

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: J.K.  
ODR #01933/10-11 JS

Date of Birth:  
[redacted]

Dates of Hearing:  
February 15, 2011  
April 5, 2011

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Downingtown Area School District  
540 Trestle Place  
Downingtown, Pennsylvania 19335

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Jennifer Bradley, Esquire  
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April 29, 2011

May 10, 2011

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

## Background

Student<sup>1</sup> is a teen-aged former resident of the Downingtown Area School District (District). The Parent requested this hearing under the Individuals with Disabilities Education Improvement Act (hereinafter “IDEA”), 20 U.S.C. § 1400 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 (hereinafter “Section 504”), 29 U.S.C. § 794, alleging that the District failed to provide Student with a free appropriate public education (FAPE) by not timely identifying Student as a child with a disability and by assigning Student to an inappropriate placement.

For the reasons set forth below I find in favor of the District.

## Issues

The Issues to be addressed in this decision are as follows:

1. Did the District fail to offer Student a free appropriate public education from January 5, 2009 through April 18, 2010?
2. If the District did not offer Student a free appropriate public education during that period, is Student entitled to compensatory education and if so in what form and in what amount?
3. Did the District fail to offer Student an appropriate placement and if so is the Parent entitled to tuition reimbursement for her unilateral placement of the Student at the Private School from April 17, 2009 to the end of the 2010-2011 school year, or in the alternative full days of compensatory education for that period?

## Findings of Fact

1. Student enrolled in public school in the District for 6<sup>th</sup> grade after having attended parochial school from kindergarten through 5<sup>th</sup> grade. [NT 47]
2. The Parent had Student evaluated privately<sup>2</sup> at the end of third grade because the teacher expressed some concern about Student’s focusing in class and a possible learning disability. The private evaluator found that Student’s level of inattentiveness did not meet the criteria for ADHD. The private evaluator did not identify any disability category. Student remained in parochial school. [NT 48-50; P-1]

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<sup>1</sup> The decision is written without further reference to the Student’s name or gender to provide privacy.

<sup>2</sup> Parent knew that an evaluation through the District could take 60 days excluding the summer and wanted to be able to arrange summer tutoring if necessary. [NT 48]

3. The District conducted an evaluation of Student in January 2008 while Student was still in parochial school because the teacher was expressing concerns about a possible learning disability. The District evaluator did not find that Student had a learning disability, as ability and achievement were congruent, and although the District evaluator noted some characteristics of ADHD, Student's academic achievement did not warrant an eligibility classification of Other Health Impairment. Student was not found to be eligible for special education. [NT 51, 55, 227-228; S-1]
4. The Parent Rating Scale from the BASC-2 administered as part of the District's evaluation resulted in the ratings of Student's social, emotional and behavioral functioning all as Average. The Teachers' Rating Scale from the BASC-2 yielded some At-risk and Clinically Significant findings, but Student's relatively few weaknesses were not significantly interfering with Student's ability to access Student's educational program, and in fact Student's achievement in some areas had improved during the 18-month period between the private evaluation and the District's evaluation. [N.T. 231, 261-262; S-1, P-1]
5. Even though Student was deemed ineligible for special education, the District evaluator recommended that, were Student to transition from parochial school and enroll in the District, Student should be monitored, participate in the regular education Instructional Support Process, and receive an occupational therapy consultation. [NT 54; S-1]
6. The Parent agreed with the District's 2008 ER. Student remained in parochial school through the remainder of the 2007-2008 school year. [NT 54-56, 231]
7. When Student enrolled in the District in September 2008 Student was placed in regular education with monitoring in accord with the January 2008 ER.<sup>3</sup> [NT 375-376]
8. Because Student had received reading support at the parochial school, Student was placed in a regular education reading comprehension class taught by a reading specialist and this support continued the following year. [NT 57-58, 377; P-3]
9. Pursuant to the 2008 ER Student received an occupational therapy screening in light of handwriting issues. The OT evaluator did not find a need for further evaluation or occupational therapy, but recommended strategies to be implemented in regular education. [NT 321-322, 384; S-4]
10. In October 2008 the District referred Student to the Academic Intervention Team [AIT], the middle school equivalent of the regular education Instructional Support Process that had been referenced in the 2008 ER, because of concerns about

