

*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: I.P.

ODR #14136/13-14-KE

ODR #14287/13-14-KE

Date of Birth:

[redacted]

Dates of Hearing:

October 11, 2013

October 29, 2013

CLOSED HEARING

Parties to the Hearing:

Parent

East Stroudsburg Area School District  
321 N. Courtland Street  
East Stroudsburg, PA 18301

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Phillip Drumheiser, Esquire  
2202 Circle Road  
Carlisle, PA 17013

Anne Hendricks, Esquire  
1301 Masons Mill Business Park  
1800 Byberry Road  
Huntingdon Valley, PA 19006

November 4, 2013

November 16, 2013

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

## Background

This decision addresses two Due Process Complaints, the first filed by the District and the second filed by the Parent. The hearing officer, with the parties being in agreement, consolidated the Complaints into one Due Process Hearing.

Student<sup>1</sup> is an early teen-aged 8<sup>th</sup> grade student who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the current classification of Other Health Impairment secondary to diagnoses of post-traumatic stress disorder<sup>2</sup> and adjustment disorder with mood disturbance. Given IDEA eligibility, Student is also a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504].

The District has determined that in order to receive a free appropriate public education [FAPE] Student requires placement in the Therapeutic Emotional Support [TES] program that is operated by the Intermediate Unit [IU] in a middle school in a neighboring district. The Parent maintains that the Student should remain in the current school.

The Parent alleges that from July 17, 2011<sup>3</sup> to the present the District has denied Student FAPE in the area of written expression including failure to conduct an occupational therapy evaluation and a sensory integration evaluation as well as in the area of positive behavior support. The Parent believes that Student is entitled to compensatory education for the alleged denial of FAPE. The District maintains that it has provided Student with FAPE at all relevant times.

In a prehearing conference it was determined that although both parties agreed that Student should receive an independent psychiatric evaluation funded by the District, they could not agree upon the evaluator. The hearing officer decided that rather than present testimony and evidence on this issue the parties should submit the names and resumes of their preferred psychiatrist[s] after which the hearing officer would choose the evaluator. [NT 31-33] In accord with the information presented, the hearing officer chose one of the psychiatrists preferred by the Parent and issued correspondence to this effect along with a delineation of the purposes of the psychiatric evaluation. [NT 320; HO-1]

## Issues

1. In order to receive FAPE should Student be placed in a supplementary emotional support program, specifically the IU-operated Therapeutic Emotional Support [TES] program located in a public middle school in a neighboring school district?

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

<sup>2</sup> Subsequent to a burn injury sustained on the leg several years ago for which Student was hospitalized for five days. [NT 161-165, 509]

<sup>3</sup> In accord with the IDEA's 2-year statute of limitations, the relevant period encompasses the 2011-2012, the 2012-2013, and the 2013-2014 school years.

2. Did the District fail to provide Student with FAPE from July 17, 2011 to the present in the area of written expression, specifically occupational therapy and an assistive technology evaluation, and/or by failing to provide an appropriate positive behavior support plan?

### Findings of Fact

#### Student's Presentation and FAPE

1. Student's placement during the relevant time period [6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grades] has been itinerant emotional support. Student is in all regular education classes, but during 7<sup>th</sup> and 8<sup>th</sup> grades every regular education class Student attended was staffed by both a regular education teacher and the special education emotional support teacher or the emotional support aide. [NT 81, 103-105, 240, 347, 438; S-25, S-26]
2. At some point prior to the relevant period in this hearing the Parent rescinded permission for Student to receive special education services, but by 6<sup>th</sup> grade she had granted permission for services to resume. [NT 160; S-27, S-34]
3. Student was re-evaluated in March 2011 as part of Student's reinstatement into special education. [S-34]
4. In June 2011 as part of the re-evaluation Student received an independent psychiatric evaluation funded by the District. [S-28]
5. In October 2011 Student received a re-evaluation that incorporated the March 2011 reevaluation and the June 2011 independent psychiatric evaluation. The IU psychologist reviewed records, spoke with the teacher and observed Student but did not do direct testing of Student for purposes of this re-evaluation. [NT 159; S-27]
6. When the District first evaluated Student in 2009, it found Student had a learning disability in the area of written expression. [NT 69-70; S-50]
7. The most recent re-evaluation in 2013 found that Student no longer has a significant discrepancy between ability and achievement in written expression. On nationally normed standardized testing Student received a standard score of 123 in the area of Broad Written Language and a Written Expression standard score of 126, both of which are in the Superior Range relative to same-aged peers. Student received a High Average standard score of 113 on Writing Samples and a standard score of 130 in the Very Superior Range on Writing Fluency. [NT 70-72, 76; S-34]
8. Consistent with findings on standardized testing, Student's 8<sup>th</sup> grade emotional support teacher confirms that Student does have the skills to produce written compositions, albeit with a great deal of prompting. [NT 361-362]

