and a behavior plan. [NT 459, 486, 512]
  40. The special education teacher worked on social skills with Student during the time Student was in the District. [NT 503]
  41. During the time Student was attending school in the District Student never exhibited violent behaviors or aggression toward peers or adults in the school setting. [NT 485]
  42. Nevertheless, the Parents were already considering residential treatment at least as of January 2011. At least by March 2011 the Parents had begun researching other placements and identified PRS as a program they believed was appropriate. [NT 41-42; S-1]
  43. On April 14, 2011 Student was quite upset at school, and confided in the emotional support teacher that Student's mother had told Student that the then-director of special education was going to be "putting [Student] away." In the conversation with the teacher Student correctly identified PRS as the placement which Student thought was a disciplinary school. At this point there had not been any discussion among District staff or between the District and the Parents that Student would not remain in the District. The teacher reassured Student that Student was wanted in the school and that the school had no plans to send Student away. [NT 490-492, 633-634]
  44. A week or two later Student again brought up to the special education teacher the topic of going away to another school. On this occasion Student was excited and happy and wanted to show the teacher the website. Student said that [Student] was told that the school was "a school for musicians" and that Student would be able to play the guitar there. [NT 492]
  45. When the April 29, 2011 IEP and its accompanying Notice of Recommended Educational Placement [NOREP] were issued to the Parents they neither

- responded asking for changes and/or giving feedback, nor did they return a signed copy of the NOREP. [NT 608; S-13]
46. On May 4, 2011 the Parents and Student completed respective portions of the PRS Application for Admission. Particularly relevant portions taken from the specific replies presented below include the Parents' assertion that the District could not develop Student's fullest potential, their acknowledging that Student had no behavior problems in school including no difficulty with authority and no physical aggression, and their representation that there were no problems between the school and the family in terms of the school's listening to their concerns and cooperating with them. The Parents noted their commitment to Student's remaining at PRS until goals are met, and also assured PRS of their intent to be involved in Student's program as PRS was only a "short drive" away from their home. [HO-1]
  47. Under Treatment Expectations in the Application for Admission the Parents wrote that Student "has been diagnosed with Asperger's Syndrome, and our public school system will not be able to develop [Student] to [Student's] fullest potential" and under Graduation Achievement Goal, "We are committed to enrollment in the school until [Student's] goals have been met". [HO-1]
  48. Under School Behaviors in the Application for Admission the Parents checked as Present: 'No school problem behaviors [emphasis added]; withdrawn; poor attendance/truancy; and school refusal'. [HO-1]
  49. Under School Behaviors in the Application for Admission the following were among the items the Parents checked as Not Applicable: 'conflicts with authority; physical aggression with teachers; leaving seat without permission; conflicts with peers/classmates; physical aggression with peers/classmates; use of profanity; disruptive behaviors; poor grades; destruction of property; angry outbursts and/or tantrum; and verbally aggressive'. [HO-1]
  50. Under Problematic Behavioral Assessment in the Application for Admission the following behaviors relevant to this hearing were among the concerns the Parents checked as Not Applicable: 'easily excitable; difficulty responding to authority; cruelty to animals; suicidal ideation/threats/attempts/plan; panic attacks; and mood swings'. [HO-1]
  51. Under Problematic Behavioral Assessment in the Application for Admission the following behaviors relevant to this hearing were among the concerns the Parents checked as Present: 'disruptive behaviors; oppositionally defiant; verbal aggression; physical aggression with parent/siblings; school refusal; poor social skills; social isolation; parent/child conflicts; poor peer relationships; and anxious behaviors'. [HO-1]

