

*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 Child: D.S.  
ODR #01000/09-10 AS

Date of Birth:  
[redacted]

Dates of Hearing:  
July 6, 2010  
July 20, 2010

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Bethlehem Area School District  
1516 Sycamore Street  
Bethlehem, Pennsylvania 18020

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:  
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Penn Argyl, Pennsylvania 18072

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August 1, 2010

August 15, 2010

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

## Background and Procedural History

Student<sup>1</sup> is a late-teen-aged eligible student with a current classification of autism; student at various times has also been classified as emotionally disturbed, other health impaired and gifted. Student is a resident of the Bethlehem Area School District (hereinafter District) and for the past school year has, pursuant to a September 8, 2009 settlement agreement, attended a private school (hereinafter Private School) with tuition and transportation funded by the District. In the spring of the current school year the District indicated it planned to graduate Student, whereupon on April 22, 2010 Student's mother and father (hereinafter Parents) requested this hearing as they did not approve the plan to graduate Student and wanted Student to remain in school, specifically the Private School. Nevertheless the District issued a graduation NOREP on May 19, 2010, and without the Student's or Parents' knowledge placed Student's name in the graduation program, called Student's name at the graduation ceremony and prepared a diploma. A hearing was scheduled for mid-June, but due to both attorneys having preplanned vacations the matter was continued to three mutually agreed-upon dates. The second date had to be canceled due to illness of one of the attorneys, therefore the hearing was completed in two sessions.

The District moves to dismiss the Parents' complaint on jurisdictional grounds. First the District argues that since Student has satisfied the requirements for graduation and is no longer eligible under IDEA this hearing officer lacks jurisdiction. Second, the District argues that the Parents are bound by the terms of the settlement agreement entered into between themselves and the District and therefore this hearing officer lacks jurisdiction to award the remedy sought by the Parents. Third the District argues that the Parents have not complied with the requirements of IDEA necessary for an award of private tuition, and therefore this hearing officer lacks jurisdiction to award the remedy sought, placement in a particular private school. Finally the District asserts that the Parents have not met their burden of proof and that therefore the remedy they seek must be denied.

For the reasons put forth below I denied the District's Motion to Dismiss, found that the Parents have met their burden of proof, and hold in favor of the Parents.

## Issues

1. Was the District's plan to graduate Student at the end of the 2009-2010 school year appropriate?
2. If Student should not be graduated what is the appropriate educational placement?

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<sup>1</sup> For purposes of privacy there will be no references to name or gender.

## Findings of Fact

### Background:

1. Student is a late-teen-aged eligible resident of the District. [NT 29-30]
2. Student is currently diagnosed with Asperger's Disorder, Attention Deficit Hyperactivity Disorder, Intermittent Explosive Disorder, Oppositional Defiant Disorder, anxiety and depression. Student also has allergies. [NT 30]
3. Student currently sees a prescribing psychiatrist about every three months and has had ongoing weekly psychotherapy with a psychologist for almost two years. [NT 30-31, 140]
4. Student currently is prescribed Prozac, Geodon, Clonazepam, Strattera, Progenta and Fexofenadine. [NT 31]
5. Student was first identified as eligible for special education in third grade, although behavioral problems began in preschool and continued. [NT 20, 34]
6. The District placed Student in approved private schools or specialized educational settings for grades four through part of the 2006-2007 school year, then Student entered a public high school, but after about one year in public high school spanning two academic years Student's difficulties were such that Student required an instructor in the home and then was hospitalized near the end of the 2007-2008 academic year. [NT 34-35]

### School Year 2008-2009:

7. Following hospitalization and the intervening summer of 2008, Student started back in public school for the 2008-2009 school year but because of a variety of issues including intolerance for noise and crowds there were almost immediate behavioral problems which led to an unsuccessful placement in an alternative educational setting for a few days. After a month's instruction in the home, Student was enrolled in a partial hospitalization program located at another public high school. After about six weeks a behavioral incident resulted in police intervention. Student then received homebound instruction for the remainder of the 2008-2009 school year. [NT 24, 40-42, 59; P-3]
8. For 2008-2009 the mother's records indicate that Student received approximately 32 hours of home bound instruction in the first semester, and approximately 98 hours of homebound instruction second semester for a total of 130 hours<sup>2</sup>. There

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<sup>2</sup> The homebound teacher who testified estimated that she provided about 123 hours of instruction and the previous homebound teacher provided approximately 8 hours for a total of 131 hours. Therefore, the discussion around accepting or excluding Exhibit S-24 as part of the record is moot, as had it been accepted there seems to be a negligible difference in the District's and the Parents' estimates of hours.

- were problems with books and materials provided during the homebound instruction. [NT 52, 64-67, 398; P3]
9. For school year 2008-2009 the District awarded Student 7.25 credits [2 in English, 2 in US History, 2 in Science and 1.25 in Math] on the basis of 130/131 hours of homebound instruction (which included time missed for behavioral outbursts). This translates to about 16.5 hours of instruction per credit. The District's special education coordinator testified that full credits can be given for homebound because the instruction is more intense, one-to-one and students are doing assignments alone in addition to the direct instruction. However, Student usually did not do the assignments and Student missed time because of meltdowns. [NT 301, 410-411, 413, 436, 442, 425; S-20, S-22]
  10. In the District students can earn 2 credits per year per subject in major subjects by "doubling up" if they choose to do so. This is possible because of the District's "block scheduling". There is no evidence in the record that Student or Student's Parents agreed to "double up" credits. There was no doubling of homebound instruction hours to allow for doubling up of credits. [NT 347, 383-384]
  11. Student had particular difficulty with written expression aside from fine motor issues. Student became very agitated and upset when asked to do writing and various strategies were tried to have Student write without becoming agitated or frustrated. [NT 400, 420-421]
  12. When facing writing assignments Student had a lot of difficulty putting thoughts in order, focusing thoughts, articulating thoughts and then putting thoughts down on paper. Student had this difficulty even with topics of interest to Student although topics of interest were easier. [NT 433-434]
  13. Student became very agitated in math, and calculus could not be provided. Statistics was tried, but was only tried for two sessions before Student became uncomfortable. Student had "meltdowns" around math, rocking or shaking feet, and the homebound teacher described that at times Student became "very, very upset, start to bang fists or get up and walk away". [NT 414-415, 431-432]
  14. Student frequently became agitated when disagreeing with the content of, for example, literature. Student could not grasp the idea that an author's views were not being forced on Student but that Student simply had to learn them; Student became "overwhelmed by the fact that [the thought that] [Student] was supposed to feel these things as well". [NT 417-418]
  15. The instructor purchased SAT prep books and worked with Student on these, an activity that Student enjoyed. [NT 416, 423-424]
  16. Student did not always complete assignments given by the homebound instructor. [NT 410-411, 413, 436, 442]