9. The Parent is a licensed social worker currently employed as a Behavior Specialist Consultant [BSC]. [NT 509-510]
10. According to the IU psychologist's observations at the time of the October 2011 evaluation Student started off 6<sup>th</sup> grade being excited about middle school, fitting in nicely, building some friendships and cooperating with teachers. However, that picture changed toward the end of 6<sup>th</sup> grade and grew "progressively worse through the years". [NT 166, 199-200, 204; S-27, S-34]
11. The 6<sup>th</sup> grade emotional support teacher saw Student as "a really nice, fun, interesting personality" who tried hard in class and who wanted to be with the rest of the class doing what they did. Student did not want nor did Student require extra academic help in the regular education classrooms. [NT 431-432]
12. The 6<sup>th</sup> grade emotional support teacher did not observe Student having any difficulty with handwriting or with producing written assignments. [NT 446-447]
13. Student did not have any difficulty staying in class in 6<sup>th</sup> grade. Student was attentive in classes. Academically Student did well in 6<sup>th</sup> grade. Student did not appear depressed. The emotional support teacher had no concerns about Student's emotional status. [NT 448-451; S-53]
14. At the Parent's request the District arranged to provide social skills instruction to Student individually during a remediation period rather than in a social skills class. The 6<sup>th</sup> grade emotional support teacher used the Spotlight program to teach social skills. [NT 91-92, 436-439]
15. The 6<sup>th</sup> grade emotional support teacher observed Student generally to be implementing what was taught in social skills instruction in other areas of the school. [NT 437]
16. In 6<sup>th</sup> grade Student refused to do the progress monitoring probes required of all students; the probes were administered by the emotional support teacher. At the Parent's request the District agreed to withhold those probes. However, Student then refused to do any other types of tests in that time period with the emotional support teacher. Student did not refuse to work in any other settings. [NT 440-442]
17. In addition to the above refusals, in 6<sup>th</sup> grade there were a few isolated behavioral incidents, one in October, one in November, one in December, one in March, one in April and three in May. The emotional support teacher saw the cited behaviors as not atypical for a student transitioning into 6<sup>th</sup> grade and had no major concerns about Student. [NT 440-444, 465; S-54]
18. Nevertheless, as the incidents were becoming more frequent, in May of 6<sup>th</sup> grade the emotional support teacher spoke with the Parent; the Parent reported that it was typical for Student to start off a school year doing well and then start to decline slowly by spring. [NT 103, 444-446]

19. At the beginning of 7<sup>th</sup> grade, the 2012-2013 school year, Student again began to refuse to do the academic probes in reading fluency, reading comprehension, written expression, math computation and math application required of all students to ensure they are making progress. The probes were given once a month unless there was an academic goal in a special education student's IEP, in which case they were given every other week; in Student's IEP there was a written expression goal and a math goal. [NT 230, 235-236]
20. When refusing the probes Student typically said, "I'm not doing it. You can't make me." [NT 40, 45]
21. On September 26, 2012 the IEP team met to revise the IEP. At the Parent's request the team removed the math and the written expression goals from the IEP. The District agreed with this change because Student was on grade level in grade-appropriate regular education classes in these areas. [NT 232, 236-237; S-22, S-23]
22. The District then removed the requirement for Student to do any academic probes at all as these seemed to be "setting [Student] off". [NT 39-40, 231]
23. At the September 26<sup>th</sup> IEP meeting, also at the Parent's request, a Specially Designed Instruction [SDI] was added providing that prior to Student's receiving a disciplinary action [office referrals for detention, in-school suspension or out-of-school suspension] mother would be contacted so she could ascertain whether all SDIs were being followed. Mother requested this addition reportedly because of situation[s] in the previous school year. [NT 101, 238; S-22, S-23]
24. Per a new FBA conducted in October 2012 it seemed that on the occasions when Student actually started a task it would be finished. Accordingly at the October 19, 2012 IEP meeting a goal was added to provide a prompting hierarchy to get Student to begin a task. [S-19]
25. Pursuant to the FBA, attention from Student's father was identified as a value for Student, and Student's father promised to buy Student a Go-Kart as a reward for appropriate behavior. In December 2012 the IEP team instituted placing a card on Student's desk[s] with a picture of an [item] on one side and a [corporate logo] on the other to serve as a non-verbal prompt and a reminder of the promised concrete positive consequence. However, at a subsequent January 2013 IEP revision meeting this technique was removed because it seemed to be another trigger for intensifying Student's refusals, and Student was throwing the card down. [NT 135-137]
26. In addition to refusing to do probes, Student was refusing to comply with other academic requirements in school such as doing projects involving writing or taking notes, and resisted all accommodations the District offered as alternatives. [NT 230, 232]
27. Work refusals and other problem behaviors typically centered around times when Student had to write, had to engage in independent learning, when being provided multiple

directions and/or when being given a consequence for inappropriate behavior. However, Student's responses are unpredictable and there do not really seem to be detectable patterns. [NT 70-71, 73, 334-336, 365-366; S-28, P-1, P-3, P-4, P-5]