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<sup>3</sup> Although the Parent did not specifically give the District a copy of the January 2008 ER she assumed that it was in the school building. Given that the District began monitoring Student and conducted an OT screening it seems that the Parent was correct. It is not clear whether or not the District also had the June 2006 private evaluation. [NT 56]

- producing written work in social studies and science, expanding ideas in written work, and distracting/off-task behaviors. [NT 232-233, 316-316, 378-379]
11. The AIT process involved team meetings in which teachers, guidance counselor, school psychologist and principal developed strategies to assist Student. Strategies to address written work and behavior included various appropriate techniques, and results were monitored from mid-October to mid-November with success noted. The strategies continued after the data-collection period. [NT 318-320, 379-382; S-2]
  12. Days after starting public school Student engaged in an act of verbal and physical aggression [September 11, 2008 - pushing another student to the ground]. Two months later Student engaged in another physically aggressive act [November 13, 2008 - punching a student], and a third act of physical aggression followed a few weeks after that [December 2, 2008 – punching and slapping a student]. Three more incidents [January 20, 2009 – slapping a student; February 13, 2009 – pushing a student’s head into the locker; March 20, 2009 – calling names] occurred during Student’s first year in public school. No physically aggressive incidents were recorded after the February incident and no other interpersonal incidents were recorded after the name-calling in March. The Disciplinary Record entered into evidence is the entirety of Student’s 2008-2009 discipline history. [NT 59-60, 63; S-3, S-9]
  13. Beginning in mid-October 2008 the guidance counselor began to meet individually with Student to address conflict resolution, behavior and peer relations. [NT 330-331]
  14. In early December 2008 Student made allegations that Student’s [redacted] physically and verbally abused Student; these allegations were reported, as mandated by state law, and pursuant to a child welfare investigation were deemed unfounded. [NT 322-323; HO-1]
  15. In mid-February 2009 the District referred Student to its Student Assistance Service [SAS], a program to assist students who may have personal, family and/or social issues that may be impacting behavior or affecting learning. After discussion, a team of teachers, counselors, intervention specialists and school psychologists assigned a mentor to Student. The assigned mentor met individually with Student to offer counseling and assistance but Student did not share very much in these sessions. [NT 324-330, 386-388; S-6]
  16. On Thursday, April 23, 2009 Student deliberately stabbed Student’s own hand with a pencil, a behavior that was quite different in nature and severity from anything Student had done previously at school. Student was taken to the school nurse for treatment while the guidance counselor telephoned the Parent and recommended that the District’s intervention specialist be allowed to conduct a risk assessment and that the school psychologist be given permission to conduct a special education evaluation. The Parent indicated verbal consent, and on Friday,

- April 24, 2009 the principal met with the Parent and the Parent's mother [Student's grandmother]<sup>4</sup> and gave the Parent a Permission to Evaluate form [PTE] which the Parent declined to sign at that time, saying she wanted the weekend to think it over. On Monday, April 27, 2009 the Parent telephoned the guidance counselor, informing her that she did not want Student to receive either the risk assessment or the special education evaluation because Student had already been "poked and prodded too much." [NT 64-68, 332-336, 389-392; S-7; HO-1]
17. Despite receiving a strong recommendation from the District to move forward with the evaluation, the Parent wanted to "put off yet another evaluation on top of the other two evaluations that were already done" because she did not think the Student would cooperate, she did not want the Student to be pulled from class and she was not sure what the results would be. The Parent indicated that she preferred to obtain private services; the services she intended to procure were tutoring services. [NT 64-66, 74; P-6]
  18. The Parent did not return the April 24, 2009 PTE form or give consent for the District to conduct a risk assessment or a special education evaluation. The guidance counselor and the principal remained concerned about Student and conducted ongoing communication with the Parent to stay informed about Parent's private services. [NT 64-68, 77-79, 336-337, 393; P-6]
  19. Continuing to be concerned about Student, on June 5, 2009, the District issued a second PTE hoping the Parent would reconsider and allow the District to perform a special education evaluation. The Parent testified that she and the principal talked about having an evaluation on two occasions at the end of the 2008-2009 year. [NT 67, 69-70; S-8]
  20. Again the Parent did not provide the necessary written consent for an evaluation, never returning the second PTE, and communicated to the principal that she did not want the evaluation. The Parent preferred to obtain tutoring through the summer. [NT 67, 69-71, 74-75, 395-397, 399]
  21. The District's having been denied permission to evaluate Student to determine eligibility for special education, Student was placed in regular education for the 2009-2010 school year with regular education supports. The District continued the SAS mentoring services, assigned another guidance counselor, and offered IOP counseling services. The District also placed Student on a smaller seventh grade team. Student was placed in an intervention literature class taught by a reading specialist, and in an additional reading class. Tutoring sessions were offered by the math teacher and through the District's REACH program, and homework clubs were offered. However, the Parent declined these services or Student would refuse to take advantage of these services. [NT 103, 397-406; S-11]