17. The homebound instructor had to modify materials and instruction to dovetail into Student's interest and "to keep [Student's] behavior intact". [NT 411]
18. Student continued to have disability-related behavioral difficulties that interrupted even the one-to-one homebound instruction.<sup>3</sup> [NT 63, 425]
19. The homebound teacher on a one-to-one basis was able to establish rapport with Student by being patient and getting to know Student and gained Student's trust. [NT 445-446]

Placement in Private School:

20. A settlement agreement of September 8, 2009 resolved a due process complaint by the Parents and provided for the District's payment of tuition for Student to attend Private School for the 2009-2010 school year. [S-1]
21. Although Private School believed that Student was an 11<sup>th</sup> grade student based upon records received from the District, the District considered Student to be a 12<sup>th</sup> grader so Private School so-designated Student. Although Student thought 2009-2010 would be "junior" year of high school, Student was classified as being in "senior" year and did not believe this senior designation was appropriate. Private School helped Student make the best of the situation by offering Student "senior privileges". [NT 71-72, 118, 181]
22. For the 2009-2010 school year Private School adopted five goals from Student's last District IEP [November 2008] and implemented a plan to address these goals. Private School engaged in and provided reports on structured progress monitoring. [NT 192-198; P-8]
23. Goal One reads: Given a writing assignment, [Student] will write using correct content, grammar, sentence structure, punctuation, vocabulary and spelling that is appropriate to [Student's] instructional level to attain a score of  $\frac{3}{4}$  on writing rubric score, on 4 writing samples/year. [S-4]
24. Student did not achieve Goal One. Cumulative monthly percentages [September through April] derived from each teacher at Private School showed a high of approximately<sup>4</sup> 50-55 percent in December and January, and an average of about 40 percent in September, October, November, February, March and April. [NT 259; S-4a]<sup>5</sup>

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<sup>3</sup> The record does not indicate that any behavior intervention supports were put into place by the IEP team to assist the teacher or the Student.

<sup>4</sup> Approximations necessary because data is shown in a line graph with intervals of 10 points. [S-4a]

<sup>5</sup> The relevant pages of S-4 were illegible so clear copies were provided by fax and are here marked as S-4a.

25. Goal Two reads: Given assignments and projects [Student] will complete the assignments and hand them in on time with 95% accuracy during 4 consecutive marking periods as assessed through teacher data and grade reports. [S-4]
26. Student did not achieve Goal Two. Cumulative monthly percentages [September through April] derived from each teacher at Private School showed a high of approximately 85 percent in December, an average of about 80 percent in September, October, November and January, about 45 percent in February and a low of about 60 percent in March and April. [NT 258; S-4a]
27. Goal Three reads: When given a writing assignment [Student] will ask to get the laptop for assistance when becoming frustrated 90% of the time on 6 consecutive biweekly observations. [S-4]
28. Student did not achieve Goal Three. Cumulative monthly percentages [September through April] derived from each teacher at Private School showed an average of 50 to 60 percent in September, October, November, December and January, about 40 percent in February, and about 30 percent in March and April. [S-4a]
29. Goal Four reads: Given a 30-minute instructional time period, [Student] will use appropriate language for 27 out of 30 minute intervals on 6 consecutive biweekly observations. S-4]
30. Student did not achieve Goal Four. Cumulative monthly percentages [September through June] derived from each teacher at Private School showed a high of about 85 percent in October, December and May, about 80 percent in September, November and January, about 70 percent in February, March and April, and a low of 50 percent in June. [S-4a]
31. Goal Five reads: Given an instruction from staff during a 30 minute instructional time period, [Student] will follow the instruction first time it is given while maintaining an appropriate voice level for 27 out of 30 minutes on 6 consecutive biweekly observations. [S-4]
32. Student achieved Goal Five in only 3 of 10 months. Cumulative monthly percentages [September through June] derived from each teacher at Private School showed about 90 percent in December, January and May, about 80 percent in September, October and November, about 70 percent in March, about 60 percent in February and April and about 50 percent in June.<sup>6</sup> [S-4a]

District's Graduating Student:

33. The settlement agreement of September 2009 provided that the District was to convene an IEP team meeting “for the fourth quarterly review to consider the

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<sup>6</sup> The graph for Goal Five has intervals of 20 points. [S-4a]

Student's functioning and appropriate growth towards graduation." [S-1]

