

This is a redacted version of the original hearing officer decision. Select details may 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: EK
ODR #9528/08-09 KE

Date of Birth:
Xx/xx/xx

Dates of Hearing:
February 20, 2009
April 21, 2009
May 1, 2009
May 18, 2009

CLOSED HEARING

Parties to the Hearing:
Ms.

Warwick School District
301 W. Orange Street
Lititz, Pennsylvania 17543

Representative:
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Date Record Closed: June 9, 2009
Date of Decision: June 21, 2009
Hearing Officer: Linda M. Valentini, Psy.D.

Background

Student is an eligible late-teen-aged student with the disability classification of Other Health Impaired due to reported Attention Deficit Hyperactivity Disorder. Student has a long history of drug addiction. Student's mother, Ms. (hereinafter Parent) lives in the Warwick School District (hereinafter District). Along with attending schools in the District Student has been enrolled in two religiously-affiliated schools. In February 2009 the Parent unilaterally placed Student at [private out-of-state residential school] (hereinafter School), a residential school in [city and state redacted] after disapproving the District's offer of an alternative educational placement at [redacted offered placement] (hereinafter Offered Placement) for the 2008-2009 school year.

The Parent requested this hearing, asserting that the District had failed to timely identify Student as a student who was eligible for special education in November 2006 and that Student was therefore entitled to compensatory education. The Parent also asserts that the placement the District offered for the 2008-2009 school year was inappropriate for Student and that therefore tuition reimbursement for the private placement is warranted. The District asserts that it timely identified Student in August 2008, that its proposed placement was appropriate, and that tuition reimbursement is not warranted.

Issues

Did the Warwick School District deny Student a free, appropriate public education (FAPE) from December 5, 2006 to December 5, 2008 through a failure to appropriately evaluate Student in November 2006¹, thereby declaring Student ineligible and failing in its Child Find obligation?

If the Warwick School District denied Student a free, appropriate public education, is Student entitled to compensatory education, in what form and in what amount?

Did the Warwick School District fail to provide or offer an appropriate program and placement for Student for the 2008-2009 school year?

If the Warwick School District failed to provide or offer an appropriate program and placement for Student for the 2008-2009 school year, was the placement unilaterally chosen by Student's mother appropriate?

If the Warwick School District failed to provide or offer an appropriate program and placement for Student, and the placement unilaterally chosen by Student's mother, was appropriate, are there equitable considerations that would remove or reduce the District's obligation for tuition reimbursement?

¹ Over the objection of the District, the hearing officer included consideration of the November 2006 evaluation in her Decision, although it was just outside the two-year timelines, since subsequent District programming during the timeframe that does fall within the statutory limits was based upon this evaluation up until the time of re-evaluation in August 2008. (NT 35-36)

Findings of Fact

1. Student is a late-teen-aged eligible student whose mother resides in the Warwick School District. Student was first enrolled in the District from kindergarten until the end of the 2004-2005 school year. (S-1)
2. Academically in the District Student achieved grades in the A to C range, was consistently on grade level for reading and math, but displayed a lack of self control, difficulty following direction, difficulty using time wisely and lack of preparation. In 4th grade Student was referred to the Instructional Support Team because of behavior, social and time management issues. (S-1)
3. In 5th grade things went more smoothly. The Parent planned to enroll Student in private school for 6th grade (2003-2004) but Student's acceptance was revoked for reasons not in the record and Student remained in the District for that school year as well as the following school year. During the 6th grade year Student's parents divorced; after he left the home the father drank heavily and did not spend much quality time with Student although Student had been very close to him. Student began cutting self, and Student's mother enrolled Student in outpatient therapy. (S-3, S-9, P-5)
4. Student began using drugs during the 2004-2005 school year when Student was 12 years old and in the 7th grade.² (NT 246; S-3, P-3, P 13)
5. Student's grades remained in the A to C range in 7th grade, and Student's teachers found Student enjoyable to have in class but negligent in work completion. However, toward the end of the year Student was skipping classes and smoking cigarettes, and was suspended for illegal possession of ibuprofen and a cigarette lighter. Neither Student's mother nor District staff, nor apparently Student's private therapist, suspected that Student was abusing drugs. At some point Student switched therapists. Student was withdrawn from the District at the end of the 2004-2005 school year. (NT 246, 262; S-1, P-5, P-7, P-13)
6. Over the years group achievement testing revealed low average to average percentile rankings (Reading 52nd percentile to 87th percentile, Mathematics 19th percentile to 66th percentile, Language 43rd percentile to 90th percentile). (S-3)

² At the beginning of Student's 9th grade year when the Parent filled out responses to the CBCL, she wrote, "Student has admitted to smoking pot a few times". When Student filled out the Youth Self Report version of the CBCL in the same time frame, Student endorsed the item "I use drugs for non-medical purposes (not including cigarettes/alcohol)" at level "2" on a scale of 0 to 2; "2" is described as "very true or often true". (P-3)