52. Under Social Relationships in the Application for Admission the Parents answered the question “*How does student interact with other family members/care givers?*” as follows: “All things considered [Student] reacts reasonably”. The Parents answered the question “*How does student interact with other adults and/or authority figures?*” as follows: “[Student] can be charming and engaging. [Student] interacts very well.” [HO-1]
53. Under Student Application Student listed Student’s own greatest weakness as “anxiety” and wrote that what Student wanted to learn at PRS was “How to cope with my anxiety”. In the initial psychiatric evaluation conducted when Student entered PRS, Student is quoted as reporting the chief complaint of “I need to work on my anxiety”. [HO-1]
54. Under Family Goals the Parents indicated that there was *not* an existing problem with a school not listening or not cooperating with them [emphasis added]. [HO-1]
55. Under Family Goals the Parents indicated in answering a question about parental involvement, “If [Student] attends [PRS] it is a *short drive* and we plan to be involved as much as possible” [emphasis added]. [HO-1]
56. Student’s attendance had become sporadic after the April 14<sup>th</sup> conversation about PRS with the special education teacher, and Student stopped attending completely in mid-May 2011. When confronted about attendance in early May, Student replied that attendance didn’t matter because Student was being sent away to another school. [NT 492, 610; S-8, S-41, P-7]
57. By letter dated June 6, 2011 the Parents through their former counsel notified the District of their decision to place Student at PRS because “the District has failed to provide a reasonable offer of FAPE to Student”. The letter also notes, “[Student’s] parents intend to have the School District pay for tuition, board, and associated [sic] including but not limited to transportation”. [NT 42-43; S-9]
58. PRS is a residential therapeutic boarding school for students with Asperger’s Disorder. Student began attending PRS as of June 13, 2011. Initial psychiatric diagnoses upon admission to PRS were Asperger’s Disorder, Anxiety Disorder NOS<sup>8</sup>, Tic Disorder NOS and Oppositional Defiant Disorder. [NT 44-45; HO-1]
59. In response to Parents’ counsel’s June 6, 2011 letter advising of the unilateral private placement, the District offered to hold an IEP team meeting. The Parents neither accepted the District’s offer, nor did they file for due process. There were no further communications between the Parents and the District regarding wanting another IEP for Student that school year. [NT 543; S-9]

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<sup>8</sup> Not Otherwise Specified

60. On December 19<sup>th</sup> and 21<sup>st</sup>, 2011 Student received a private “neuropsychological learning” evaluation upon the recommendation of the family’s former attorney. The evaluation was conducted at a facility located in the geographical vicinity of one of the District’s neighboring school districts. Although a licensed psychologist in Pennsylvania, the evaluator was not a school-certified psychologist. [S-11]
61. Notably, although the evaluator utilized thirteen different assessment tools plus a clinical interview for the December 2011 evaluation, the assessment of attention [CAT-C], the behavior rating scales [BASC] and the scale of executive functioning [BRIEF] were completed without input from Student’s former District teachers or more significantly from Student’s teachers at PRS.<sup>9</sup> Only the mother and the father provided responses on these rating scales even though Student had been placed out of the home, albeit with home visits, since June 2011. [S-11]
62. In addition to not having teacher input on the rating scales, the December 2011 private evaluation report was devoid of any written narratives or indications of verbal input from Student’s former teachers at the District or current teachers at PRS. [S-11]
63. The December 2011 private evaluation report does not make reference to a review of previous psychiatric reports, and although the report references the District’s February 2011 ER the private evaluator specifically notes, “The results of this evaluation were not available to the undersigned”. [S-11]
64. The private evaluator noted that based upon testing results Student’s Broad Reading was in the average range at grade level, that although Student’s Math was in the low average to average range and slightly below grade level Student appeared to have an adequate grasp of Math, and that Broad Written Language was in the average range. Academic knowledge was in the average range and above grade level. [S-11]
65. Examining the statistical relationship between Student’s cognitive functioning results [IQ] and academic achievement results obtained contemporaneously, in all cases Student’s actual academic achievement exceeded predicted academic achievement based on IQ. Achievement exceeded predictions by 1.54 standard deviations in Broad Reading, by 1.21 standard deviations in Math Reasoning and by 2.53 standard deviations in Basic Writing Skills.<sup>10</sup> [S-11]
66. The private evaluator concluded that Student “has an emotional disorder with primary impulsivity” and assigned the diagnoses of Attention Deficit

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<sup>9</sup> Although the report notes that data on the BASC was derived from the Parent Rating Scale and the Teacher Rating Scale, no scores from a teacher were presented. [S-11 p 19]