28. To address Student's refusal to/dislike of writing, the District has offered a wide variety of positive accommodations. On tests the District has offered to scribe for Student or allow Student to answer orally but Student refused. The District offered Student the use of a speech-to-text program, Dragon Naturally Speaking, at an IEP meeting in which Student was present and where Student refused to sign the attendance sheet. The District has given Student "cloze" notes on which Student only has to fill a word or two into a blank space but Student will not use them. The District has given Student copies of the entire notes on which Student could just highlight a word, and has offered to go over the notes orally with Student but Student has refused. Teachers have written assignments down in the assignment book for the Parent to review because Student refuses to do so. [NT 45-46, 131, 230, 232, 360-361, 403-404,447; S-66]
29. As observed by the IU psychologist who saw Student a number of times over the past two years Student has no problem with the physical mechanics of handwriting. Student's handwriting looked "fine" and Student's motor skills seem unimpaired as well. In school there is not a lot of physical writing because there are laptops in every classroom, there are laptop carts carrying enough laptops for every student, there are computers in the library, and all long projects are done on computers. At this point students do not have to hand-write anything except on PSSA testing. [NT 190, 413-414, 428-429]
30. Student's current 8<sup>th</sup> grade emotional support teacher has not observed Student having any difficulty with the physical act of writing nor has Student expressed any concerns about the quality of Student's handwriting. [NT 359, 415-416]
31. Student's current 8<sup>th</sup> grade teacher has seen that Student is capable of producing acceptable quality written work and Student has been proud when receiving a good grade. [NT 362-363]
32. Student's 8<sup>th</sup> grade emotional support teacher has sat alongside Student to check if there is a problem understanding the work. She has received no indication that Student is experiencing problems with understanding the work. [NT 370]
33. Although Student was failing 8<sup>th</sup> grade math as of the hearing dates, the 8<sup>th</sup> grade emotional support teacher has seen that Student does understand the work and can do it if Student feels like it. Student likes doing math problems on the board and gets them correct. [NT 388-390, 420]
34. Sometimes when Student appears to be complying Student is just writing down anything to finish with the task. For example Student, whose writing abilities tested in the above average to the very superior ranges, entered the following in a journal: "I like snow. Snow is white. I build snowmen. I go sleighing. I throw snowballs". When the emotional support teacher approached Student to assist in expanding on the entry Student crumpled

up the paper and threw it away. At other times Student will just write down “nonsense” such as random numbers on a math sheet. [NT 272, 305-306, 400; S-56, S-62]

35. In addition to continuing/escalating work refusal, Student has engaged in verbal harassment of peers and physical aggression with a teacher and with peers. When in accord with the IEP the 7<sup>th</sup> grade emotional support teacher would attempt to assist Student by checking the assignment book Student would slam the book shut without regard for the teacher’s hand. On one occasion Student slapped the homework assignment book shut on the teacher’s hand. [NT 40, 47, 350]
36. Student has threatened the 7<sup>th</sup> grade emotional support teacher with a [verbal threat]. [NT 40-41]
37. There were occasions when Student would become so angry about being offered assistance that the 7<sup>th</sup> grade emotional support teacher could not calm Student down in the moment. [NT 350-352]
38. This 8<sup>th</sup> grade school year Student persistently called a peer a [derogatory name] which resulted in an escalated verbal exchange that became physical and [and teacher intervened]. [NT 47-48, 149, 395-396]
39. The week prior to the start of the hearing Student [was physically and verbally abused to another student]. [NT 397-398]
40. In another instance this school year Student repeatedly called a female peer “Miley Cyrus” which upset that student to the point where she has refused to come to school. [NT 47-48, 384]
41. In the spring of 2013 Student was unwilling to participate in a full re-evaluation; however the IU psychologist was able to cajole Student into doing some subtests. [NT 184; S-10]
42. Following the re-evaluation a new IEP was created in April 2013. That IEP continued to address Student’s needs but has not been implemented as the Parent has withheld approval. [NT 139-142; S-8]
43. During the independent psychiatric evaluation the Parent told the psychiatrist that Student was angry five to seven days a week. The IU psychologist who has worked with Student and the teachers over the last two years sees Student manifesting irritability and moodiness in school as opposed to typical anger, although Student has been lashing out more this [8<sup>th</sup> grade] school year which is different than previously. [NT 165-166; S-28]
44. In a series of many conversations Student had with the IU psychologist Student said that the work is not too hard, “some of it is stupid and I could do it in three seconds”. Student said that Student does not want to do the work, “because I think it’s stupid. I don’t want to do it. You can’t make me. I’m not doing stuff I don’t want to do”. Further Student told the psychologist, “I’m only going to do what I want to do” and “I just do the stuff I like”. Student identified liking things such as going onto the computer. [NT 169]

45. Student told the 8<sup>th</sup> grade emotional support teacher that Student's father did the same kinds of things Student does when he was in school and then he "woke up" and now has his own business, so that it is okay for Student to do the same. [NT 365]
46. Student seems to believe that there are a different set of rules for Student than for the rest of the students. [NT 368-369]
47. Asked why Student comes to school given disliking to do the work, Student told the IU psychologist, "Well, I come because I see my friends, but it's the rest of the crap that you have to do that I don't like, you know." Although this type of feeling is not uncommon among students, it is Student's actual and persistent refusal to do work that sets Student apart significantly. [NT 198]
48. Student can communicate effectively with teachers and peers and has in-school friendships with typical peers. [NT 172-173]
49. When the 7<sup>th</sup> grade special education teacher interacted with Student about non-academic topics Student was personable and a pleasure to talk with, but Student engaged in resistance as soon as any kind of school work was presented. [NT 230]
50. Even when Student was refusing to engage in testing which Student had agreed upon previously Student was able to be pleasant and engaging with the IU psychologist. [NT 182]
51. The District received training from the Pennsylvania Training and Technical Assistance Network [PaTTAN] on Least Restrictive Environment [LRE] and on utilizing the Supplementary Aids and Services [SAS] tool kit for LRE issues in November 2008. When considering supplementary aids and services for Student the District utilized approaches consistent with the SAS tool kit. [NT 38, 63-64, 110; P-8]
52. Consistent with the SAS tool kit approach, the District has conducted Functional Behavior Analyses beginning with a line of inquiry and has developed and modified positive behavior support plans for Student. [NT 62-64, 105-108; P-1, P-3, P-4, P-5, P-8]
53. Beginning in 7<sup>th</sup> grade as part of the itinerant emotional support program Student had virtually one-to-one assistance from the special education teacher due to the significance of Student's needs. The emotional support teacher was in each one of Student's classes to provide immediate assistance and removal if necessary because of the ongoing refusal to do work and the disruption of the classroom. [NT 111]
54. The 6<sup>th</sup> grade emotional support teacher implemented a daily communication log with the Parent. The 7<sup>th</sup> grade emotional support teacher communicated frequently with the Parent by email and the emails eventually became an almost every day occurrence. The 8<sup>th</sup> grade emotional support teacher also had email correspondence with the Parent, again almost daily. [NT 307, 400; S-25, S-58, S-66]