7. In 7th grade Student was diagnosed with Attention Deficit Hyperactivity Disorder and prescribed Adderall. (S-3, P-3)
8. For the 2005-2006 school year Student enrolled in the 8th grade at [redacted] Middle School, because the Parent was seeking a smaller educational environment for Student. Student's grades ranged from As to Ds. (NT 645; S-1, P-10, P-14)
9. Because of physical fighting with another student, Student was asked to leave Middle School in the spring of 2006, and was subsequently placed in the [redacted] Partial Hospitalization program from April 19 through May 5, 2006. The Parent reenrolled Student in the District. (NT 230-231, 640, 645-646; P-3, P-14)
10. After discharge from Philhaven, Student received a period of homebound instruction through the District and continued to be seen in outpatient therapy. At about that time at the informal suggestion of a District employee with whom she had worked the Parent requested that the District perform an evaluation of Student. (NT 161, 183-185; S-2, P-12, P-14)
11. Student remained enrolled in the District as a 9th grade student as of September 2006, and pursuant to a Permission to Evaluate signed on September 27, 2006³ the District produced its evaluation on November 1, 2006. (S-3)
12. The evaluation consisted of detailed background information provided by the Parent, present levels of academic achievement provided by each of Student's teachers, classroom observation, testing with standardized instruments (cognitive, WISC-IV; achievement, WIAT-II; behavior, CBCL Teacher Form, Parent Form, and Youth Self-Report). (S-3)
13. Student's teachers reported variable functioning: Earth Science grades were in failure range due to low homework completion, low work quality and low test preparation; Physical Education participation was sub-par with failing grades and excessive socialization with peers; Algebra grade was a B- with homework completion, work quality and quiz scores in the mid-eighties and test average in the high-nineties; History grade was a D, with 0% homework completion and 68% quiz scores; English grades were in failure range, with incomplete or missing assignments and poor quiz grades; German grade was failing with poor homework completion and poor test/quiz grades, but average work quality when it was done. (S-3)

³ The record is silent as to when the Parent made a formal written request for an evaluation and/or why the PTE was not issued until late September. The PTE references "email sent April 13, 2006" but this email is not in evidence. Also, the PTE is dated September 28, 2006 but the Parent's signature is dated September 27, 2006. (P-3)

14. On the WISC-IV Student's cognitive functioning was average (FS IQ 101), with high average working memory (116), average verbal (102) and perceptual reasoning (100), and low average processing speed (83). Of particular interest given Student's diagnosis of ADHD was Digit Span, a test requiring listening and remembering. Student's Digit Span subtest score was 15 on a continuum where the mean score is 10. In contrast, on tasks requiring visual scanning and a grapho-motor (paper and pencil) response Student's subtest scores were 7/6, again with the range mean being 10. (S-3, P-3)
15. Student's Reading, Mathematics, and Written Language scores on the WIAT-II were all in the average range (27th to 68th percentiles) and there was no discrepancy between any score and Student's cognitive scores. Based on these scores, Student's essential skills acquisition through instruction in the regular education curriculum was found to be adequate, in spite of Student's poor classroom performance. (S-3)
16. Behavior rating scales completed by Student, five teachers, and Student's mother were interesting in that on the indexes of Internalizing, Externalizing, and Total Problems, Student's self-report yielded a clinically significant Externalizing score, a non-significant Internalizing score, combining to make a borderline clinically significant Total Score; Student's mother's reports put all three categories into the clinically significant range; and, of the fifteen scores reflecting the teachers' ratings, none were clinically significant and only one score (Internalizing, from the English teacher) was borderline clinically significant. (S-3)
17. These behavior rating scales suggest that Student was functioning well behaviorally and emotionally in school overall but that Student's behaviors at home were out of control. (S-3)
18. Notably Student was described by Student's teachers as respectful towards adults and having a sense of humor. (S-3)
19. The District's evaluation concluded that Student was not a student with a disability who needed specially designed instruction. Student did not meet criteria for a learning disability or an emotional disturbance under the IDEIA. Student was found not to be eligible for special education. (S-3)
20. The District's evaluation did find it significant however that Student had been diagnosed with ADHD, and thus the recommendation was that if the team found that difficulty with sustained attention and organizational skills impacted Student's academic achievement a Service Agreement under Section 504 of the Rehabilitation Act of 1973 could be implemented. (S-3)
21. The Notice of Recommended Educational Placement (NOREP) dated November 15, 2006 noted, "The team has recommended that a 504 Service Agreement be

- developed to allow for accommodations and adaptations in the general education setting based on Student's diagnosis of ADHD". The Parent approved the NOREP on November 27, 2006. (P-4)
22. The Parent agreed with the findings of the evaluation report. Printed notice was given that "a copy of the Procedural Safeguards Notice explaining your rights is available from your child's school". The Parent could not remember if she received a copy of the Procedural Safeguards Notice at the meeting held to discuss the evaluation. (NT 54, 256-257; S-3)
 23. The Parent is a special education teacher who received certification in 1996. Her training included coursework about the IDEA. She has worked for the [LEA redacted] for almost twelve, years. She is now working with the [redacted] program, and has held other positions in learning support, life skills, and the [redacted] program. She has participated in IEP meetings and has been present when parents are given Procedural Safeguard Notices. (NT 50, 54-55)
 24. The District convened a meeting at the end of November 2006 to determine whether or not Student was eligible for a Section 504 Service Plan. The English and the German teachers provided input which the team used to decide whether Student's ADHD was affecting Student in the classroom. The team determination of the specific degree to which Student's condition limited the major life activity of learning was "Negligibly". Student therefore was not given a Section 504 Service Plan. (NT 186-188; S-5)
 25. As of November 2006 Student's behavior, according to the Parent, "was coming to a crisis outside school". Finally, in January/February of the 2006-2007 (9th grade) school year, Student told the mother that Student had a drug problem, and although the Parent, "was shocked", [she] was also very relieved ... because we had put a face or a name to the problem." Student was heavily into drug abuse. (245-246, 258-259, 262)
 26. Student entered the [redacted] Foundation for drug addiction treatment and remained in that program for four months. Foundation staff noted that Student excelled in the IU classroom Student attended while at Foundation. (NT 262-263, 640-641; S-6, S-7)
 27. Foundation staff recommended a change in schools because the students with whom Student abused drugs were enrolled at the District High School, and Student had benefited from a smaller class size and more personalized attention. For the 2007-2008 school year (repeating 9th grade because of time missed for drug rehabilitation) the Parent enrolled Student at [redacted private] High School. (NT 566-567; S-9, P-5, P 14)
 28. However, after a suicide gesture/attempt in late September 2007 Student was placed at [redacted] Hospital, first on an inpatient basis and then in the partial