34. On April 12, 2010 a meeting was convened for the purposes of a third quarter review, and although the Parents thought an IEP would be discussed, the District's special education director indicated the need to consult with counsel and scheduled another meeting for April 19<sup>th</sup>. Although the Parents believed, and a District witness later testified, that the April 19<sup>th</sup> meeting was an IEP team meeting, the District did not send required invitations to the Parents. [NT 90-91, 319, 323-324, 469-470]
35. At the April 19, 2010 IEP team meeting, the District acknowledged that Student would not do well in a bricks and mortar school environment and discussed the possibility of dual enrollment but provided no details about such a program. The District did not present the Parents with a proposed IEP for the 2010-2011 school year. [NT 308, 312, 315, 317-319, 465]
36. The District's director of special education testified that at the April 19, 2010 IEP team meeting, he asked the Private School participant(s) to answer Yes or No to the question "Had [Student] made progress toward graduation?" [NT 464]
37. The April 19, 2010 IEP meeting did not address Student's academic needs, progress on IEP goals or readiness for graduation. [NT 324-325, 338]
38. The District's special education coordinator who was Student's case manager testified that to her knowledge no one from the District has interviewed Student regarding Student's progress or needs, and Student's preparation in terms of graduation. [NT 327]
39. The District's special education coordinator who was Student's case manager testified that to her knowledge no one from the District has interviewed Student about Student's transition needs and transition concerns. [NT 327]
40. At the April 19, 2010 IEP team meeting, the District indicated that Student had sufficient credits to graduate and did not permit discussion of Student's academic, functional, or social needs or Student's readiness for graduation. The director of special education stated that Student met the graduation requirements. Immediately after the District advised the parents of its intention to graduate Student, the Parents filed a due process hearing request that was dated April 22, 2010. [NT 92, 468-469]
41. The District's director of special education testified that at the end of the April 19, 2010 IEP team meeting "it was pretty obvious that Mrs. [redacted] did not want to see [Student] graduate, and that she wanted that extra year; and she was going to move to due process". [NT 466]
42. Despite the April 22, 2010 filing of a due process request that officially signaled

that a dispute had commenced, and while the dispute had been ongoing for nearly one month, the District nevertheless prepared a NOREP dated May 17, 2010 that indicated the intent to graduate Student. However, the Parents were not sent, or did not receive, this document. [NT 98, 266-267, 340; S-7]

43. The Parents and Student learned that Student was “graduated” from friends who had attended the graduation ceremony; the friends told the Parents that Student’s name was in the printed program and Student’s name was called along with the other students’ names.<sup>7</sup> Other than the statement of intent at the April 19, 2010 meeting, the Parents had no notice of the District’s intent to follow through with graduating Student even though there was an active due process case.<sup>8</sup> [NT 98, 272-273, 275-276, 343]
44. Although the settlement agreement specifies that, “the agreement is for one year only, at which time a District IEP team will convene”, it also provides that “[n]othing in this agreement shall be construed to limit the rights of either party to raise any issue regarding the student’s educational placement for the 2010-2011 or any subsequent year pursuant to the IDEA and supporting regulations.” [S-1]
45. The District determined that Student had accumulated enough credits to meet the requirement for graduation. The District graduated the Student based on credits, grades and attendance. [NT 283, 285-288, 292-293, 466, 477-478, 488]
46. The District did not evaluate Student prior to its decision to graduate Student. [NT 355]
47. The District did not discuss with Private School whether or not graduation was appropriate for Student. [NT 355]
48. The District did not discuss with the Parents whether or not graduation was appropriate for Student. [NT 355]
49. The District’s School Board Policy and Student Handbook relative to graduation requirements also require in part the completion of a culminating project; 60 hours of community service and demonstration of proficiency of reading and math on the 11<sup>th</sup> grade PSSA, or one of several alternatives. [S-29]
50. The District’s special education coordinator testified that Student did not complete a culminating project, but could have done so. The District’s director of special education testified that no culminating project was required of Student but offered no explanation as to how this decision was made. To the director of

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<sup>7</sup> The District sent a diploma to Parents’ counsel but the diploma was refused by the Parents and the Student.

<sup>8</sup> The person responsible for overseeing the sending out of graduation instructions was the special education coordinator. The material was not indicated as having been sent, however, until several days after this individual went out on sick leave. The secretary who may have sent them out did not testify. [NT 281]



- special education's knowledge no document exists that states that the District was waiving Student's culminating project. The special education coordinator who was Student's case manager was not aware that any prior IEP team had considered waiving the culminating project for Student. [NT 330, 333-334, 360, 467, 473, 476-477]
51. The special education coordinator who was Student's case manager testified that waiving the School Board's graduation requirement of a culminating project was "not a big consideration" because Student was in a private school and that the person making that decision was "probably" herself with no consultation from anyone else. [NT 361-362]
  52. Student was not given the required .5 credit for completing 60 hours of community service although the District's director of special education testified that he understood from the mother that Student had completed them. Although he spoke in general about why a student could be excused from this requirement he did not offer information about if or how or why Student was excused, or if Student had completed the work why Student did not receive the credit. The special education coordinator who was Student's case manager was not aware that any prior IEP team had considered waiving community service for Student. [NT 293-294, 331-334, 359-360, 457-459]
  53. The special education coordinator who was Student's case manager testified that waiving the School Board's graduation requirement of documented community service was discussed between herself and the District's director of special education. [NT 362]
  54. Student took the 11<sup>th</sup> grade PSSA at Private School but the results were not known at the time the District "graduated" Student. Student did not complete any of the alternatives provided for in the Student Handbook. To the director of special education's knowledge no document exists that states that the District was waiving the PSSA requirement. Student's last District IEP provided that Student was to take the PSSA. The District did not contact the State Department of Education regarding a PSSA exemption for Student. [NT 295-298, 335-337, 477]
  55. The special education coordinator who was Student's case manager testified that waiving the School Board's graduation requirement regarding the PSSA was not documented as having been done by anyone and that she was not aware that Student had taken the PSSA until after the school year was over and she looked at material from the Private School. [NT 363]
  56. In the last IEP drawn up by the District, in November 2008, it was provided that Student would take the PSSA's. [NT 369-371]
  57. The District's director of special education nevertheless testified that it is his belief that Student met the requirements for graduation. [NT 467, 486]