<sup>10</sup> The evaluator noted that because Student at times was restless and sometimes lost focus, and was not happy about going through the testing, the test scores may have been a conservative estimate. [S-11]

Hyperactivity Disorder, Combined Type; Oppositional Defiant Disorder, and Asperger's Disorder. Notably he dropped the diagnosis of Anxiety Disorder. [S-11]

67. Based solely upon individual testing with Student, interviews with Student and the Parent, and rating scales completed only by the mother, father and Student, the December 2011 private evaluation recommended continuation in the current residential program. This report was not shared with the District at the time it was completed. [S-11]
68. On June 11, 2012, in their first communication since they had removed Student from the District a year previously, the Parents faxed a letter to the District asking for school records. [S-15]
69. By letter dated June 22, 2012 the Parents informed the District that as they had not received an IEP or an offer of placement for the 2012-2013 school year they were continuing Student's placement at PRS and would seek "reimbursement and/or prospective payment [direct payment] from the School District for tuition and related services". There is no record of their having previously alerted the District of an intent to return Student to public school, or of their requesting an IEP for 2012-2013. [NT 49, 76, 543; S-14, S-15]
70. The District responded by inviting the Parents to an IEP meeting to be held on July 2<sup>nd</sup>. [NT 49-50]
71. On June 27, 2012, prior to beginning the IEP process, the District also offered Student extended school year [ESY] services to facilitate the reevaluation process, provide baseline data for the IEP process for 2012-2013, and facilitate Student's transition back to the District. [NT S-15]
72. Also prior to the July IEP process, in order to have recent data from which to develop another IEP/PBSP for 2012-2013 the District requested that the Parents provide "all of your [child's] educational records from [Student's] private school placement to include, but not limited to grades, present levels of performance, transition plan, goals, specially designed instruction, progress monitoring data and all related services records." In response, the Parents provided only the December 2011 private neuropsychological evaluation, the 2011-2012 PRS report card, and a two page narrative from the PRS social worker. There was no information regarding a PRS behavior plan, data collection, or progress monitoring. [NT 83, 656; [S-15]
73. The IEP team convened on July 2<sup>nd</sup> and again on July 9<sup>th</sup>. An IEP dated July 9, 2012 was prepared. The District staff participating in the IEP meeting[s] were the former special education director, Student's special education teacher from 8<sup>th</sup> grade, a regular education teacher and a regular education coordinator, the director of student services, the assistant high school principal, the guidance

- counselor, and the District's behavior analyst. Student's mother was in attendance, accompanied by her advocate<sup>11</sup>. [NT 49-50, 55; S-22, P-8]
74. The IEP team discussed behavioral assessment of Student and also the previously offered ESY services for summer 2012. The District believed that in order to plan for Student's placement in the District in the fall, observation of Student in the ESY program was important, as to date little information had been received from PRS. [NT 57-58]
75. The July 2012 IEP carried an academic goal addressing written expression [the math goal was not added based on academic testing results of the private evaluation], and provided specially designed instruction in the form of study guides for tests, adapted assessments, graphic organizers, use of computer for writing assignments and use of calculator for math, all classwork/assignments reduced in length and difficulty and divided into smaller parts, extended test taking time, preferential seating, direct instruction on organizational skills including binder checks, provision of fill-in-the-blanks class notes templates, and multisensory instruction. The IEP also provided for social work services daily as scheduled and up to weekly sessions with the guidance counselor. [S-22]
76. Although the July 2012 IEP contained an interim PBSP the District deferred creating an entire new PBSP for Student until there had been the opportunity for observation in the public school setting. Student had been away from the District for over a year in a residential placement and complete records had not been obtained from PRS despite numerous requests. If an FBA were to be a valid basis for a PBSP it had to be based on observation in the setting in which the PBSP would be implemented. [NT 551-554; P- 7a]
77. After speaking about the offered ESY program and going to the site but not gaining access to view the classroom, the Parents declined ESY services from the District in a letter dated July 19, 2012. [NT 58-59; S-40, P-23]
78. By letter dated July 31, 2012 the District's superintendent responded, informing the Parents that the District believed it could meet Student's needs and provide FAPE within the District. The letter also noted that certain records requested regarding Student's placement at PRS had not been received. [S-24]
79. On August 10, 2012 the Parents provided the District with additional documents from PRS including an IEP, a treatment team review, and a quarterly update. [S-25]
80. The District reconvened another IEP meeting on August 20, 2012 to consider the new PRS information and to revise the IEP based on this new data. The team