- hospitalization program. Student was transitioned back to High School, but was removed in late February or early March for sending a threatening message. The Parent reenrolled Student back in the District. (NT 567, 571, 573, 643, 647; P-11)
29. In March 2008 the Parent met with District officials, including a school psychologist who suggested doing another special education evaluation. The Parent initially did not give her permission for the District to evaluate Student because she was planning to withdraw Student from school entirely. (NT 578, 593-594)
 30. The District provided homebound instruction through the end of the 2007-2008 school year. The homebound teacher found Student to be “bright and manipulative”, having drawn “battle lines” between self and the rest of the world. The Parent was in agreement with this characterization of Student’s interactions with the world. (NT 584-585)
 31. During the period when Student was receiving homebound instruction, Student received Family Based Services (FBS) through the mental health system. At the conclusion of FBS the team recommended a transition to “wraparound” services but although she was aware of all the options, not just TSS,⁴ the Parent did not access these services through the mental health system because she believed that Student would not agree to them. (NT 587-588)
 32. Also during the period Student was receiving, but not cooperating with, homebound instruction, Student received private outpatient therapy which the therapist terminated because the treatment “was not going anywhere” and attended a drug and alcohol counseling group which the counselor told Student Student had to leave because of Student’s poor level of cooperation. Student was not buying into any of the services Student was receiving through the educational, the mental health or the drug addiction rehabilitation system. (NT 590-91.)
 33. Feeling that the homebound instruction was not working, and learning that Student’s private therapist and drug addictions group counselor believed that their services were not working, the Parent attempted to follow through with the plan she had made in March 2008 to withdraw Student from school altogether, but learned she could not because Student was only 16 and therefore would have needed to show proof of having full-time (40 hours per week) employment. (NT 585-586, 592-593)

⁴ “Wraparound” services are Behavioral Health Rehabilitative Services (BHRS) available provided medical necessity exists to individuals up to the 21st birthday and include: Behavior Specialist Consultant services (BSC) involving analysis of the triggers and functions of behaviors, design of a behavior modification program in the form of a treatment plan to be implemented across all settings in which the individual participates, teaching the adults how to implement the plan, and monitoring the implementation of the plan with revisions as needed; Mobile Therapy services (MT) both individual and/or family carried out in the home setting; and Therapeutic Staff Support services (TSS) involving one-to-one assistance in the school, home or community settings. Medical Assistance Bulletin, January 1, 1994

34. The Parent then gave the District permission to evaluate Student and the written report was available on August 28, 2008. New information in the August 2008 evaluation that was not available or reported at the time of the November 2006 evaluation was Student's drug addiction, that the family constellation now included a step-father, that at age fifteen Student had been diagnosed with Type I diabetes, and that Student had repeated 9th grade due to time spent in drug addiction rehabilitation. (S-9, P-5)
35. The evaluation was conducted by a psychologist who is no longer with the District. It was reported that the Parent did not believe that Student's academic issues were due to family problems, among other discounted possibilities, but that the Parent did believe that "a combination of social problems, depression and drug/alcohol abuse" were contributory. The evaluation finding was that Student has an "other health impairment" based upon ADHD; the school psychologist did not assign another classification to Student. The Parent was in agreement with the District evaluation which was discussed at a meeting on September 1, 2008.⁵ (NT 525-526, 592-593, 596; S-9, P-5)
36. As of August 2008, according to Student's consulting psychiatrist Student was "staying out all night, sneaking out when grounded, not following house rules, and was against using [psychotropic] drugs. Student was not taking Student's bedtime insulin ... and was openly defiant to mother. Mother felt helpless and hopeless". The Parent concurred with this report. (NT 672; P 13)
37. At the IEP meeting on October 1, 2008 the District learned that the Parent had decided that she was placing Student back into drug addiction rehabilitation treatment.⁶ The District therefore planned to meet with the Parent and continue refining the IEP when Student was near to being discharged from inpatient drug addiction treatment. On October 2, 2008 before receiving the first draft of the IEP, the Parent disapproved the NOREP for initial placement in special education, writing "I do not feel the public school setting is appropriate for Student". She "thought [she] had made it very clear to them that a public school setting was not going to work for Student". (NT 604, 697-699, 759; P-6)
38. On September 29, 2008 Student had been taken to the emergency room for a few hours for a suicide risk assessment. The ER had arranged with [redacted], an inpatient substance abuse rehabilitation center, to call the family the next day to arrange for admission. (NT 600, 648-649; P 14)
39. However, the Parent did not choose to send Student to the [redacted] facility on September 30, 2008 because the Parent had "heard not very good things" about it. She was put in touch with and had a consultation session with an individual who "does interventions and places people in rehabs" who helped her find [redacted], a

⁵ The appropriateness of the District's August 2008 evaluation was not an issue in this hearing. (NT 770)

⁶ Also Student had stolen money from the home and the Parent was considering pressing charges. (NT 601.)