55. The District has called in two IU psychologists [one whom Student knew and one whom Student did not know] to observe Student in every area, to see if they could identify any specific triggers and/or to suggest the teachers' doing anything differently in their approach to Student. One IU psychologist observed Student in four classes and the other observed Student over four days and together they covered all Student's classes. The IU psychologist who testified at the hearing observed Student engaging in work refusal. [NT 51-52, 108-109, 191-194, 196-197]
56. Over the past two years the teachers have consulted the IU psychologist regularly about Student and Student has had many meetings with the IU psychologist. [NT 166, 330]
57. The District has funded an independent psychiatric evaluation pursuant to which the psychiatrist made recommendations. These recommendations included revisiting the diagnosis of PTSD, obtaining individual counseling/therapy, obtaining family therapy, and having a trial of medication. The recommendation for individual therapy was not followed until now and Student is having a first appointment a few days after the final hearing session. The recommendation for family therapy has not been followed. Student was started on medication a few days before this hearing began, never having been on medication before. [NT 53, 170-171, 516-517, 527; S-28]
58. The Parent testified that since the 2011 psychiatric evaluation she has had difficulty following the psychiatrist's recommendations because of financial problems and problems with her insurance. [NT 529-532]
59. However, in March 2013 when the IU psychologist was attempting to re-evaluate Student she and the Parent had a conversation in which the Parent shared that she was having trouble finding a provider that took her insurance and that she liked because she works in the field and has formed opinions about some providers. The psychologist gave the Parent some suggestions including a list of neuropsychiatrists and developmental pediatricians. The psychologist recommended a psychiatrist as well. [NT 185, 204]
60. From the beginning of 7<sup>th</sup> grade the District has collected behavioral data relative to the IEP goals from every one of Student's classes on a daily basis. This data is used to monitor and report progress and to provide an incentive system for rewards. Data targets the behaviors of responding appropriately to authority figures and appropriate peer interactions. [NT 81-90, 262-263, 272-273, 373-374; S-25]
61. Initially Student was expected to carry the sheet and give it to the teacher at the end of each class, but because Student would tear/rip/destroy the sheets or throw them away the emotional support teacher or the aide took over carrying the sheets. [NT 86]
62. Both the 7<sup>th</sup> and the 8<sup>th</sup> grade emotional support teachers find that there is no apparent pattern of antecedents or consequences that set Student off, or serve as a positive or negative consequence. Student has gone from refusing writing to refusing math to refusing nearly all work. Student has sometimes had a couple good days, but the District

cannot pinpoint what is different and Student cannot or will not say what is different. Some days start off badly and stay bad and other days the day gets better. [NT 251-256, 379-380]

63. Student responds sporadically and rarely to rewards, and a reward that worked once may not work again. The only consequence Student really does not like is mother's taking away video games. [NT 198-200, 375]
64. If Student was passively refusing to do work, part of the positive behavior support plan was to allow Student to go to the in-school suspension [ISS] room for the period or part of the period consistent with considerations also given to other students.<sup>4</sup> Trips to the ISS room were not considered disciplinary measures and were not part of the discipline record. The ISS room is a regular education setting. [NT 61, 65, 133-134, 334-338]
65. Student likes to go to the ISS room and has asked to go there, but will not say why Student likes the room. At times when Student was leaving the regular education class to go to ISS Student would announce "Bye guys. See you later. I'm going to ISS. See you next period". [NT 40-41, 66]
66. When Student was in ISS Student still did not do the required work which was sent along. Student would put down Student's head and say "I'm not doing it. You can't make me". The emotional support teacher or the instructional aide would check in periodically to see if they could help Student or get Student to work. [NT 268-269]
67. The teachers realized that Student wanted to be taken out to the ISS room so they stopped doing this when Student refused work. When Student caught on to this change Student would say, "Well, aren't you going to pull me out? Aren't you going to put me in ISS?" Then Student started acting out in class just to be removed, and if Student was calling out and making a scene with all the other students watching then Student had to be removed. Since Student sought removal to ISS the teacher instead would utilize a table in the hall outside the classroom when Student was not doing work. [NT 264-265]
68. Student became angry when the teachers would not put Student in ISS, would get red-faced and clench fists, and threaten the teacher. At these and at other times when Student was exceptionally angry the teacher would walk Student down to the office of the assistant principal with whom Student had a good rapport for a calming talk. [NT 266-267, 344, 353]
69. Other students began to mimic Student's behaviors such that Student's behaviors were impacting the education of peers. [NT 338]