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<sup>4</sup> The Parent's mother [Student's grandmother] attended both sessions of the hearing and appears to have been closely involved and supportive of her daughter. Mother herself is educated and competent and identified her profession as [redacted].

22. Private tutoring for four hours a week occurred from the end of April 2009 to December 2009. [NT 79, 93]
23. Despite private tutoring and tutoring by Student's math teacher, Student failed writing, math and history the first semester. [NT 82; S-13]
24. Student's behavior problems escalated in seventh grade, with increasing disciplinary referrals in comparison to the previous year. [NT 410-411; S-9, S-12]
25. Although the Parent testified that Student's disciplinary issues in the 2009-2010 school year did not arise until about a month into the year, and were "knucklehead stupid things" like running in the halls or tossing a bottle into trashcan from Student's classroom seat, the disciplinary record shows cursing, elbowing another student and [redacted] in a fight, and gross insubordination during September 2009. Of the 18 recorded incidents between September 9, 2009 and December 17, 2009 the majority involved disrespect, defiance and physical and verbal aggression towards staff and other students. [NT 81; S-12]
26. The school called the Parent any time there was an incident and emails "were always going back and forth". The Parent and the Student were "feeling that Student was always getting caught for something" and both were getting frustrated. [NT 82-84, 87; P-12]
27. The Parent testified that she did not recall if a discussion arose about evaluating Student during this time. [NT 91]
28. The Parent testified that she was also trying to get Student into therapy but that Student wasn't participating. [NT 68, 96-97, 107]
29. In the fall of seventh grade, Student had two incidents of self-injurious behavior, purposefully [redacted], and intentionally [redacted]. The Parent was informed of these incidents. [NT 412-414; P-12]
30. On November 16, 2009, the principal emailed the Parent to convey the District's request to conduct a Functional Behavior Assessment (hereinafter "FBA") and develop a Behavior Intervention Plan (hereinafter "BIP") to assist Student. During a follow-up telephone conversation the Parent told the principal that she would think about the District's offer. Two days later the Parent indicated by email that she wanted to try her own behavior plan at home using hockey as an incentive. [NT 406-410; S-10, S-11]
31. In December 2009, Student cut [redacted], and the principal informed the Parent of this. A week later Student [redacted]. In late December 2009, in light of the lack of parental consent for a special education evaluation, the principal explored other regular education options for Student with the District's prevention specialist. The Parent was "all for it because obviously [Student] was having issues where [Student] was". [NT 105, 111, 412- 416]
32. On December 23, 2009, the District recommended the Intermediate Unit's [redacted] program [redacted]. [Redacted] has a mental health component, small class sizes, group and individual therapy and a behavior plan; it follows the