- facility she preferred, but to which Student was not admitted until October 13, 2008. (NT 609-612; P-14)
40. This individual also suggested that the Parent consider a residential placement and he located School. As of October 23, 2008 the Parent had arranged a campus visit to the School, and emailed the District asking for a copy of Student's IEP that she needed by the following day. She found School to be "perfect" for Student. (NT 602, 610-611; P-16)
41. Student remained at [the short term inpatient drug addiction treatment facility] for "treatment of Student's chemical dependency" until November 9, 2008. Upon Student's discharge, facility staff recommended an alternative school setting rather than "the stress of a mainstream school setting" and the staff also recommended other safeguards such as refraining from drug use, avoiding places associated with drug use, and attending AA/NA meetings. (NT 698-699, 701, 703; P-14)
42. As had been planned at the October 1, 2008 IEP meeting, a follow-up IEP meeting was held on November 5, 2008. As Student did not attend that meeting, and with the District wanting Student to attend and participate, another meeting was scheduled for November 19, 2008 following Student's discharge from the facility. Student did not attend the November 19, 2008 meeting. At this meeting the District made some changes to the IEP with which the Parent agreed. A fourth IEP meeting was convened on December 1, 2008. (NT 609, 616-617, 704-705)
43. The December 1, 2008 IEP notes "needs related to student's disability" as organizational skills, study skills, work completion, math, reading comprehension, and written expression. The IEP contains goals in the academic areas of vocabulary, spelling, written expression, reading comprehension and math. The December 1, 2008 IEP contains organizational/behavioral goals related to following school rules, using appropriate problem-solving strategies and skills, improving social skills and enhancing coping skills.⁷ (P-6 pages 28-49)
44. The December 1, 2008 IEP contains specially designed instruction and related services through a positive behavior support plan, regularly scheduled counseling, access to additional counseling as needed, and social skills instruction.⁸ (P-6 pages 28-49)
45. The final IEP revision was completed on December 1, 2008 with the District's intent that if Student were enrolled at its proposed placement, the IEP team would

⁷ Although the Parent spent considerable time during her case in chief criticizing the IEP, this case was really about the Parent's desire for a residential setting to address Student's drug addiction and out-of-control home behaviors.

⁸ See above footnote.

- have called in Proposed Placement staff to further revise the IEP to complement the details of the setting. (NT 726-727; P-6 pages 28-49)
46. The NOREP following the December 1, 2008 IEP meeting offered full-time emotional support services in a public school environment, referring to Proposed Placement. The Parent disapproved the NOREP on December 9, 2008, asserting, "This placement does not provide the level of therapeutic support Student needs at this time and does not provide general ed academics/credits needed to apply for college after graduation". The Parent elected to continue homebound instruction and filed for a due process hearing. (NT 717; P 6)
 47. At the December 1st IEP meeting the District offered to provide homebound instruction as Student had been released from drug rehabilitation on November 19th. Homebound instruction began on December 10th.⁹ The District approved five hours per week, and stated the intention to make up hours that were missed from the beginning of the school year.¹⁰ As there was no approved IEP and no approved NOREP the homebound was provided as it would have been to a regular education student. (NT 623-624; P-16)
 48. On December 31, 2008 the District again offered Proposed Placement for Student when school reopened after the winter break, and extended the alternate option of Student attending Warwick High School. Student was at home pending acceptance into School. (NT 716, S-12)
 49. Student's consulting psychiatrist performed an evaluation that was, "not an evaluation for purposes of educational issues. It [was] a psychiatric evaluation for treatment purposes." The psychiatrist does not do educational evaluations in her current practice, and does not review reports from schools. She had not read Student's school evaluations or school records, and did not formally diagnose Student with ADHD in her report. (NT 109, 121, 133)
 50. The consulting psychiatrist did not recommend that Student be placed in a residential setting for educational purposes. She has recommended that Student not attend the public school where Student had problems with peers [Warwick High School], that Student attend an alternative school or a nontraditional school such as Lancaster Academy (the Mall School)¹¹ and/or that Student receive homebound instruction. (NT 74-75, 120; P 13)

⁹ The Parent testified that homebound began on December 11th but her email at P-16 page 15 indicates that it started December 10th.