58. The District's special education coordinator acknowledged that the District treated Student as a special education student in awarding a diploma. [NT 350]
59. The District's School Board Policy and Student Handbook do not have separate sections related to special education students. [NT 471]
60. Despite the settlement agreement's having provided for the possibility of placement discussions for 2010-2011, and despite the District's having brought up the possibility of dual enrollment at the April 19<sup>th</sup> IEP team meeting, and despite the director of special education's finding it clear that the Parents were intending to pursue due process, the District did not prepare or propose an individualized education program for Student for 2010-2011. [NT 481]
61. The NOREP dated May 17, 2010 that indicated the intent to graduate Student did not list dual enrollment or any other option under Options Considered. [NT 361, 481-482; S-7]

Student's Educational Needs:

62. Student testified, acknowledged a lack of coping skills and characterized self as "mak[ing] mountains out of molehills", experiencing anxiety, and at these times feeling compelled to "escape, get away from it, whatever is causing it...which...ends up a lot of times making [Student's] condition worse". [NT 120]
63. The mother testified, and described Student's current needs as coping with transitions, managing temper outbursts (rocking, foot-jiggling, putting head in hands, not looking at another, and getting loud), engaging in social relationships, increasing self-esteem, improving written expression and increasing organizational skills. [NT 32-33]
64. Student's therapist testified, describing that, as anxiety builds, Student shakes leg(s), repeats the same phrase again, and then may progress to overstimulation and self-harm where a "worst case scenario" would include biting self, banging head off the wall, and trying to escape to avoid the situation. [NT 144]
65. The therapist testified that Student continues to experience problems with self regulation, emotional dysregulation, and socialization and requires support in triggered times such as when being presented with lengthy assignments. [NT 156-157]
66. Although Student was ultimately able to complete taking the 11<sup>th</sup> grade PSSA's at Private School, Student became highly anxious and had to discontinue on two separate days.<sup>9</sup> [NT 159, 189-190; S-3]

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<sup>9</sup> The results of the PSSA testing were not yet available at the time of the hearing.

67. The Director of Pupil Services of the Private School testified that she was not aware that the district had graduated Student. She offered her opinion that Student was not ready to attend community college (as suggested by the District) due to deficits in written expression and self advocacy and difficulties with frustration and anxiety. [NT 217, 219]
68. The Director of Pupil Services of the Private School testified, noting that Student still needs support for anger management issues, needs to work on self advocacy skills and self regulation, requires a solid relationship with staff in order to make progress, and has deficits in written expression such that Student is unable to produce written assignments at Student's ability level. [NT 200, 203-205]
69. The Private School representative testified that Student's difficulties with written expression are a trigger for disruptive behaviors, and that self advocacy deficits impact Student's ability to ask for assistance. [NT 186-187]

Private School:

70. Private School is an alternative private school offering a very small setting with a two-to-one student-teacher ratio. Last year there were about 36 students enrolled; in the coming year there will be about 28. [NT 177, 180]
71. Private School serves a diverse population consisting of learning support students, emotional support students, dual-exceptionality [emotional support and gifted] students, and unclassified students privately placed by their families. [NT 177]
72. Private School offers classes from the Remedial level to Honors and Advanced Placement [AP] levels in state-approved curricula for 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> grades. [NT 180]
73. Private School offers a number of different electives. [NT 181]
74. Private School has a school-wide behavioral support program, incorporates individual behavioral plans as needed, provides counseling on an as-needed or fixed basis, and structured socialization on a weekly ["Round Table"] and a monthly ["Night Out"] basis. [NT 177-179]
75. At Private School Student was enrolled in classes over a variety of grade levels including introductory Spanish (a 9<sup>th</sup> grade class) and Chemistry (an 11<sup>th</sup> grade class). Student was able to successfully attend school for the first time since late 10<sup>th</sup> grade and missed only 6 days of school. Student improved peer interaction and has begun to develop friendships. Student has expressed an interest in participating in extracurricular activities. [NT 87-89, 205, 209-210; P10A]
76. Student has been deriving meaningful educational benefit from attendance at Private School. Prior to attending Private School Student was considered by Student's treating psychologist to be in need of residential placement. Since

- attending Private School Student has dramatically decreased self-injurious behaviors. Private School was able to communicate with the treating psychologist when a serious incident arose and was able to de-escalate Student prior to the behavior increasing. Private School provided Student with a safe place to go and access to a counselor. Student is beginning to be able to regain calm and re-engage in the school setting. A limited number of serious behavioral incidents were reported. [NT 69, 146, 148-149, 150-151, 200-202; P-7]
77. The District's special education coordinator acknowledged in testimony that Student was doing well at Private School. [NT 256, 338]
78. Private School's tuition for Student for 2009-2010 was \$30,000 paid in quarterly installments of \$7,500 each. The District received a \$5000 discount. [NT 459, 485]
79. Student believes that Student's year at the private school was "great", "one of my best school years of my school time" because Student "didn't have any problems there", there was "a good connection" with the teachers there, "if I needed help on anything...the teachers were there to help", "it was nice knowing that if I needed to I could stay for after school tutoring", "I guess it's kind of the way the school is run that I just love. I mean it's an hour and ten minute drive away minimum, but I still love going there every school day". [NT 119]
80. Student loves the way the school is run because Student feels that if Student has "a bad day and I have behavioral problems that day, then the next day coming in I'm not looked at as the kid that just flipped out at school. I'm not going to be made fun of or anything. I just go back to school like any other day". [NT 119-120]
81. Student made good grades at Private School. [NT 256, 263; S-3, S-6]
82. Student wants to go to a four-year college and then go on for a doctoral degree. Student wants to go on to do something in science, such as quantum physics or marine biology; Student at least wants to minor in hydrodynamics. [NT 127-128]
83. Student's Full Scale IQ on the WISC-III cited by the District in June 1999 was 137 which is in the Very Superior range.<sup>10</sup> [SD Closing Argument]

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing brought under the IDEA, the burden of persuasion, which is one element of the burden of proof, is properly placed upon the party seeking relief. Schaffer

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<sup>10</sup> As a licensed clinical/school certified psychologist, this hearing officer notes that given an updating of test format and norms to the WISC-IV, and Student's intervening emotional and academic vicissitudes, current IQ results could be somewhat lower but likely would remain at least at the Superior Range.

v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In the instant matter, the evidence was not in equipoise.

Credibility: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.<sup>11</sup> Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. 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). This is a particularly important function, as in many cases the hearing officer level is the forum in which the witnesses will be appearing in person. Credibility will be addressed in the Discussion section below.

### Discussion and Conclusions of Law

This hearing officer will address each of the District's reasons for arguing for dismissal because of lack of hearing officer jurisdiction, as well as the proof put forth by the Parents to support their claims.

1. District's Position: Since Student has satisfied the requirements for graduation and is no longer eligible under IDEA the hearing officer lacks jurisdiction.

Jurisdiction: The federal regulations implementing the IDEA require that school districts provide FAPE to children with qualifying disabilities until the age of twenty-one. 34 C.F.R. § 300.121. This obligation, however, does not apply where the disabled student has "graduated from high school with a regular high school diploma." 34 C.F.R. § 300.122.

The IDEA mandates that a local educational agency must provide parents with written prior notice whenever the local educational agency proposes to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. 20 USC §1415 (b)(3)

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<sup>11</sup> Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Graduation from high school with a regular high school diploma constitutes a change of placement, requiring written prior notice in accordance with §300.503.

Parents have the opportunity to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child [subject to time limitations not applicable in this matter] 20 USC §1415 (b)(6)(A) Whenever a complaint has been received the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency. 20 USC §1415 (f)(1)(A)

This matter involves a change of placement to which the Parents object and about which they are entitled to a due process hearing. The District's reasoning appears to be circular: 'We graduated the child. Therefore the child is no longer eligible under the IDEA. Therefore the IDEA protections wherein the Parents can challenge our graduating the child no longer apply.' The District's Motion to Dismiss on this point is denied.

Merits of the Parents' Case: Graduation from high school with a regular high school diploma constitutes a change of placement, requiring written prior notice in accordance with §300.503. The notice required shall include a description of the action proposed or refused by the agency; an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; sources for parents to contact to obtain assistance in understanding the provisions of this subchapter; a description of other options considered by the IEP Team and the reason why those options were rejected; and a description of the factors that are relevant to the agency's proposal or refusal. 20 USC §1415 (c)(1)

In deciding whether to graduate a student an LEA must consider the student's progress in his/her IEP goals in making the determination. 34 C.F.R. 300.102(a)(3)(i) To graduate a student with a disability under the IDEA, the student must meet the general graduation requirements and make progress on or complete the IEP goals and objectives. Chuhran v. Walled Lake Consol. Sch., 839 F.Supp. 465, 474 (E.D.Mich.1993), *aff'd*, 51 F.3d 271 (6th Cir.1995). Automatic grade promotion does not necessarily mean that the disabled child received a FAPE or is required to be graduated. *See, e.g., Rowley*, 458 U.S. 203, n. 25.

This matter concerns a dispute about the District's having proposed to change [and subsequently unilaterally changing] the educational placement of Student from continuing eligibility for special education services to graduation against the Parents' wishes. Though there seem to be no Pennsylvania cases directly on point with the facts

articulated in this matter, there is some authority for allowing parents to keep a child with a disability in school in accordance with the child receiving a FAPE past a district's determination that the child has graduated. In Susquehanna Township School District v. Frances J., the Commonwealth Court of Pennsylvania heard a case involving whether a school district could graduate an IDEA-eligible child despite an objection from the child's parents. In that case, the parents objected to the school district's decision to graduate the child alleging that the school district had never provided the appropriate services detailed in the student's IEP. At the due process hearing over this dispute, the parents claimed "that the District never provided the transitional services specified in the 2001 IEP." Susquehanna Township School District, 823 A.2d 249, 251 (2003). The District countered by arguing that the student had fulfilled the district's graduation requirements. The Hearing Officer determined that the Student had graduated and that the District had therefore fulfilled the obligations of providing the Student with a FAPE. Upon review of the case, the Appeals Review Panel reversed the Hearing Officer's decision determining that the services detailed in the 2001 IEP had not been provided and awarded the student compensatory education. The Commonwealth Court then heard the case upon review. Upon this review, the court stated, "Although the Hearing Officer did not expressly determine whether the District provided the transitional services specified in the 2001 IEP, we believe that a proper resolution of that issue is essential in determining whether [Student] had 'legally' graduated, thereby terminating the District's obligation to provide FAPE under the IDEA." *Id.* at 254. The court went on to say, "...regulations...pertaining to...graduation requirements provide in pertinent part that 'children with disabilities who satisfactorily complete a special education program developed by an IEP team under the IDEA and this part shall be granted and issued a regular high school diploma by the school district...'" *Id.* at 254 (quoting 22 Pa. Code § 4.24(e)). The court then set out the standard by which the determination of "legal" graduation must be made. The court stated, "Pursuant to 22 Pa. Code § 4.24(e), in order to graduate, a child with a disability must satisfactorily complete a program developed by an IEP team under the IDEA. Therefore, this court believes that in order for [Student] to graduate, there must be determination that the 2001 IEP was fully implemented, including the implementation of the planned transitional services. This determination must be in addition to whether [Student] had obtained the necessary credits for graduation." *Id.* at 255. The court found that although the student had fulfilled the standard graduation requirements, the IEP had not been fully implemented. Therefore, in that case, the student was not "legally" graduated and was still entitled to a FAPE under the IDEA.

From another Circuit, and therefore not binding, but nevertheless more directly on point, Kevin T v. Elmhurst Community School District, 2002 U.S. Dist. LEXIS 4645, 2002 WL 433061 (N.D. Ill 2002) is instructive. The court heard an appeal of the decision of a hearing officer who affirmed a district's decision to unilaterally graduate a 19-year-old student with emotional disturbance and ADHD against the wishes of the student and his parents. After not meeting success in public school the student was placed in a private school where he improved his performance. Despite the student's improved performance at the private school and his lack of academic achievement prior to that time, the District decided to unilaterally graduate him from high school against his wishes and those of his

parents. The District contended that the student should be graduated because he had completed enough credits to graduate from high school. The Court found that the District's decision to graduate Kevin was based on his accumulation of required credits and not based on his progress on his IEP goals and objectives. The Court found that the District focused on whether the student was passing his courses so that he would have sufficient credits to graduate. Witnesses called for the District testified that in making the determination to graduate Kevin, the IEP team reviewed his grades, credit hours, and transition plan but not Kevin's IEP goals and objectives. Moreover the student's 2000 IEP stated that the District recommended that Kevin graduate in June 2000 because he "will have completed all the required credits for graduation ... by the end of the current semester." The Court found that the District did not assess whether the Student made any progress on or completed his IEP goals and objectives, and thus, inappropriately graduated Kevin. The Court reversed the IHO's decision that had affirmed the district's decision to unilaterally graduate Kevin. Additionally, because the District inappropriately graduated Kevin, the Court ordered the District reimburse the parents for the reasonable expenses incurred at the private school after the District stopped its funding of Kevin's education and before the Court entered a stay put order.

We turn now to the instant matter. No clarity was offered as to exactly when or how or by whom the District determined that Student should graduate based on credits awarded and "progress towards graduation" rather than on readiness to graduate or progress related to IEP goals. The District's special education coordinator, who acted in this case from February 2010 to the third week in May 2010, appears to have been the person who finalized the credit calculations begun by her predecessor, but she is unlikely to have the power to have made the decision to graduate Student unilaterally. Her testimony was instructive in some regards but given her lack of a substantial body of direct knowledge was given little weight. The District's director of special education may have made the decision to graduate Student but his testimony was evasive and his reasoning was unclear as he frequently referenced the settlement agreement even when the reference was not on point. What is crystal clear however is that the District, in the absence of active participation by an IEP team that should have included the Parents and the Private School, determined that it would graduate Student based on credits alone, as confirmed on the record by District counsel, "It is not the district's position as to readiness. It's the district's position as to credits achieved." [NT 157]

The District decided that during the 2008-2009 school year, combined with previous credits and credits from Private School, Student had earned sufficient credits for graduation. Although the District's guidance counselor testified credibly to how courses can be "doubled up" if Students wish or need to do so, in Student's case this doubling up was done by the District with no apparent consultation or input from the homebound instructor and with absolutely no consultation or input from Student or the Parents. Although the District's basis for awarding credits for 2008-2009 is flimsy at best, whether or not Student earned enough credits to graduate and become ineligible for special education services is moot. Despite the District's mantra that Student was awarded credits therefore Student graduated on credits, credits alone do not constitute appropriate graduation for this Student.



Notably the District seems to have glided over, or gilded over, its own School Board's requirements for granting a diploma to students. Without benefit of any discussion with a team, the District's special education coordinator alone or in concert with the special education director waived specific requirements for a cumulative project, community service, and successful completion of the 11<sup>th</sup> grade PSSA or an alternative examination.

On April 19, 2010 the District convened an IEP team meeting during which the director of special education sought from the representative(s) of Private School only a Yes or No answer to the question, "Has Student made progress toward graduation?" This language mirrors the settlement agreement which provides that the placement in Private School is "contingent upon the Student's making academic progress toward graduation". However, while the form of the question is clear, requiring a Yes or No answer is analogous to the hackneyed question "Have you stopped beating your wife?" If the Private School answered No, it could be determined that the placement was inappropriate. When the Private School representatives candidly answered Yes, the District rapidly concluded that "progress toward graduation" constituted appropriateness for graduation and promptly informed the Parents of its intent to graduate Student. The language of the settlement agreement at Section 1) b is somewhat obscure. "The placement and payment by the District is contingent upon the Student's making academic progress toward graduation". This is followed by "The determination of academic progress toward graduation, including consistent attendance, will be made solely by the appropriate [Private School] personnel." On April 19<sup>th</sup>, after requiring a Yes or No answer of the Private School regarding "progress toward graduation", the director of special education concluded that Student should graduate. The plain language of "progress toward" an endpoint does not mean that the endpoint is reached. "Progress toward" means moving in a positive direction vis a vis an endpoint as in "I have made progress toward writing my decision" and does not mean that I have finished writing my decision. The most logical interpretation of the provision in Section 1) b is that it rightfully protects the District from uselessly expending tuition funds for a placement in which the high school Student is not *making progress toward* the ultimate goal of graduation.

I find that the District inappropriately graduated Student from high school. As Student has not appropriately graduated Student remains eligible for FAPE.

2. District's Position. The District argues that the Parents are bound by the terms of the settlement agreement entered into between themselves and the District and therefore this hearing officer lacks jurisdiction to award the remedy sought by the Parents.

Jurisdiction: Under 20 USC §1415 (b)(6)(A) this hearing officer has jurisdiction over disputes regarding the "educational placement of the child, or the provision of a free appropriate public education to such child" and further the September 8, 2009 settlement agreement provides, that "[n]othing in this agreement shall be construed to limit the rights of either party to raise any issue regarding the student's educational placement for the 2010-2011 or any subsequent year pursuant to the IDEA and supporting regulations."

For these reasons the District's Motion to Dismiss on jurisdictional grounds is denied.

Merits of the Parents' Position: The District cites Section 2 of the settlement agreement, "In the event the Student no longer attends [Private School] for any reason, the parties agree that the pendent placement is the District's partial hospitalization program or, in the alternative, a full time emotional support placement in the event that there is no space available in the partial hospitalization program. The Parents agree that under no circumstances does pendency attach to [Private School]."

First, it is not the case that Student "no longer attends Private School". Although Private School is not in session because of summer break, Student has not disenrolled from Private School. If the District bases its contention that Student "no longer attends" on the basis of its having graduated Student, this argument fails as the graduation was inappropriate. Second, although this hearing officer agrees that the settlement agreement is clear that pendency does not attach to Private School, it is not at all clear that the pendent placement(s) that are provided for in the settlement agreement are appropriate for Student one year later in the 2010-2011 school year. Back in September 2009, when Student's therapist was recommending that Student be considered for residential placement, a partial hospitalization program or a full time emotional support program made sense should the Private School placement fail. It is questionable at this time, considering Student's progress in Private School, that partial psychiatric hospitalization is medically necessary particularly in light of there being no recent evaluation. Likewise, there is no evidence that a full time emotional support program "in the event that there is no space available in the partial hospitalization program" is an appropriate placement for Student.

3. The District argues that the Parents have not complied with the requirements of IDEA necessary for an award of private tuition, and therefore this hearing officer lacks jurisdiction to award the remedy sought, placement in a particular private school.

Jurisdiction: 20 U.S.C. § 1415(i)(2)(C)(iii), gives courts and extension hearing officers broad authority to grant "appropriate" relief, including reimbursement for the cost of private special education when a school district fails to provide a FAPE. Section 1412(a)(10)(C)(ii) provides that a "court or hearing officer may require [a public] agency to reimburse the parents for the cost of [private-school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available" and the child has "previously received special education and related services under the authority of [the] agency."

Although a hearing officer's determination of whether a child received FAPE must be based on substantive grounds, a hearing officer may also find a denial of FAPE on procedural grounds, but only if the procedural inadequacies impeded the child's right to a free appropriate public education; significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or caused a deprivation of educational benefits. 20 USC §1415(f)(3)(E)(ii)(I-III), 34 CFR §300.513.

For the reasons cited above, and on the merits of the Parents' case addressed below, this hearing officer finds that it is well within her jurisdiction to award the relief the Parents request as the Parents did comply with the requirements of the IDEA for an award of private tuition and as the District failed to provide Student FAPE on procedural and substantive grounds. The District's Motion to Dismiss on this point is denied.

Merits of the Parents' Case: 20 USC § 1412(a)(10)(C)(iii) discusses circumstances under which the "cost of reimbursement described in clause (ii) may be reduced or denied," as when a parent fails to give 10 days' notice before removing a child from public school or refuses to make a child available for evaluation.

In its closing argument the District argues that the Parents are not entitled to an award of private school tuition because they did not send the District a letter ten days in advance of their intention to place Student unilaterally in Private School and/or seek tuition reimbursement on a denial of FAPE. The argument as to the first factor is disingenuous. At the conclusion of the April 19<sup>th</sup> IEP team meeting the District's director of special education was clear that the parents did not approve of graduating Student, wanted Student to remain at Private School and intended to file for due process. A mere three days later, on April 22<sup>nd</sup>, the Parents through counsel filed their due process complaint. The due process complaint serves as the ten day prior notice and fulfills the letter as well as the intent of the IDEA.

By graduating Student without convening an IEP team to *thoroughly discuss* a contemplated change in educational placement for Student, and then by unilaterally carrying through with the change in educational placement, the District committed a serious procedural violation that impeded the child's right to a free appropriate public education and significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to Student. The first violation, impeding Student's right to a free appropriate public education, has been addressed above. We now turn to the second violation, in which the District significantly impeded the Parents' opportunity to participate in the *decision making* process regarding the provision of FAPE to Student.

During the pendency of any due process proceedings, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child. 20 USC §1415 (j) Special education is a program and not necessarily a physical place. Not only did the District fail to provide prior written notice to the Parents of its intent to unilaterally graduate Student, by preparing a graduation NOREP on May 17<sup>th</sup>, *nearly one month after the Parents had already filed for due process*, the District violated the pendency provisions of the IDEA. Given that Parents were challenging graduation and Student's consequent loss of eligibility for special education, the District's preparing a graduation NOREP in May anyway *and then actually publicly "graduating" Student in print and by announcement at the ceremony in June* was a serious procedural violation of the IDEA's pendency provision. In this matter, pendency attached to Student's continued eligibility rather than

to the physical placement.

The District erred on substantive as well as procedural grounds. Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004).

Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26

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 child progress; provided in conformity with an Individualized Educational Program (IEP). 20 U.S.C. §1401(9); 34 C.F.R. §300.17 In addition to the other IEP requirements in IDEA, if a child’s behavior impedes his/her educational progress, the school district must develop a behavior program that assists in 1) eliminating the inappropriate behaviors and 2) develops good behaviors. 20 U.S.C. 1414(d)(3)(B).

In addition to the IDEA requirements incorporated by reference (see 34 CFR 300.320—300.324) 22 Pa. Code § 14.131 offers *additional* considerations an IEP team must entertain for the specific needs of students with various types of disabilities, and the Pennsylvania statute makes it clear that special education programming for students with autism goes beyond academics and must encompass behavioral and social skills and provide “[s]ervices for students with the disability of autism who require services to address needs primarily in the areas of communication, social skills or behaviors consistent with those of autism spectrum disorders. The IEP for these students must address needs as identified by the team which may include, as appropriate, the verbal and nonverbal communication needs of the child; social interaction skills and proficiencies; the child’s response to sensory experiences and changes in the environment, daily routine and schedules; and, the need for positive behavior supports or behavioral interventions”.

The District’s focused intent to graduate Student based on academic credits alone, and not on readiness for graduation or sufficient progress toward behavioral and social skills ignores this Commonwealth’s vision for autistic students. Student continues to have skill deficits and behavioral and emotional difficulties which interfere with educational

progress and can be expected to interfere substantially when Student accesses post-secondary education. Even in the one-to-one homebound setting, with an empathic teacher who established good rapport, Student's disabilities forced instruction below Student's cognitive potential. In its closing argument, the District argues, and does so rightfully and empathically, that Student's disability will never be cured and will not go away. However, this is true of most, if not all, of the serious disabilities borne by children embraced by the IDEA. The only absolute limit (barring a compensatory education award) to a District's responsibility to provide an appropriate education that can result in independence and self-sufficiency is the child's reaching age 21 – up until that point, the child is entitled to continue to be afforded the chance to make educational progress – which in the case of autistic students includes emotional and behavioral progress. There are particular circumstances that can end a child's entitlement to FAPE, but a precipitous graduation based solely on accumulation of credits is not one of them.