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<sup>4</sup> The District does not send students to the emotional support classroom when they need some time away from the regular education class because it is disruptive to the students whose placement is the emotional support program. [NT 66-67]

70. The only time Student's behavior is responded to with disciplinary action is if the behavior involved a threat or an action against a teacher or peer, or if the behavior caused a disruption of other students. [NT 61, 263-264, 345, 382]
71. When Student began to refuse to bring books home, the District provided a second copy at home. In school, if Student did not bring books from the locker to class, the teacher would allow Student to use the classroom copy. If the class ran out of books then Student would be required to retrieve the book from the locker. [NT 342]
72. When Student had behavior problems on the bus the District changed seating arrangements. This occurred on several occasions such that the District has run out of seating options so Student's bus has now been changed. [NT 410-411, 522]
73. As of April 2013 Student was failing all 7<sup>th</sup> grade classes because of failure to complete work, to turn in work, or to take tests. Student was refusing everything.<sup>5</sup> [NT 140]
74. The 7<sup>th</sup> grade special education teacher is very concerned about Student emotionally because Student's refusals were persistent, unlike those of other students with whom she has worked. [NT 231, 233]
75. Currently in 8<sup>th</sup> grade Student is continuing to give "I don't know" or "I'm not doing it" responses and the presentation of refusals is not substantially different than in 7<sup>th</sup> grade. [NT 98-100, 358-359; S-19]
76. The 8<sup>th</sup> grade emotional support teacher believes that Student needs to be "more stable and more in touch with reality". Boundaries are difficult for Student, and when Student "puts up the wall and gets into the refusal mode" the teacher cannot get past that obstacle. [NT 372]
77. The 8<sup>th</sup> grade emotional support teacher believes Student needs a therapeutic setting because she has dealt with students at the intermediate level, and at the high school level, and has never had a student refuse as much as Student. The teacher has tried all her "tricks" to get Student to do what is needed but there is a wall that she cannot get past. [NT 406]
78. Although Student is academically capable at this time and has the foundation skills in literacy and math, the IU psychologist is concerned that because Student is not practicing skills Student may not be picking up the middle school higher level skills/concepts. [NT 195-196, 363-364]
79. Although Student values contact with peers at school, Student has established a role within the regular education program as "the student who refuses to do anything", and this refusal has escalated from passive refusal, to disrupting the regular education class, to verbal and physical aggression towards peers, to verbally threatening a teacher to

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<sup>5</sup> For reasons still not clear to the hearing officer Student was "assigned to" 8<sup>th</sup> grade for the current school year although Student failed all or most 7<sup>th</sup> grade subjects. [T 149]

physical aggression toward a teacher. Student's behaviors have significantly disrupted the education of Student's peers. [NT 148-150]

80. The District is concerned that unless Student is removed from the current setting and receives therapeutic intervention behaviors will escalate further and Student or someone else will be hurt. [NT 150]
81. The IU psychologist is concerned about the escalation of Student's behaviors and that because of work refusal Student has in essence lost a year's worth of educational benefit. She is concerned about the underlying emotional problems that are causing the work refusals. [NT 224-225]
82. The District cannot currently meet Student's academic or behavioral/emotional needs in Student's present school building. [NT 155]

#### Placement Considerations

83. There is a supplemental emotional support program in the building Student attends that is staffed by a special education teacher and an instructional aide. The program utilizes the school guidance counselor and the school psychologist if meetings with student about behavioral/emotional issues are required. There is no mental health component in the classroom. [NT 49, 309-310]
84. The District provides a variety of teacher trainings in such areas as differentiated instruction, co-teaching, inclusionary practices, least restrictive environment, supplementary aids and services, accessibility, and assistive technology. However the teachers are not trained in mental health. [NT 119, 327-328]
85. When students need a more intensive program the District recommends the TES program which is located in a middle school in a neighboring District and is operated by the IU. The District has sent at least five other students to the TES program in the last ten years with much success. The District proposed placing Student in the TES program. [NT 49-50, 54, 68]
86. Although the District has guidance counselor and social worker availability, in the TES program, the special education teacher is paired with a mental health therapist who has more specific training than a typical school guidance counselor or school social worker would have and is immediately available to address issues as they arise. [NT 125]
87. On April 11, 2013 the IEP team met to discuss placement. The Parent favored placement in the District's Virtual Academy, which is the District's own cyber school. [NT 55]
88. The District did not believe that its cyber school was appropriate for two reasons: first, because it does not have a therapeutic component which Student needs; and second, because many of the teachers providing the cyber instruction were Student's 7<sup>th</sup> grade teachers in the bricks and mortar program and the District reasoned that if Student wasn't doing work in the direct presence of the teachers with the added 1:1 presence and support

of the itinerant special education teacher it was doubtful that Student would do work for the same teachers in the cyber setting. [NT 55-56]