¹⁰ Not directly relevant to the issues, but illustrative of the Parent's wanting her own way and/or blaming the District for Student "sitting home", was her response when she was told the District needed another doctor's note ordering homebound instruction. Mother said that she "was not going to the psychiatrist again to get the homebound script "that made no sense to me at all". The District was going to stop the homebound after the winter break, but did continue for about two more weeks to provide make-up hours under the old script. (NT 625-628; P-16 page 15)

¹¹ The District does not believe the Mall School is appropriate for Student. (NT 720)

51. The consulting psychiatrist only put her recommendation for a residential school into writing after the mother had located and visited the School and only after the mother had filed for a due process hearing. The consulting psychiatrist wrote, "I believe it would be in Student's best interests to be in a residential treatment setting ... Student's relationships with others are unlikely to be appropriate without such interventions ..." The reasons provided by the consulting psychiatrist that a residential treatment center was in Student's best interests did not pertain to Student's IDEA disability (other health impairment by reason of ADHD, a diagnosis which this psychiatrist did not confer) but rather to learn to manage emotions, understand anger, and obtain daily structure including enough supervision. (NT 97-98, 100; P 13)
52. From August to December 2008, Student's illicit drug abuse had worsened. The consulting psychiatrist did not explicitly recommend reentry into a drug treatment program in December because she believed Student would be getting drug abuse treatment in a residential setting fairly quickly. (NT 131-132)
53. Although the consulting psychiatrist noted that "everything else had failed" she does not know and could not answer whether Student is likely to succeed in any other setting than residential. (NT 99-100)
54. Instructionally, the consulting psychiatrist recommended a small class (eight students or fewer) where the adults in the room would be able to notice whether Student was on task and would be able to intervene if Student was not on task or veering off toward unsafe behavior. (NT 114)
55. The District recommended Proposed Placement at the time of the November 19th meeting. The Parent became upset, because "Proposed Placement is a classroom for out-of-control, disruptive, aggressive students, and Student has not demonstrated any of these behaviors in school". (NT 618-619, 710, 718)
56. The District, based upon evaluation by the school psychologist who found Student's disability category to be other health impaired by reason of ADHD, but also in consideration of Student's recent history of inpatient and day drug addiction treatment, offered a placement at Proposed Placement during school hours and recommended that the parent and school team access the CASSP process to obtain home and community based services, and possibly additional school services, through the mental health system. The Parent rejected the idea of a CASSP meeting because "we have, you know, already tried the coordination of services".¹² (NT 621, 710- 715; P-6)

¹² The Parent also dismissed the idea of seeking residential drug addiction treatment through the mental health funding stream because she believed it would take too long, in contrast to having Student wait approximately 2 weeks to enter a facility in September/October 2008 and over three months during November/December/January 2008/2009.

57. Proposed Placement was chosen for Student for several reasons: it offers daily group counseling sessions and the availability of counselors for individual assistance as problems arise, and none of the students with whom Student had previously abused substances attended that program. (NT 707, 709, 720-721)
58. The [redacted system of programs] offer both alternative programs for disruptive youth (which are general education programs under Article XIX-C of the Public School Code) and special education programs for students with disabilities. (NT 142)
59. Many of the students in the [redacted system of program]'s special education programs for students with disabilities have emotional disturbance and some have other health impairments such as ADHD. (NT 144-145)
60. As drug and alcohol problems among [redacted system of programs]'s students are not uncommon, drug and alcohol problems are addressed programmatically in the special education programs in the [redacted system of programs]. (NT 146)
61. An Assistant Principal at Warwick High School who taught at a residential treatment facility, consulted as an IU employee with the [redacted system of programs] in Lancaster and Lebanon Counties, and served as a special education consultant within the District's secondary education program confirmed that the staff at Proposed Placement is well trained to be aware of and to intervene with drug and alcohol problems and the emotional issues that underlie those problems. (NT 147-149)
62. The Proposed Placement has both an alternative education program (with two classes) and a special education program (with two classes); they are separate, and the students in the two types of programs are separated. Students attend the special education program because of their need for center-based emotional support, not as a result of disciplinary or disruptiveness issues.¹³ (NT 143, 174)
63. In the Proposed Placement special education program, each class has six students, a certified teacher and an assistant. Classroom staff deliver the instruction, monitor the behaviors, and implement behavior support plans. There is also a behavior support assistant with a separate "reflection" area. (NT 147)
64. If Student had joined the Proposed Placement class for which Student was recommended, the class would have consisted of seven students: four males and three females. (NT 166)

¹³ The materials on and after P 6 page 54 do not describe the class or program which was recommended for Student. (NT 181-182)

65. The Proposed Placement program has on site a social worker, a psychologist, a job trainer, a nurse, as well as a private therapist whose contracted services are funded by the District. (NT 147, 168)
66. Proposed Placement students are provided a school-wide behavior support plan as well as individual support plans. (NT 150)
67. Proposed Placement addresses social skills development as a separate, directly instructional, activity. Staff are trained to recognize frustration and anxiety in students and to intervene immediately when there are signs of these issues. Proposed Placement provides a highly structured environment with 100 percent supervision. (NT 153, 155-159)
68. The Assistant Principal at Warwick High School cited above noted that based on the consulting psychiatrist's description, Student's needs are typical of the needs of students in the Proposed Placement special education program and concluded when the consulting psychiatrist talked about what Student needed, she "was verbatim explaining what the Proposed Placement has to offer" including external systems to help Student regulate Student's mood and the need to self-medicate, not just access to traditional academics. (NT 164, 212-213, 223)
69. One of the District's certified school psychologists who is the District's Director of Student Services noted that Proposed Placement is appropriate in terms of the consulting psychiatrist's observation about Student's difficulty extricating self from chaotic relationships and in relation to the consulting psychiatrist's recommendation that Student be with adults who can help Student manage Student's emotions and stay on task or return to task. (NT 689, 720-721)
70. The consulting psychiatrist has no knowledge about any of the programs offered at Proposed Placement or the particular emotional support program at Proposed Placement that the District recommended for Student. She assumed that Student's recommended class had only a similar "trouble[d] youth" population to other [redacted system of programs] in Lancaster and Lebanon Counties. (NT 109-112)
71. The School in its early years, was a place to stay sober, and a place to gain friendships. (NT 407)
72. Currently, 25 to 30 percent of School students have not used drugs or alcohol, while approximately 50 percent have alcohol or drug abuse issues in the diagnosable dependency range. (NT 409, 465)
73. School is based on 12-step principles, the 12 steps of Alcoholics Anonymous. The program encourages the idea of a "higher power" through daily (weekday) chapel attendance. (NT 419, 487-488)