- District's curriculum and is located near the middle school. The Parent visited [redacted] over the winter break and agreed to this placement to begin after the winter break. [NT 116-117, 416-419]
33. On January 5, 2010 Student started at [redacted], and the Parent emailed the District after the first day there saying that Student was relieved and happy and liked the placement. The placement remained successful through February per Parent report. [NT 421-422, 426; S-14]
  34. Eventually, however, the family started calling [reacted] the school of "thugs" as there were students there with which the family was uncomfortable. Two of the District's personnel contacted [redacted] director who reported that Student was instigating some of the altercations, that Student was safe, and that Student was disciplined for Student's part in the fighting. [NT 467]
  35. In mid-March Student had gotten into an altercation with another student at [redacted] and was fearful of returning. Allegedly because of Student's being upset about the situation with the other student, Student cut [redacted], but did not require medical attention and was not taken to a doctor. The Parent subsequently removed Student from [redacted], the last day of attendance being March 19, 2010, and submitted a doctor's note on April 15, 2010 so truancy charges would not be an issue. [NT 125, 134-136, 424-427; S-17, P-13]
  36. At the end of March 2010 the principal and the Parent discussed scheduling a meeting as the Parent wanted to discuss other placement options, but the Parent said that first she needed "to get her ducks in a row" by obtaining counsel. In early April 2010, the Parent's counsel requested a special education evaluation and on April 5, 2010 the District immediately issued another PTE to the Parent. The Parent signed the PTE and returned it to the District on April 12, 2010. [NT 427-432; S-16]
  37. The Parent meanwhile pursued a private unilateral placement and Student began attending Private School on May 17 or May 18, 2010. [NT 152; P-8]
  38. The District's evaluation, which included a psychiatric assessment, was issued on June 10, 2010 prior to the end of the school year. Student was found eligible under the IDEIA for special education under the classifications of Emotional Disturbance and Other Health Impairment. [S-19]
  39. On July 19, 2010 the District proposed a placement for Student in its full time emotional support program for the 2010-2011 school year, but the Parent declined the District's offer. [S-20]
  40. The Parent and Student have moved and no longer reside in the District. [Parent's Closing Brief]

## Discussion and Conclusions of Law

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome determining rule applies only when the evidence is evenly balanced in “equipoise,” as otherwise one party’s evidence would be preponderant. *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). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parent requested this hearing and was therefore, assigned the burden of persuasion pursuant to *Schaffer* and also bore the burden of production. The Parent failed to meet her burden of persuasion and could not prevail, given the preponderance of the evidence in the District’s case and the resulting lack of evenly balanced evidence between the parties.

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). Specific credibility references are made below as appropriate to the discussion.

### IDEA

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* The IDEIA sets forth the responsibilities (commonly referenced as “child find” responsibilities) borne by school districts for identifying which children residing in its boundaries are in need of special education and related services such that “[all] children with disabilities residing in the State...regardless of the severity of their disabilities...are identified, located and evaluated...” 20 U.S.C. §1412(a)(3).

Once disabled children are identified as being eligible for special education services the IDEIA requires the State to provide them with a “free appropriate public education”. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26

Parents of children eligible for special education 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), make it clear that tuition reimbursement can be considered under specific conditions:

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

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

#### Section 504

The Parent articulated a claim under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §793 *et seq.* To establish a violation of §504, the Parent must demonstrate that (1) Student is disabled as defined by the Act;<sup>5</sup> (2) Student is "otherwise qualified" to participate in school activities; (3) the school or the Board receives federal financial assistance; and (4) Student was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *Ridgewood Board of Education v. N.E.* 172 F.3d 238, 253 (3d Cir. 1999); *J.F. v. School District of Philadelphia*, 2000 U.S. Dist. LEXIS 4434, No. 98-1793, (E.D.Pa. 2000); *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1380 (3d Cir. 1991); 34 C.F.R. § 104.4(a).

Section 504 requires a recipient of federal funds to make “reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped” person. 34 C.F.R. §104.12 (a). Although the Third Circuit has not specifically addressed what is a “reasonable accommodation” in relation to the Rehabilitation Act's requirement of an "appropriate" education, Courts have concluded that a reasonable accommodation analysis comports with the Third Circuit's explanation that an "appropriate" education must "provide 'significant learning' and confer 'meaningful benefit,'" *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988), but that it "need not maximize the potential of a disabled student." *Ridgewood*, 172 F.3d at 247; *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002).

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<sup>5</sup> A “Handicapped person” under Section 504 of the Rehabilitation Act is defined as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 34 C.F.R. §104.3(j).

The Parent produced no evidence of discrimination on the basis of disability, and did not argue that the evidence established a separate and distinct claim under §504 in addition to the District's alleged violations of IDEA. The Parent's 504 claim was based entirely upon the same facts that were asserted in support of the IDEA claims. The District's satisfaction of its IDEA child find obligation fulfills its child find obligation under Section 504. *See West Chester Area School Dist. v. Bruce C., et al.*, 194 F.Supp.2d 417, 422 n.5 (E.D.Pa. 2002) (court found issue of whether student was entitled to Section 504 Service Plan to be moot because court found student eligible for IDEA services).