89. As an alternative to TES, the District also offered to place Student in its own emotional support program if they could also supplement it with an after-school component, the Pennsylvania Treatment and Healing [PATH] program. The District would provide transportation at the end of the day from the school to PATH, where there is a psychiatrist, a psychologist and a licensed social worker. At PATH students do homework, receive counseling, have some free time, have dinner and then are transported home. This was not the District's first choice since direct therapeutic intervention in the school setting when Student was refusing work would not be available. [NT 56-57]
90. The District issued a NOREP after the April 11, 2013 meeting proposing placement in the TES program, but on April 17, 2013 the Parent signed indicating that she did not approve and asked for a follow-up meeting. [NT 53; S-9]
91. At the Parent's request for a NOREP detailing why the District would not consider its Virtual Academy for Student, the District issued a NOREP dated April 18, 2013 that detailed the placement considerations put forth at the April 11<sup>th</sup> meeting. [NT 59-60; S-4]
92. The Parent visited the PATH program but did not enroll Student there. She told the District that she was exploring the KidsPeace after-school program. [NT 57-58]
93. The District offered to invite KidsPeace representatives to the follow-up meeting, but the Parent told the District she did not want that agency's staff involved at that time. To the District's knowledge there has been no follow-up with KidsPeace. [NT 59, 525]
94. The follow-up meeting was held on April 24<sup>th</sup>. The District offered the Parent four different dates/times when she could visit the TES program accompanied by out-of-district educational consultants and meet the teacher and the mental health worker. The Parent declined to visit. [NT 59, 526]
95. The Parent has expressed that she did not approve of the TES program because she does not trust the IU. [NT 54-55, 233]
96. The Parent told the 7<sup>th</sup> grade emotional support teacher that she had concerns about the proposed placement because she anticipated problems getting Student on the bus to go to the placement. [NT 233]
97. Student does not want to move to another school because Student wants to stay with Student's friends. [NT 515]
98. The District filed for a Due Process Hearing regarding an appropriate placement for Student. However, the District withdrew the hearing request because in July the Parent notified the District by letter that she was withdrawing Student from the District and enrolling Student in a cyber-charter school, Connections Academy. [NT 41-43; S-61]

99. As the District had not received the usual letter from the cyber charter school requesting records the District suspected that the Parent had not enrolled Student in the cyber-charter school and would re-enroll the Student in the District. On August 21, 2013 the Parent in fact notified the District that she was not having Student attend the cyber charter school and was re-enrolling Student in the District. [NT 43]
100. Upon inquiring and learning from the Parent that she was still opposed to the TES program the District reinstated the Due Process Request that it had previously withdrawn. The Parent reinstated then her Due Process Request as well. [NT 43]

#### Proposed Placement

101. The TES program was developed over a decade ago to serve students whose needs went beyond the traditional emotional support classroom with an emotional support teacher and an aide. The students TES targets are those with a behavioral health disorder underlying their IDEA disability. TES pairs a special education emotional support teacher with a person with training and background in mental health so as to have a more effective impact on students' needs in the educational setting. [NT 470-471]
102. One specific way in which the TES program differs from a partial hospitalization program is that in TES the major emphasis is on education with a mental health component whereas in a partial hospitalization program the emphasis is on mental health with an educational component.<sup>6</sup> Partial hospitalization programs are designed to stabilize patients with acute mental health problems. [NT 471-473]
103. The mental health portion of the TES program is overseen by the supervisor of clinical support services for IU 20, an individual who has held that position for ten years. Previously this individual was a treatment coordinator overseeing the mental health functioning of the IU's partial hospitalization program, a management assistant at Second Chance Academy [currently Colonial Academy], and a master's level mental health clinician in one of the IU's partial hospitalization programs. He holds bachelors and masters degrees in social work and is a licensed social worker in the State of Pennsylvania. [NT 468-470]
104. The TES program has a male<sup>7</sup> certified special education teacher who is highly qualified in all subject content areas for grades 6 through 8. [NT 153, 472]
105. The TES program has a male mental health bachelor's level worker who acting in a collaborative role with the special education teacher provides individual and group counseling, case management services, and behavioral and crisis interventions. This individual has worked for ten years in the IU's behavioral health programs, the first 6 or

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<sup>6</sup> Additionally this hearing officer who is a licensed psychologist in Pennsylvania offers administrative expertise in adding that placement in a partial psychiatric hospital program is driven by a finding of medical necessity for that level of restrictiveness on the spectrum of mental health services, rather than by special education needs.

<sup>7</sup> Student reportedly seems to respond better to males than to females. [NT 143-144]

7 in the partial hospitalization program and the remaining years in the TES classroom and has received training for two hours per month for ten years in the areas of his expertise. [NT 472-473, 503]

106. TES staff receives a three-day training in a specific crisis intervention model called TACT-II. This model primarily uses behavioral recognition techniques and verbal de-escalation strategies. The model also teaches passive restraint techniques to be used as a last resort consistent with Pennsylvania's Chapter 14. [NT 496]
107. The special education teacher and the mental health worker are together in the TES program classroom all day. The TES program is a supplemental special education setting, therefore the students are in the TES classroom for part of their day and in regular education classes for the rest of their day. [NT 473]
108. The IEP that comes when a student first enters TES is followed with regard to attendance in regular education classes. The regular education teachers are made aware of the student's IEP and behavior support plan, and the mental health worker provides support to the regular education teachers if/as required. Usually support is needed early on when a student first enters the TES program. [NT 485-488]
109. If supporting the student in one or the other regular education class[es] is not being effective after significant effort then an IEP team meeting would be held and the student possibly would receive that/those particular subject[s] in the TES classroom on a temporary basis. [NT 487-488]
110. From a mental health/behavioral health standpoint, the TES program supervisor and team members have a strong philosophical stance that they are trying to create a good fit for the individual student, meaning they do not expect the student to fit into the TES classroom but rather having identified the individual student's strengths and needs the team makes modifications to meet that student's individual needs. The team looks at how they can shape the environment to help meet the identified needs. [NT 477]
111. Every student entering the TES program receives a biopsychosocial assessment conducted by the licensed social worker. The biopsychosocial assessment is designed to look at the various levels of functioning that the student demonstrates, for example the things the student does well and the things with which the student struggles, the student's strengths and the student's limitations. The biopsychosocial assessment collects a historical perspective in terms of developmental stages of the student, and also looks at aspects of the home and the community impacting the student. As part of the biopsychosocial assessment the licensed social worker also does a Mental Status examination of the student. Following the biopsychosocial assessment if appropriate the social worker makes specific recommendations about what types of additional services other than the TES program services would benefit the student. Any recommendations of this type would be presented to the family to obtain a formal consent or a withholding of consent for the additional services. If the family consents then the service is imbedded into the student's IEP and delivered as part of the IEP. [NT 475-477, 483-484]

112. The TES classroom team looks at the information gathered in the biopsychosocial assessment that will be useful in working with the student. The TES classroom team does a thorough record review to see what types of things have been tried, what kind of things may have worked, what types of things haven't worked, so as not to repeat past history and create any undue anxiety or stress for the student. The classroom team will look at the current FBA and behavior support plan and at a base level begin to implement that FBA and the FBA-driven behavior support plan, and take good data across time to see whether or not the intervention strategies that are a direct result of the hypothesis driven in the FBA was on target; if not, the team would revisit the FBA, with the help of the BCBA. [NT 480-481]
113. When the students are in the TES classroom, being able to see the behaviors or the symptoms as they unfold allows the teacher/mental health worker classroom team a natural advantage for using those moments as teachable moments for the students and allow the classroom team to gain important information to shed light on the intervention strategies that are useful. [NT 473]
114. Assigned to the TES classroom is also a licensed social worker who can give targeted interventions for students. [NT 470-471, 476]
115. Additionally the TES program is served by a school psychologist who is also a Board Certified Behavior Analyst [BCBA] and within the IU department in which TES is situated there are another three BCBA's available for consultation. [NT 474-475]
116. The department in which TES is placed is the "Resolve Behavioral Health Services" [Resolve] program, which umbrellas a Behavioral Health Rehabilitative Services [BHRS] component [aka "wraparound" or "Provider 50" services] and an outpatient therapy component; as needed students in TES can access these services whether or not they have Medical Assistance. [NT 475, 483]
117. At a minimum every student that comes to the TES program receives a minimum of one individual counseling session per week lasting from 30 to 90 minutes depending on what the student can tolerate, and a minimum of two group counseling sessions per week with the bachelor's level mental health worker on the TES classroom team. The individual and group counseling is done during the time the students are rostered to be in the TES classroom which time in turn is rostered around the student's regular education classroom schedules. [NT 477, 500-501]
118. The sending districts provide transportation to and from the TES program and students' homes. [NT 154, 505]
119. There are six students in the TES program at this time in grades 6 through 8. The students are approximately ages 12 through 14. There are 5 male students and one female student at this time. [NT 470, 489]



120. The TES classroom is the size of a standard classroom in the middle school and is located in the middle school in the midst of other classrooms and facilities such as the library and the cafeteria. [NT 489-490]
121. In addition to the student's own original positive behavior support plan, the TES classroom has its own positive behavior support plan and the middle school as a whole has an overall positive behavior support plan. [NT 491-492]
122. The positive behavior support classroom in the TES classroom looks at things such as preparedness, on-task types of behaviors, readiness, interactions with others, and respect. Consistent with positive behavior support, lesson plans are generated for each one of those desired behaviors. [NT 492]
123. When students are "caught" exhibiting these behaviors successfully they are rewarded with "bear paws" at an initial high [frequent] rate of reinforcement for prosocial acts. Bear paws can then be turned in for rewards in the classroom. In the TES classroom the rate of return [cashing in rewards] is twice a day, once in late morning and once before students go home. The TES team believes that for its students that high rate of reinforcement and return is helpful and necessary for the students to engage and buy into the positive behavior support plan. Students will never [emphasized by witness] lose bear paws that they have earned as that would defeat the purpose of the positive behavior support plan. Because there is a school-wide behavior support plan the TES students can also cash in bear paws in the middle school store. [NT 492-495]
124. If a student is engaging in negative behavior or not earning bear paws for prosocial behaviors then the TES team considers whether the TES team needs to adjust its approaches to the student so that the program fits student better. [NT 495]
125. The goal of the TES program is to help the student acquire the skills to utilize to return to the home school/home district as quickly as possible. Last school year the average length of stay for the TES program students was approximately 133 school days. [NT 481-482]
126. The TES team starts looking at transition back to the home school very early on, usually about 60 school days after entrance. TES staff attends IEP meetings to transition students back into their home schools. Often transitioning out of TES is more difficult than transitioning in because the students tend to develop strong relationships with the TES classroom team. [NT 498, 504-505]

#### Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with

the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the District asked for a hearing on the issue of placement and thus bore the burden of proof on that issue. The Parent asked for a hearing on the issue of denial of FAPE and thus assumed the burden of proof on that issue. As the evidence was not equally balanced on either issue the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). Each of the District’s witnesses who testified in this hearing was judged to be credible, that is they appeared to be giving their honest perceptions and relating their direct experiences with Student. I found the testimony of the District witnesses to be candid and detailed and it was perfectly clear that the teachers and the psychologist liked Student very much and were committed to helping Student. Although I found the Parent to be a stalwart advocate for her child, I did not find that I could rely upon her testimony in deciding the issues before me. She is clearly a committed mother with a child whose attitude and behavior in school has been baffling and intractable over a one and a half school year period. Given her concern about whether Student will agree to attend a school other than the neighborhood school suggests that Student presents compliance issues at home as well. Although she works in the field of mental health/behavior management I do not believe she has, nor would I necessarily expect her to have, the ability to take an objective point of view regarding her child’s educational needs as they are impacted by underlying emotional difficulties.

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

Least Restrictive Environment: The IDEA requires that disabled students be placed in the least restrictive environment appropriate for the student that will provide meaningful educational benefit. Congress has expressed a clear intent and preference that disabled children be placed in regular education classes, and that removal of a student from regular education classrooms is permissible “only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C.A. § 1412(a)(5)(A); 34 CFR §300.550. 22 Pa. Code § 14.131(b) and 22 Pa. Code §

14.102 (a)(2) adopt all federal regulatory requirements for a student's educational program, including the requirement that a student be educated in the least restrictive environment. There is a continuum of educational placements, and each student's placement must be matched to that student's level of need; not every student can receive meaningful educational benefit in the lowest level of restrictiveness.

### Discussion and Conclusions

The foregoing detailed Findings of Fact lead to two inevitable conclusions. First, the District at all times has provided Student with the opportunity to derive meaningful educational benefit from Student's special education program, and second, the District at this time can no longer program appropriately for Student in the current school building.

When the Parent allowed Student to be reinstated in special education the District conducted appropriate re-evaluations including funding a private psychiatric evaluation. The District was responsive to the Parent's concerns and wishes, and made ongoing adjustments to program requirements to attempt to meet Student's needs. The District conducted an FBA and created a positive behavior support plan which was revised as Student's presentation changed. The District offered numerous accommodations to Student in the hope of eliciting cooperation. The District implemented input from outside sources and employed strategies designed to provide appropriate supports to Student in the least restrictive environment. However, none of the strategies the District employed resulted in appreciable changes to Student's behavior, and in fact over the relevant period Student has moved from work refusal to verbal and physical aggression. The Student has in effect now lost more than an entire year of instructional benefit. After working intensively with Student and with the Parent for almost two years the District concluded that Student needs more than is offered in the current setting. It is unfortunate that rather than work with the District in identifying an appropriate placement for her child, over the summer the Parent employed a delaying tactic that has resulted in Student's spending yet another half-year in a placement that is not appropriate. Keeping Student in the current placement has denied Student the therapeutic assistance Student needs in order to derive meaningful benefit from an educational program and to access obviously impressive cognitive abilities

Based upon the Student's escalating presentation the District is concerned that if Student does not receive a therapeutic educational program Student and others will be hurt. I agree. The District presented very persuasive testimony that Student requires a strong integrated therapeutic component to Student's educational program, that the package of therapeutic interventions Student requires is not available in the school Student currently attends, and that the TES program is particularly well suited to meet Student's emotional/behavioral needs so that Student can resume making meaningful educational progress. It is well established that every school building does not have to offer every type of program a special education student might need and that Districts and IUs are permitted to allocate resources as they see fit for the overall good of the students under their care. The TES program is well-designed, it provides a high level of therapeutic support within a public school, it affords Student the ability to continue to attend regular education classes for a large part of the school day, and it is designed to help Student acquire the skills Student needs to return successfully to the home school. The TES program is

an appropriate program for Student and it represents the least restrictive environment for Student at this time.

I find that the Parent's allegations of a denial of FAPE in the areas of written expression [by not conducting an occupational therapy evaluation and a sensory integration evaluation] and positive behavior support were red herrings, employed to prolong the process in the hope of preventing Student's placement in an appropriate therapeutic program. There is not a scintilla of evidence that Student has a physical impediment to handwriting and that Student has any difficulties with sensory integration. Likewise, the District at all times and with the Parent's input revised and implemented a program of positive behavior support. At this time Student, for whatever underlying emotional reason, is not capable of or willing to participate in what the District has to offer. The District's educational programming for Student has been designed to provide meaningful educational benefit and the Student's refusal to participate does not constitute a denial of FAPE. The Parent has not succeeded in providing any persuasive evidence that Student was denied FAPE in any respect.

#### Order

It is hereby ordered that:

1. Student shall be placed forthwith in the Therapeutic Emotional Support [TES] program proposed by the District.
2. The District shall immediately deliver a copy of all educational records pertaining to Student to the TES program.
3. The social worker assigned to the TES program shall conduct the standard intake biopsychosocial evaluation of Student whether or not the Parent gives consent.
4. Should Student dis-enroll from the District and subsequently re-enroll the TES program shall be Student's pendent placement.
5. The District provided Student with FAPE during the relevant period and therefore no compensatory education is due.

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

November 16, 2013

Date

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

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