74. School hosts newcomer AA meetings. Each student has an AA sponsor and a junior sponsor. School tracks whether its graduates stay clean and sober after leaving School. (NT 412-413, 419, 473-474)
75. Prospective students are not allowed to visit the campus because many of the students are not "treatment-ready" and "none of [the] students want to be here when they are enrolled." If they knew what was being planned for them, they "might run away before the parents ever had an opportunity to bring them here." (NT 478, 490-492)
76. The minimum stay in the program is 18 months. The 18 month period was designed to ensure long-term change. (NT 466, 481)
77. School does not allow any of its residents to attend the local public school. (NT 410)
78. The School representative noted that Student is the school's typical student. "Student has a history of substance abuse and other issues, Student has long-standing difficulties with Student's parents, especially, you know, estrangement with Student's father." (NT 421)
79. Student's problems in the School classroom were not that Student was distracted but rather that Student was distracting. (NT 422-423)
80. The School representative did not mention other health impairments, ADHD, or other attentional disabilities, or any other IDEA category of disability with regard to Student. (NT 474-478)
81. School describes itself, "...we are not a special education setting, that is, we don't have special education teachers ..." (NT 445)
82. School described the key for Student's success in class was to have someone prompting the class back to attention. (NT 448)
83. One of School's behavior-shaping techniques is to cancel Student's weekly telephone conversation with Student's mother if Student does not complete a homework assignment. A typical consequence if a student does not have his/her planner with them is to have the student write, "I will carry and use my planner" twenty times. (NT 454, 469, 488-489)
84. Student was taken to School on February 6, 2009. Student's mother will be allowed to take Student off campus in July, six weeks after the mother attends a mandatory second family counseling session in late May. After 9-12 months, students are allowed to visit home. (NT 461-462, 487)

Discussion and Conclusions of Law

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion, as one element of the burden of proof, for cases brought under the IDEA, is properly placed upon the party seeking relief. Schaffer 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 Parent asked for this hearing, the Parent bears the burden of persuasion. However, application of the burden of persuasion analysis does not enter into play unless the evidence is in equipoise, that is, equally balanced so that by definition the party seeking relief has not presented a preponderance of the evidence. In the instant matter, the evidence is not in equipoise as the Parent did not present equal, much less preponderant, evidence on any issue.

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.¹⁴ 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 only forum in which the witnesses will be appearing in person. Credibility will be addressed in the discussion below

FAPE: Having been found eligible for special education, Student is entitled by federal law under IDEA, and by state law under the Pennsylvania Special Education Regulations, to receive a free appropriate public education (FAPE). FAPE is defined in part as special education and related services: 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; 22 PA Code § 14 *et seq.*

However, "The IDEA's requirements regarding a FAPE are 'modest'." Z.W. v. Smith, C.A. No. 06-1201, 2006 WL 3797975, *3 (4th Cir.), *quoting* A.B. v. Lawson, 354 F.3d 315, 325 (4th Cir. 2000). A student's special education program must be reasonably

¹⁴ 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).

calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). Districts need not provide the optimal level of service, maximize a child's opportunity, or even offer a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998); Lachman, supra. 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). The purpose of the IEP is not to provide the "best" education. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993). Recently, the Eastern District Court of Pennsylvania reiterated, "districts 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), citing Carlisle, 62 F.3d at 534, citations omitted. See also, Neena S. ex rel. Robert S. v. School Dist. of Philadelphia, 2008 WL 5273546, 11 (E.D.Pa., 2008).

Statute of Limitations: With certain exceptions, the Individuals with Disabilities Education Improvement Act requires that a complaint be filed within two years of the date on which the parent "knew or should have known about the alleged action that forms the basis of the [due process] complaint." 20 USC § 1415(f)(3)(C); 34 CFR § 300.511(e).¹⁵ The actions complained of can be adjudicated to the extent that the complaint is filed within two years of knowledge (either actual knowledge or constructive knowledge) of the actions.

The statute of limitations at issue here consists of a general two-year rule and two exceptions. The Parent did not question the overall applicability of the two-year rule, either in her complaint or in her opening statement. If neither of the exceptions is evident here, the statute draws the line at December 5, 2006. However, the Parent asserts one of the exceptions. The exceptions are as follows:

- (D) Exceptions to the timeline.--The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—
 - (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
 - (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent. 20 USC § 1415(f)(3)(D).

¹⁵ This requirement was enacted on December 3, 2004 and took effect on July 1, 2005.

To trigger one or both exceptions, the misrepresentation must be intentional and the withholding must be of information regarding procedural safeguards. Evan H. v. Unionville-Chadds Ford Sch. District, 2008 WL 4791634, 51 IDELR 157 (E.D. Pa. 2008). Prior to the parties' presenting their cases in chief this hearing officer heard testimony regarding whether or not either or both exceptions existed. After hearing the testimony this hearing officer determined that neither exception existed.