### Evaluation

In her closing argument the Parent asserts that the District's January 2008 evaluation, conducted while Student was enrolled in parochial school, was incorrect by virtue of not finding Student eligible for special education services under IDEA or for a Service Plan under Section 504. Further the Parent implies that had Student been found eligible she would have approved her child's placement in special education or accepted a 504 Service Plan upon enrollment in the District. When it conducted its evaluation of Student while Student was in parochial school there were no indications from the data gathered that Student required specially designed instruction or accommodations in order to access the regular education curriculum. [FF 3] Student had made academic gains over the previous 18 months while receiving the parochial school curriculum. [FF 4]

Monday morning quarterbacking invariably results in a more favorable outcome. Had the District been in possession of the same data in January 2008 that it later acquired in the winter/spring of 2009 when Student was in a District school, Student would likely have been found eligible under the IDEA. Similarly, had the Parent known in April 2009 what she later came to learn in the fall of 2009 she likely would have quickly signed the first Permission to Evaluate. In fact, in April 2009, and again in June 2009, and yet again in November 2009 the Parent, although aware of increasingly disturbing information, refused the District's requests to assess Student and only acceded to these requests once advised to do so by legal counsel. [FF 16, FF 17, FF 18, FF 19, FF 20, FF 30] Hindsight is 20/20 no matter who is wearing the lenses.

The fact that Student was not found eligible for special education or offered a 504 Service Plan upon entrance into the District does not mean that Student did not receive supportive services in the regular education program. The District implemented a variety of strategies to ease Student's transition into public school 6<sup>th</sup> grade from parochial school where Student had been from kindergarten through 5<sup>th</sup> grade. In 2008-2009 Student was assigned to a reading specialist's classroom for reading comprehension, Student was screened for OT needs and the teachers were given strategies to assist Student in handwriting, Student was referred to the AIT where the team developed strategies and monitored them for success, Student began meeting with the guidance counselor and after making allegations of being abused [redacted] Student was referred to SAS and assigned a mentor. After the District sought and was denied permission to evaluate Student, the District continued to provide these regular education supports and once again sought the Parent's permission to evaluate Student. [FF 7, FF 8, FF 9, FF 10, FF 11, FF 13, FF 15]

In 2009-2010, lacking the Parent's permission to evaluate Student, the District continued SAS supports from the previous year, assigned another specifically chosen guidance counselor, offered IOP counseling services, placed Student on a smaller seventh grade team, placed Student in an intervention literature class taught by a reading specialist, and in an additional reading class, and gave Student tutoring by the math teacher. Tutoring sessions were also offered through the District's REACH program, and homework clubs were offered, but the Parent declined these services (perhaps because she was obtaining private tutoring for Student) or Student would refuse to take advantage of these services. [FF 21]

Seeing Student's behavior escalate, and twice having been denied permission to conduct a special education evaluation, the principal in an email raised the possibility of and sought the Parent's permission to conduct an FBA [which is considered to be an evaluation requiring written parental consent] and develop a behavior plan, but did not receive permission. [FF 30] Interpretation of the record on this point turns on the relative credibility of the Parent, who testified that she gave verbal permission for an FBA, and the principal who testified that the Parent said she would talk to her mother about it and get back to her. The next communication from the Parent was an email about trying a home-based behavior plan. Given the Parent's previous withholding permission for evaluations, and given her tendency to consult with her mother before making decisions about Student's educational issues, the principal's testimony is credited with more weight on this point and I conclude that the Parent did not give the District verbal permission on the telephone to conduct an FBA, particularly in light of the fact that the next written communication from the Parent, two days later, did not reference the FBA but did reference her idea for a home-based incentive program.

Although the District could have filed for a Due Process Hearing in order to obtain an order forcing an evaluation of Student, the District had no legal *requirement* to pursue litigation against the Parent in this regard. Although the IDEA allows such a step it is a discretionary option for school districts. 20 U.S.C. § 1414(a)(D)(i)(I) states:

If the parent of such child does not provide consent for an initial evaluation under clause (i)(I), or the parent fails to respond to a request to provide the consent, the local educational agency *may* pursue the initial evaluation of the child by utilizing the procedures described in section 1415 of this title, except to the extent inconsistent with State law relating to such parental consent.

20 U.S.C.A. § 1414(a)(D)(i)(I) (emphasis added). Congress specifically used the word "may," instead of "must" or "shall" in this provision regarding initial evaluations.<sup>6</sup> In the instant matter the District indicated that it chose to respect the right of the Parent, who is educated, articulate and involved, to make educational decisions for her child particularly given her stated intention to seek private services to address Student's needs.

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<sup>6</sup> Although the statute does not reference re-evaluations, an inference can be made that an evaluation of Student in April 2009 or following could be considered initial as Student was not yet classified as a special education student.

### Placement

Finally, because Student was becoming more self-destructive in the school setting despite a panoply of supports in regular education and tutoring procured privately the District sought another regular education setting that could better meet Student's needs. The [redacted] program presented a reasonable option as it offered a mental health component, small class sizes, group and individual therapy and a behavior plan. It also followed the District's curriculum and was located near the middle school. After the Parent visited the school she approved the placement. Student liked the placement from the first day, and did well for at least two months, which alone is remarkable given Student's earlier escalation in troubling behaviors. [FF 29, FF 31, FF 32, FF 33] However, given Student's difficulties with a peer, Parent unilaterally removed Student from [redacted] and located a private placement, within the same time frame obtaining legal counsel and requesting an evaluation that the District was eager to provide. [FF 34, 35, 36] The evaluation was completed in a timely fashion, Student was found eligible for special education, and a program was offered. However, the Parent declined the offer and subsequently relocated out of the District. [FF 38, FF 39, FF 40]

The District's placement of Student in [redacted] was appropriate given the behavioral and emotional needs Student was displaying. As Student was a regular education student during the unilateral placement at the Private School, and the District was not given an opportunity previously to evaluate Student for special education despite three attempts to gain permission, tuition reimbursement cannot be considered. The District did not have the opportunity to propose an appropriate special education program and therefore an analysis under Carter is neither necessary nor appropriate.

### Summary and Conclusion

Student was evaluated privately in 3<sup>rd</sup> grade, and by the District in 5<sup>th</sup> grade, and neither evaluator found Student eligible for special education. However, upon Student's entry into the District's 6<sup>th</sup> grade Student was monitored as per the District's evaluation and was given increasing levels of academic and behavioral/emotional supports by the District as well as privately. By spring of Student's first year in the District emotional issues led to the District's request for permission to evaluate Student, which the Parent denied. The District attempted to gain permission to evaluate again at the end of the school year, and the Parent again denied permission. Student began 7<sup>th</sup> grade as a regular education student and as behaviors escalated in the fall the District sought permission to assess Student through an FBA, for which parental permission was not given. When Student, still a regular education student, experienced serious emotional issues the District sought an appropriate alternate placement with the Parent's agreement. Upon parental approval Student was placed as a regular education student in [redacted], which for several months served Student well. However, peer relational issues led to the Parent's withdrawal of Student from [redacted]. The Parent obtained counsel and on counsel's advice requested an evaluation in April, and the Parent found an alternate unilateral placement in May. The District performed the requested evaluation in a timely manner and in June, before the end of the school year, produced its report, finding

Student eligible for special education. During the summer the District proposed a special education program to be implemented for 8<sup>th</sup> grade, but the Parent did not accept the offer and moved from the District.

During the time Student was in regular education the District provided appropriate supports, while keeping in close communication with the Parent and requesting to evaluate Student on three separate occasions. As a regular education student, Student was appropriately placed at [redacted]. I conclude that the District has produced preponderant evidence that it fulfilled its obligations to Student in all respects and therefore prevails in this matter.

### ORDER

It is hereby ordered that:

1. The District offered Student a free appropriate public education from January 5, 2009 through April 18, 2010.
2. As the District offered Student a free appropriate public education Student is not entitled to compensatory education.
3. As the District offered Student an appropriate placement, the Parent is not entitled to tuition reimbursement for her unilateral placement of the Student at the Private School from April 17, 2009 to the end of the 2010-2011 school year, or to compensatory education for that period

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

May 10, 2011

Date

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

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