Student is very bright and has aspirations to attend a four-year college and access graduate studies in science. In order to be prepared to succeed, a carefully planned and thoroughly implemented transition plan is essential. The IDEA places significant emphasis on preparing students to transition from the free appropriate public education they receive during their period of eligibility to post-secondary life. The IDEA insists on transition planning that a) is designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; b) is based upon the individual student's needs, taking into account the student's preferences and interests; and that c) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation. Not only did the District not consider Student's entitlement to continued eligibility on academic and behavioral grounds, it ignored Student's need for solid transition planning.

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) 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. This analysis remains the reimbursement standard some 17 years later.

The District attempted to rush Student out the door of Private School and out the door of its District rolls. In its haste, it did not protect itself and certainly did not protect Student. The District appears to have been so certain that its unilateral change of placement on credits alone would stand, such that it no longer needed to offer FAPE, that it failed to have a back-up plan – it failed to offer an IEP to Student, or in fact to make any formal offer of an appropriate educational program even when it knew the Parents were challenging the graduation decision. By sticking steadfastly to its plan to graduate

Student, despite the Parents' filing a due process complaint, the District conceded the first prong of *Carter* to the Parents. The District may argue that it did not offer an inappropriate IEP as it offered no IEP at all. This must fail as it bears close resemblance to a recent Supreme Court case.

In *Forest Grove School District v. T.A.*, \_ U.S. \_, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009) our United States Supreme Court addressed the issue of "no IEP" and wrote:

This Court held in *Burlington* and *Florence County School Dist. Four v. Carter*, (citation omitted) that § 1415(i)(2)(C)(iii) authorizes courts to reimburse parents for the cost of private-school tuition when a school district fails to provide a child a FAPE and the private-school placement is appropriate. That *Burlington* and *Carter* involved the deficiency of a proposed IEP does not distinguish this case, nor does the fact that the children in *Burlington* and *Carter* had previously received special-education services; the Court's decision in those cases depended on the Act's language and purpose rather than the particular facts involved.

The dispute giving rise to the present litigation differs from those in *Burlington* and *Carter* in that it concerns not the adequacy of a proposed IEP but the School District's failure to provide an IEP at all...[W]hen a child requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.

Clause (i)'s safe harbor explicitly bars reimbursement only when a school district makes a FAPE available by correctly identifying a child as having a disability and proposing an IEP adequate to meet the child's needs. The clause says nothing about the availability of reimbursement when a school district fails to provide a FAPE. Indeed, its statement that reimbursement *is not* authorized when a school district provides a FAPE could be read to indicate that reimbursement *is* authorized when a school district does not fulfill that obligation.

Clause (ii) likewise does not support the District's position. Because that clause is phrased permissively, stating only that courts "may require" reimbursement in those circumstances, it does not foreclose reimbursement awards in other circumstances. Together with clauses (iii) and (iv), clause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a FAPE by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child's parents believe those services are inadequate.

Indeed, by immunizing a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need, the School District's interpretation of § 1412(a)(10)(C) would produce a rule bordering on the irrational. **It would be particularly strange for the Act to provide a remedy, as**

**all agree it does, when a school district offers a child inadequate special-education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether.** [Emphasis added]

As to the first prong of Carter, the District failed to offer Student an appropriate program and placement.

With regard to Carter's second prong, the evidence is substantial and persuasive that Private School offers Student an appropriate educational program and placement. It offers small class size, staff knowledgeable about Student's disability, a track record of working successfully with Student, and has been the first successful placement for Student in several years. The witness from Private School provided very credible testimony regarding Student's successful functioning in that setting, along with significant information about what Student continues to require. Her testimony was complemented by that of Student's psychologist who offered credible facts concerning Student's functioning prior to attending Private School and while attending Private School, and persuasive reasons as to Student's continued need for high school education.

The third prong of Carter requires a balancing of the equities. The mother's testimony was entirely credible and was provided without evasion or embellishment. Where her testimony conflicted with that of District witnesses, particularly with regard to receipt of documents such as the May NOREP or graduation materials, this hearing officer finds that her account of facts is entitled to considerably more deference than accounts provided by the District's administrators, neither of whom was in command of details. The District contends that the Parents seek to violate the settlement agreement. For the reasons explained above, in detail, this hearing officer does not so find. Rather the District committed procedural and substantive violations, inappropriately cloaking itself in the settlement agreement which, unfortunately, it draped askew. There are no equitable considerations that remove or reduce the District's obligation to fund Student's placement at Private School for the 2010-2011 school year.

This hearing officer rejects the District's Motion to Dismiss on grounds that the Parents did not meet their burden of proof. To the contrary, by providing credible and persuasive evidence, the Parents have met their burden of proof in all respects and I find in their favor in this matter.

## Order

It is hereby ordered that:

1. The District's unilateral graduation of Student is not appropriate.
2. Student remains entitled to FAPE.
3. The District has failed to provide an appropriate program and placement for Student for the 2010-2011 school year.
4. The Private School is an appropriate placement for Student.
5. Equitable considerations do not remove or reduce the District's responsibility for Student's tuition and transportation.
6. The District must pay for Student's tuition at Private School for the 2010-2011 school year.
7. The District must provide transportation for Student from home to the school and back.
8. No later than September 15, 2010 the District must convene an IEP team consisting of the Parents, the Student, knowledgeable District personnel, and personnel from Private School. The IEP team shall address academic and behavioral goals for Student and shall create a detailed transition plan for Student; the IEP shall be implemented in Private School with the District's cooperation and collaboration.

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

August 15, 2010

Date

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

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