November 2006 Evaluation and Subsequent Programming: The purpose of an evaluation is, of course, to determine whether the child meets any of the criteria for identification as a "child with a disability" as that term is defined in 34 C.F.R. §300.8, as well as to provide a basis for the contents of an eligible child's IEP, including a determination of the extent to which the child can make appropriate progress "in the general education curriculum." C.F.R. §§300.8, 300.304(b)(1)(i), (ii). The general standards for an appropriate evaluation are found at 34 C.F.R. §§300.304—300.306. The District is required to 1) "use a variety of assessment tools"; 2) "gather relevant functional, developmental and academic information about the child, including information from the parent"; 3) "Use technically sound instruments" to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using "any single measure or assessment as the sole criterion" for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be "sufficiently comprehensive to identify all of the child's special education and related service needs" and provide "relevant information that directly assists" in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). An initial evaluation must also include, if appropriate: 1) A review of existing evaluation data, if any; 2) local and state assessments; 3) classroom-based and teacher observations and assessments; 4) a determination of additional data necessary to determine whether the child has an IDEA-defined disability, the child's educational needs, present levels of academic achievement and related developmental needs, whether the child needs specially-designed instruction and whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(1),(2), 305(a)(1),(2).

Once the assessments are completed, the qualified District professionals and the child's parents determine whether he/she is a "child with a disability" and his/her educational needs. 34 C.F.R. §300.306(a). In making such determinations, the District is required to: 1) "Draw upon information from a variety of sources," including those required to be part of the assessments, assure that all such information is "documented and carefully considered." 34 C.F.R. §300.306 (c)(1). The District must also provide a copy of the evaluation report and documentation of the eligibility determination to the Parents at no cost. 34 C.F.R. §300.306(a)(2). If it is determined that the child meets the criteria for IDEA eligibility *i.e.*, is a child with a disability and is in need of specially designed instruction, an IEP must be developed. 34 C.F.R. §§300.306(c)(2).

This hearing officer has determined through examination of documents and in consideration of the entire record that the November 2006 evaluation was appropriately conducted. This hearing officer has also determined that the evaluation reached the correct conclusion. The finding of ineligibility for special education services at the time of the November 2006 evaluation is consistent with the information provided by the Parent, the teachers and the testing instruments. The subsequent process for determining whether Student required a 504 Service Plan was appropriate under the applicable standards regarding protection under the ADA in effect at the time. Student was appropriately deemed to be a regular education student from the time of the November 2006 evaluation until the August 2008 evaluation. Student did not require a Section 504 Plan, despite Student's reported diagnosis of ADHD.

Compensatory Education: Specifically, for eligible students, special education and related services are the critical constituents of a free *appropriate* public education (FAPE). Special education has at its focal point specially designed instruction (SDI), which to be *appropriate* adapts to an eligible child's unique needs the content, the methodology, or the delivery of instruction, with access to the general curriculum that allows the meeting of state education agency standards for all. In-kind compensatory education is a remedy for a span of FAPE denial by district action or inaction, less a reasonable period when it could have been rectified, its form and timing to be a matter of parental discretion as long as costs are commensurate with what was denied and it does not replace otherwise currently entitled to programming.

Student was not denied FAPE during the period in question, or during any period addressed in this decision, and is therefore not entitled to compensatory education.

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

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress.

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

“If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency¹⁶ enroll the child in a private...school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment...”

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

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

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

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

¹⁶ A threshold issue for the tuition reimbursement portion of the case is now pending before the United States Supreme Court in Forest Grove Sch. Dist. v T.A., cert. granted, 129 S.Ct. 987, 109 LRP 13478 (January 16, 2009). The District contends that since Student did not receive special education services from the District tuition reimbursement is precluded by the existing statute. Nevertheless the District acknowledges as does this hearing officer that the Supreme Court is considering alternate points of view. This decision will proceed along the lines of analysis as if the student had already received special education services as Student was deemed eligible for the 2008-2009 school year.

free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii)

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

With regard to the first prong for tuition reimbursement under Carter, the District clearly offered Student an appropriate educational program and placement to address Student's disability classification. In light of recommendations from Student's last inpatient drug addiction treatment facility it also added additional supports to address other behavioral needs. The testimony offered by the District's witnesses was credible and persuasive given that they had knowledge of Student through extensive school records and had the additional opportunity to hear what the consulting psychiatrist had to say about the student's situation. They were the only witnesses with direct and current information to offer about Proposed Placement and the program it would have provided to Student. The consulting psychiatrist's testimony was not particularly persuasive given that she did not confer a diagnosis of ADHD, she did not recommend a residential setting until after the Parent filed for due process, she could not say with any certainty whether Student could be served only in a residential setting and she had no direct knowledge of the Proposed Placement program being proposed for Student. The former district psychologist presented as a sincere individual but an unpersuasive witness who was in the uncomfortable position of testifying in opposition to the position taken by his former employer based on his own evaluation. In several instances he was evasive; he also at times relied heavily on a particular expert and frequent conference presenter as opposed to, or to supplement, authoritative texts. His ability to persuade this hearing officer was further diminished by some inconsistency between his evaluation findings and his recommendations, and by the idiosyncratic manner in which he structured his recommendations. The Parent's testimony was found to be credible in some respects but was not persuasive. The Parent testified to her great concern about Student, and her testimony that she was very distraught at the time of the October 1st IEP meeting seemed sincere. However, the Parent's credibility was diminished by the fact that even though the ER staff who had evaluated Student on September 29th had arranged for Student to enter an inpatient drug addiction treatment center the next day, the Parent chose to reject the proposed facility and contacted someone with whom to consult about an alternate facility, which resulted in Student's not beginning inpatient treatment until October 13th, two weeks later. A similar behavior was evident when rather than accept a placement, even a temporary one, in Proposed Placement the Parent elected to have Student remain on homebound instruction although the student had not responded well to this in the recent past. The Parent again demonstrated yet another instance of wanting what she wanted on her own timetable when she rejected participation in a CASSP meeting that could have resulted in Student's receiving long-term residential treatment through the