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<sup>11</sup> Parent's advocate was one of the attorneys who represented the Parents in this hearing; at the time of the July 9<sup>th</sup> IEP meeting she had not yet been admitted to the bar.

- revised the IEP areas of Present Levels [Section II], Related Services [Section VI] and the Positive Behavior Support Plan. [NT 620-621; S-26, S-27, P-8, P-8a]
81. The August 20, 2012 IEP carried written expression and organization goals. Specially designed instruction added was repeating directions for assignments and assessments and checking for understanding, use of both verbal and non-verbal direction when Student is off task or inattentive, and provision of a definite purpose for Student during unstructured activities or settings. Additional supports were weekly guidance sessions gradually faded to monthly and daily sessions with the school social worker in an individual therapy session or an in-vivo coaching session. [S-27, P-8, P-8a]
82. Although again the District noted its intent to perform an FBA once Student was attending in the District, the PBSP addressed elimination of behavioral outbursts should they occur and provision of self-regulation and relaxation strategies to promote daily attendance, punctuality, and remaining in class for full periods. [S-27]
83. At the August 20, 2012 IEP meeting the Parents' main concern was that since Student was making progress at PRS they wanted Student to continue there. The District maintained, based on all the information in its possession, including the new information from PRS, that the placement it was offering in the District's high school was appropriate. [NT 558]
84. In the July 31, 2012 letter the superintendent had also requested that the Parents supply dates in August or September when Student could meet with the District's psychologist for testing for a reevaluation. Between July and October 2012 the District made repeated requests that the Parents make Student available for a reevaluation. [S-24, S-32, S-33]
85. Student's mother testified that the PRS team, including the psychiatrist and the social worker, believed that Student was "not capable of having an evaluation", "was not at a good spot to have an evaluation". In an October 1, 2012 letter the Parents informed the District of PRS's position. [NT 63]
86. In a September 12, 2012 letter addressed To Whom It May Concern the PRS psychiatrist and social worker noted that at the most recent visit home Student had demonstrated physical and verbal aggression towards family members and that the Transfer of Treatment aspect of PRS was assisting the Parents with transferring some of the structure of PRS into the home environment. The letter also noted that "due to behavioral deterioration within the home environment, and also difficulty reintegrating into the program after a home visit, we are recommending that [Student's] travel home be restricted at this time". [P-26]
87. Student's mother testified that when Student comes home it is for short periods of time, arriving late Friday and returning on Sunday, such that it was "hard to have [Student] at home and get [Student] to an evaluation. [NT 64]

88. Nevertheless, Student had been tested in Scranton in December 2011, and traveled home for multiple-day visits in August and in September 2012 [both times for nearly a week], as well as in October and at Thanksgiving 2012. [NT 77-78; S-29, HO-2]
89. As Student was not made available for assessments despite repeated attempts, the District's reevaluation report [RR] completed on October 26, 2012 consisted only of a review of records; based upon the information reviewed, current baseline levels of academic performance could not be ascertained. [NT 360; S-32]
90. The RR reviewed records including previous evaluations, input from 8<sup>th</sup> grade teachers from the District, and input received from PRS. [S-32]
91. The IEP team, including Student's mother, convened to review the RR on November 7, 2012. The Parent expressed no concerns about the content of the RR at the meeting. [NT 659; S-32]
92. Based upon the RR, the IEP team reconvened to develop a new annual IEP on December 7, 2012. The December 7, 2012 IEP was based upon results of the RR, updates from PRS as of fall 2012, and a review of past records and IEP/PBSP documents. It provided academic goals in math and written expression and to the list from the August 20, 2012 IEP added the specially designed instruction of provision for unrestricted access to the school social worker. [NT 620-621; S-34]
93. Although multiple efforts were made to secure their participation at the meeting, the Parents did not attend. The District attempted to reschedule a meeting with the Parents attending; however, the Parents and District finally agreed that no further meeting was necessary as the Parents through present counsel had filed for a due process hearing on December 10, 2012. Neither the Parents nor their counsel requested changes to the December 2012 IEP. [NT 617-619, 661-662, 664; S-35; S-36]
94. The Parents maintain that the District placement is not appropriate because they believe Student needs a therapeutic 24-hour setting. The Parents maintain that they had "tried to have [Student] integrated into the public school, and it didn't work". [NT 62]
95. Counseling at PRS takes place once a week, and social skills instruction takes place once per week after school. Psychiatric contacts are monthly. [NT 437-438; HO-2, HO-3]
96. In response to direction from the Hearing Officer to provide application forms, psychiatric notes and therapy notes, PRS provided the Application for Admission form. However, psychiatric progress notes [M.D. Progress Notes] produced were only for the time period May 8, 2012 through March 14, 2013. [HO-1, HO-2, HO-3]

97. Other than one incident in August 2012 when Student became frustrated at PRS [redacted], M.D. Progress Notes contain no documentation of aggressive behavior in the school or residential setting. The M.D. Progress Notes do include however frequent references to how Student was doing on visits home and describe the vicissitudes of Student/family interactions. [HO-2]
98. Individual Therapy Progress Notes provided in response to the Hearing Officer's direction were only for the time period from January 9, 2013 through April 15, 2013. The notes reflect home issues that Student was having regarding communicating with Parents and taking "no" for an answer. The notes address the issues at PRS of overreacting to situations and difficulty accepting things that do not go Student's own way, and accepting feedback and consequences without making excuses or arguing. [HO-3]
99. At PRS half of Student's targeted behaviors worsened somewhat over the course of the data period given [**presented in bold below**] and minimal progress was noted on the other behaviors. The data collection tracked only the frequency of behaviors and not their severity or duration. [NT 564; S-25]
100. The behaviors of concern PRS targeted for Student were: talking down to peers, **laughing at others' failures**, poor eye contact, **mumbling**, poor volume control [soft], isolating self, **making excuses**, being fidgety/nervous/jittery, **not completing tasks**, and **avoidance**. These behaviors were not operationally defined and there were no baselines identified. [NT 297-298, 427-429; S-25]
101. There was no evidence of PRS tracking Student's acquisition of any replacement behaviors. [S-25]
102. Although PRS utilizes a token economy to reward appropriate behavior, this approach is implemented in such a way that a student can earn all his/her tokens while still consistently exhibiting the behaviors of concern. [NT 431-432]
103. Behavior data from PRS indicates that Student earned between 99% and 100% of available tokens in the 2011-2012 year, that Student had zero visits to the quiet area, and that Student had no visits to either a safety room or to a therapeutic time out room. [S-25]
104. The District's behavior analyst testified that there was no behavior presented on the PRS list that the District would be unable to address. [NT 626]

#### Discussion and Conclusions of Law

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder,

in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

**Credibility:** During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

Each of the District’s witnesses testified credibly and taken as a whole they provided information sufficient to establish that the District both provided and offered FAPE in the least restrictive environment. One witness, the Behavior Analyst, was in a particularly good position to offer comprehensive testimony about the District’s program and provide comments on PRS. This witness’ role in the District over the last five years is to facilitate and assist with the completion of functional behavioral assessments, provide district wide crisis management and act as the internal coach for the District’s competent learner model, a supplementary program in the autistic support and life skills classrooms. He serves as liaison between the District and mental health agencies in coordinating mental health services. He works with the teachers and staff in the District to implement positive behavior support plans and behavior modification interventions for regular education and special education pupils by overseeing those interventions, and providing support in terms of progress monitoring and feedback. Finally, he also conducts parent trainings and staff trainings in the area of behavioral mental health. This individual has been employed in the mental health field for 17 years in positions such as therapist, therapeutic staff support [TSS] worker, mobile therapist, case manager for persons with intellectual disabilities, and lead clinician for an autism program. He holds an undergraduate degree in psychology and a master's degree in counseling. He received the credential of Board Certified Behavior Analyst in 2010 through the BCBA program at Penn State University. Currently he is taking coursework in multicultural counseling and career counseling. *This witness gave precise and reasonable responses to questions on both direct and cross examination in a modest low key manner. His clearly comprehensive knowledge and considerable experience in the area of behavior analysis and management combined to provide the hearing officer with a good understanding of what the District was capable of providing Student. His testimony was given a great deal of weight both with regard to what the District had done and could do with Student and what PRS was providing. Specific note was taken of his offer to assist the Parents in managing Student at home through parent training groups and individual consultation.*

*His previous role working in home and community settings as a TSS worker and a mobile therapist enhanced his qualification to assist the Parents in this regard.*

Two witnesses from PRS testified by telephone, the special education teacher and the social worker assigned as Student's therapist. The teacher provided a description of the school and the program while the social worker spoke about the school's behavioral work with Student. There were no particular credibility issues with either of these witnesses although the social worker had some difficulty explaining the behaviors rated and tracked on the token system.

*Student's mother testified in the hearing on behalf of both Parents. The Parents are clearly concerned parents, with a child whose home behavior is challenging. However, I found certain aspects of the Parents' behavior troubling. For example, the Parents unilaterally stopped both Student's partial psychiatric hospitalization program and Student's in-home mental health services at the same time; they failed to share information from [or even the existence of] the February 2011 CHOP evaluation done at the same time Student was receiving a District evaluation; they did not inform the District that Student was being weaned from psychotropic medication while Student was in the transition phase to a public school placement for the first time; they told Student that it was the special education director who was "sending [Student] away" to PRS; they wrote on the Application for Admission for PRS that their home was "a short drive" away yet held that the travel time for home visits made a session with the District psychologist impossible, and they would not produce Student for reevaluation even though Student visited home multiple times during the period the District was seeking to evaluate Student; and their responses about Student's behaviors on the Application for Admission for PRS were inconsistent with mother's testimony at the hearing. The sum total of these and other actions on the Parents' part served to undermine the mother's credibility as a witness to the extent that I could not confidently rely on her testimony at any point where it may have conflicted with that of District witnesses.*

FAPE: Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or student progress; and provided in conformity with an Individualized Educational Program (IEP).

Tuition Reimbursement: Although parents have an absolute right to decide upon the program and placement that they believe will best meet their student's needs, public funding for that choice is available only under limited circumstances. Federal regulations provide that "[i]f placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.104 Thus, we must consider whether the residential placement at

PRS was necessary to provide Student with special education.

The United States Supreme Court established a three part test to determine whether or not a school district is obligated to fund a private placement. *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program legally adequate? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. *See also, Florence County School District v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3<sup>rd</sup> Cir. 2007).

School districts and other LEAs provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" at the time it was created to enable the student to receive "meaningful educational benefit", a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist.*, WL 2682741 (E.D. PA. July 8, 2011).

An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the student only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); *Polk*. The Third Circuit explains that while an "appropriate" education must "provide 'significant learning' and confer 'meaningful benefit,'" it "need not maximize the potential of a disabled student." *Ridgewood*, 172 F.3d at 247 (3d Cir. 1999); *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002). An IEP must provide a "basic floor of opportunity". There is no requirement to provide the "optimal level of services." *Mary Courtney T. v. School District of Philadelphia*; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania's federal court in the Eastern District noted, [LEAs] "need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at \*7 (E.D.Pa., July 24, 2008). ). The U.S. District Court for the Middle District of Pennsylvania has noted, 'the standard is virtually minimal, indeed, "modest.'" *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 1:11-CV-574, 2012

WL 2979038 at 27 (M.D. Pa. July 20, 2012). The law requires only that the plan was reasonably calculated to provide meaningful benefit at the time it was created.

The IEP for each student with a disability must include a statement of the student's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general curriculum and meeting the student's other educational needs that result from the student's disability; a statement of the special education and related services and supplementary aids and services to be provided to the student...and a statement of the program modifications or supports for school personnel that will be provided for the student 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 students with disabilities and nondisabled students; an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class... 34 CFR §300.347(a)(1) through (4).

The IDEA also requires that disabled students be placed in the least restrictive environment that will provide meaningful educational benefit. Congress has expressed a clear intent and preference that disabled children be placed in regular education classes, and that removal of a student from regular education classrooms is permissible "only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C.A. § 1412(a)(5)(A); 34 CFR §300.550. Pennsylvania State regulations adopted by reference from the IDEA state verbatim what an IEP shall contain. 22 Pa. Code § 14.131(b) and 22 Pa. Code § 14.102 (a)(2) adopt all federal regulatory requirements, including the requirement that a student be educated in the least restrictive environment. Federal regulations declare that "[i]f placement in a public or private residential program is *necessary to provide special education* and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.104 (emphasis added).

### Discussion

The testimony of witnesses called by both parties and the extensive documentary evidence offered in this matter provided the basis for findings of fact which, when applied to the relevant law, led to the clear conclusion that the District proposed an appropriate program and placement for Student such that the Parents' request for tuition reimbursement must be denied. Since the District has prevailed on the first prong of the *Burlington Carter* analysis it is not necessary for me to reach a determination regarding the appropriateness of the private residential placement under the Act or to consider the equities in relation to the Parents' conduct.

Student's entire educational history is devoid of any significant problems in school across multiple settings. During seven years of parochial school, six months in a partial

hospitalization program with educational services, four and a half months in the District, and, in fact, going on two years at PRS, Student has not at any time in any school setting exhibited disabling anxiety or physical aggression towards peers or adults. Indeed, the list of target behaviors in Student's PRS token economy plan implemented in the 24-hour a day seven days a week setting notes only one behavior that directly relates to anxiety, "being fidgety/nervous/jittery", and the closest Student's behaviors come to any difficulty with teachers/staff or fellow pupils is "making excuses" and "laughing at others' failures". This is not to say that I doubt the Parents' representations that Student has historically been aggressive in the home setting and continues to be a behavior management problem on home visits; the fact that these clearly concerned and caring Parents sought out and sent their child to an out-of-home placement speaks to the seriousness of their concerns.

The District produced five appropriate IEPs for Student and each IEP contained an appropriate PBSP. Of the five, the District was able to implement only the first, the one created in March 2011. During the brief time Student attended school in the District the program and placements provided allowed Student to do well on academic assessments and to maintain behavioral control. This fact takes on even more significance considering that Student had never before been in a public school, that Student had just left a partial hospitalization program, that Student had just lost in-home mental health services and that Student was being weaned from an array of psychiatric medications.

The evidence in this case is compelling that even before Student enrolled in the District the Parents were focused on securing residential placement, and that once they had informed Student of these plans Student lost the motivation to continue in the District's program. The record is very clear that Student's self-withdrawal from the District's program through non-attendance had little if anything to do with the District and very much to do with the imminent transfer to an out of state boarding school.

Testimony presented by all District staff and all documentary evidence produced was persuasive of the fact that the District provided Student with FAPE in the least restrictive environment for the second portion of the 2010-2011 school year, was fully capable of continuing to provide Student with FAPE in the least restrictive environment during the 2011-2012 and the 2012-2013 school years, and will be capable of doing so if the Parents should choose to affirmatively notify the District that they are planning to return Student to the District for the coming year and are requesting an IEP.

### Conclusion

The Parents have failed to prove their case by a preponderance of the evidence and their request for tuition reimbursement for Student's unilateral private residential placement is denied.

## Order

It is hereby ordered that:

1. The District offered Student an appropriate program and placement for the 2011-2012 and the 2012-1013 school years.
2. The District is not required to reimburse the Parents for tuition and associated costs for Student's out-of-state private residential placement.
3. The District is required to take no further action.

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

June 8, 2013

Date

*Linda M. Valentini, Psy.D., CHO*

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