mental health system, because that process might take too long, opting instead to attempt to have the school district pay for Student's drug addiction rehabilitation.

The program and placement unilaterally selected by the Parent is inappropriate. Since the District fulfilled its obligation to offer Student an appropriate program and placement, the second prong of the Carter analysis does not have to be reached. If such an analysis were necessary, attention is drawn to the findings of fact which lead to the inevitable conclusion that as a special education placement for Student, School is not appropriate. Although it need not be repeated here, particular attention is also drawn with approval to the District's closing argument relative to case law in the area of drug addiction treatment and special education. In terms of the second prong for tuition reimbursement, the District argues persuasively, and this hearing officer agrees, that,

"It is uncontested that, for IDEA purposes, Student's disability is an other health impairment caused by Student's ADHD (OHI/ADHD). [The consulting psychiatrist] has described Student's problems and needs in considerable detail. She did not say, write, or suggest that they were the result of Student's OHI/ADHD. The same is true of the professionals at Foundation, facility, inpatient program and partial hospitalization, and the School. Student began abusing alcohol and illicit drugs when Student was 12 years old, during the 2004-05 school year. None of the various analysts and educators who have worked with Student have indicated a belief that this was caused by OHI/ADHD. (Nobody has even expressed a belief that Student had OHI/ADHD in 2004-05.) In light of the statutory text, these facts matter.

[The Parent's] choice of the School was not irrational, but neither was that choice a response to Student's disability. Although School has the significant weaknesses of not being a special education school, not having staff who are trained in special education interventions, not having any particular expertise with ADHD, and not offering special education interventions, it also has the strengths of using a well-established 12-step drug [addiction] treatment model, and providing round-the-clock controls on Student's whereabouts and social communication (with, for example, [student's of the opposite gender]). In light of this combination of strengths and weaknesses, we question not the rationality of the family's priorities but the relevance and appropriateness of that choice under the IDEA."

The equities favor the District. Since the District fulfilled its obligation to offer Student an appropriate program and placement, and the program and placement unilaterally chosen by the Parent is inappropriate, the third prong of the Carter analysis does not have to be reached. If such an analysis were necessary, attention is drawn to the fact that the Parent rejected the District's program before she received the IEP, sought outside consultation to find a facility to treat Student's drug addiction on a residential basis before she received the IEP, and visited School before the District's placement was offered. It was very clear that the Parent was not considering anything less than a residential facility, on her own terms and within her own timelines. Parents' actions can

compromise their entitlement to tuition reimbursement. In re the Educational Assignment of C.S., SEA 1658 (2005), “where the parents have predetermined that they will place their child in a private school regardless of the district’s ability to program for the child, the equities favor the district.”

The Parent’s choice of a residential setting for Student filled what she believed were Student’s needs in the area of treatment for her child’s drug addiction, but a residential setting also relieved the Parent of the onerous burden of being responsible for her child on a 24-hour per day/7 days per week basis. Telling was her candid testimony, "I don't think that anybody can really understand what it's like to live with someone who has mental illness and drug and alcohol problems." (NT 636)

In offering the IEP and Proposed Placement the District proposed a reasonable educational program and placement to address the needs related to Student’s other health impairment [ADHD] identified in its August 2008 evaluation, while also acknowledging and programming around additional social and therapeutic needs. A school district cannot be held responsible for treating a student’s longstanding drug addiction, familial problems, or delinquent behavior. In particular, having offered an appropriate program and placement, in this matter the District cannot be required to fund 24/7 residential treatment for these issues in a non-special education setting chosen by a parent who refused to consider other options or other funding sources.

Order

It is hereby ordered that:

1. The Warwick School District did not deny Student a free, appropriate public education (FAPE) from December 5, 2006 to December 5, 2008. The November 2006 evaluation was appropriate and properly found Student ineligible for special education at the time it was performed. The team also properly found that Student was not eligible for a 504 Service Plan.
2. Student is not entitled to compensatory education.
3. The Warwick School District offered Student an appropriate program and placement at Proposed Placement for the 2008-2009 school year.
4. The placement unilaterally chosen by the Parent was not an appropriate educational placement in the least restrictive environment to address Student's other health impairment, ADHD. The unilateral placement chosen by the Parent was designed to treat Student's drug addiction.
5. The equities favor the District.
6. The Parent is not entitled to reimbursement for her unilateral placement of Student at the School.
7. The District is required to take no further action.

June 21, 2009

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer