

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: L.P.

ODR File 19213 16 17

Date of Birth: [redacted]

Dates of Hearing:

7/17/17

7/28/17

CLOSED HEARING

Parent(s):

[redacted]

Nicole Reimann, Esquire, Batchis Nestle & Reimann, Two Bala Plaza, Suite 300,
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(*Counsel for Parent*)

School District:

Chester Charter School for the Arts, 200 Commerce Drive,
Aston, PA 19014

Maria Ramola, Esquire, Latsha Davis Yohe & McKenna, 350 Eagleview Blvd., Suite 100,
Exton, PA 19341
(*Counsel for the School District*)

Date of Decision:

8/16/17

Hearing Officer:

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

Background

Student¹ is an early teen-aged student who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the current classifications of specific learning disability and other health impairment (ADHD). As such, the Student is also an individual with a disability as defined under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 and a protected handicapped student under Pennsylvania Chapter 15.²

The Parents³ requested this hearing, asserting that Student's LEA, the Charter School (School), has not provided Student with a free appropriate public education (FAPE) since Student's April 6, 2017 dismissal from an Approved Private School (APS), a placement previously made by agreement of the parties for school year 2016-2017. They seek compensatory education as a remedy for this alleged violation. The Parents also believe that the School's current offer of placement in an IU-operated program (IU Program) for the upcoming school year is not appropriate, and seek an order that Student be placed in the private school (Private School) they favor.

Based upon the preponderance of the evidence before me I find in favor of the School.

Issues

Did the School fail to provide Student FAPE from April 7, 2017 onwards, and if so what is the appropriate remedy?

Is the program/placement the School offered Student for the 2017-2018 school year appropriate?

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14) 29 U.S.C. § 794. The federal regulations implementing Section 504 are codified in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

³ Student's father requested the hearing and was the person who interacted with the School and the other facilities as Student lives with him. [NT 438] For purposes of the hearing when the plural 'Parents' is used it was understood that he was acting on behalf of both parents.

Findings of Fact

The School

1. Student entered the School for the 5th grade, having transferred from another charter school. [NT 54, 396]
2. At the previous charter school Student was identified as eligible for special education under the classifications of specific learning disability and speech or language impairment. [NT 54-55; P-1, P-2]
3. Student displayed inappropriate behaviors from Student's entrance into the School, committing Level 2 and Level 3 infractions as documented on Student's Discipline Student Record Listing. A Level 2 infraction is defined as disruptive and disorderly behaviors. A Level 3 infraction is defined as safety issues/aggressive/threatening behaviors. In the 2015-2016 school year, Student had four Level 3 and three Level 2 infractions, with a total of 89 official behavior incidents during the 2015-2016 school year. Student had Level 3 and Level 2 infractions in the two previous years as well. [NT 57, 397; J-3, P-5]
4. Upon parental request for an evaluation, in April 2016 the School issued a comprehensive Psycho-educational Evaluation Report based on evaluations by a school psychologist, a speech/language pathologist and an occupational therapist. Cognitive testing revealed low average to average abilities in the areas assessed while academic achievement fell into the low to below average ranges in reading and math and in the below average to average ranges in written expression. [NT 397-398; P-17, P-85]
5. Social/emotional/behavioral assessment through rating scales by a Parent and teachers revealed difficulties in the areas of externalizing behaviors and executive functioning. [P-85]
6. The Parents refused permission for the School to obtain records from or speak with the staff at the outpatient facility where Student was being treated; the April 2016 evaluation therefore did not have the benefit of Student's outside providers. [NT 434-435; J-1]
7. After receiving the report the Parents requested that sections on Student's aggression be stricken from the report because of their position that Student's behaviors were based in impulsivity due to ADHD more so than on deliberate actions. The Parents requested that a statement be added, "[Student]'s behavior and emotional issues are interfering with [Student's] ability to be successful at school." The School removed some of the language but not all. [NT 399-400, 451-453; J-1, J-3]
8. The language to which the Parents objected includes the following; "Aggression is considered one of [Student's] most significant behavioral and emotional problems. It is characterized by hostile or destructive behaviors that can be both physical and verbal. Children who exhibit aggressive behaviors may have inadequacies with problem-solving and deficiencies in the specific area of identifying alternatives, considering consequences

and determining causality, and they may also engage in means-ends thinking and have difficulty with seeing other perspectives.” [P-85]

9. The Parents objected to the listing of intervention strategies known to be helpful in addressing behaviors such as Student presented: bullying prevention, child-centered play therapy, classroom social dynamics, cognitive restructuring and counseling groups. [P-85]
10. The Parents also objected to references in the FBA section of the report to several behavioral issues. [P-85]

The Approved Private School

11. On August 30, 2016 as part of a settlement the School issued a Notice of Recommended Educational Placement (NOREP) for Student to attend the APS. The School crafted an IEP for Student based upon the April 2016 evaluation and Student began at the APS in September 2016. [NT 37, 193, 396, 449; J-4, P-56]
12. The APS is a small school comprised of 6th through 12th grades with both special education and regular education students. The special education students are learning disabled, have high functioning autism, or require emotional support because of issues such as bipolar disorder, depression, anxiety and/or victimization by bullies. [NT 195]
13. Regular and special education students are educated together. All the middle school teachers are special education teachers. The average class size is six to eight students, and for middle school academic classes, in addition to the special education teacher, there is a paraprofessional to assist the teacher. [NT 196]
14. The art, gym and music teachers are regular education teachers. [NT 196]
15. The entire middle school of eighteen students attends gym class together, and there are ten to twelve students in art and music classes. The paraprofessionals are in those classes in addition to the teachers. [NT 196-197]
16. The APS is not designed as a school for students with acting out behaviors. [NT 195]
17. At the beginning of the school year Student did well academically but there were a variety of behavioral challenges. [NT 38-39, 193; S-10, P-57, P-80]
18. At the APS Student respected some staff members but not others, but all staff members wrote Student up at one time or another. Student disrespected both male and female staff. [NT 213-215]
19. Student had behavioral difficulties in the non-academic classes and in the hallways as well as in the academic classes. [NT 197, 223]
20. The APS hired paraprofessionals to be in every middle school classroom specifically because of Student’s behaviors. [NT 222; S-16, S-26, S-36, P-57]

21. Student received weekly individual and group counseling and social skills training at the APS. [J-9, P-56]
22. Student's APS Disciplinary Log reflects behavior issues⁴ from Student's entrance into the APS. As early as September 6, 2016 Student was cited for nine behavioral notations in September, sometimes more than one in a day. [P-57]
23. In October 2016 there were seven notations for verbal and physical aggression and noncompliance. [P-57]
24. In November 2016 there were six notations for physical aggression and disruption. [P-57]
25. In December 2016 there were nine notations for escalating physical and verbal aggression. [P-57]
26. Student was suspended on or about December 20, 2016 for repeated incidents of physical and verbal aggression. After the winter break the APS⁵ requested that the Charter School provide a one-on-one for Student because while still doing well academically, Student's inappropriate behaviors were increasing. [NT 39-40, 194]
27. In January 2017 there were seventeen notations for physical and verbal aggression and disruption. [P-57]
28. The Disciplinary Log stops on February 7, 2017. The three entries for February included disruption of class and verbal disrespect and verbal aggression. [P-57]
29. Although not recorded in the Disciplinary Log, the record contains multiple disciplinary forms for March 2017 for similar behaviors as in earlier months. [S-36, P-80]
30. Student was removed from instruction with peers at least every other week because of behavior incidents. [NT 219-221, 470-471; S-16, P-57]
31. Given cognitive ability tested as low average to average, Student's academic achievement (grades) were minimally commensurate based on the portion of the school year Student was at the APS: English A 68, English B 80, History 77, Math A 83, Math B 81, Science A 81. [J-13]
32. Student saw a psychiatrist for medication management and had a therapist for outpatient individual and family counseling as well. [NT 322-323, 426-428]
33. Student was prescribed Strattera to address symptoms of Attention Deficit Hyperactivity Disorder (ADHD). [NT 324-325; J-6]

⁴ Notations for infractions such as missing homework are not included in the count.

⁵ Herein, the APS Head of School, who was acting on behalf of the facility.

34. Student did not always take the prescribed medication. While taking the medication every day is very important, timing of the daily dosage of Strattera is less important than having the correct dosage based on the patient's weight,. [NT 326-327, 403]
35. [physical description of Student redacted] [NT 327-328, 335; J-6]

Events Preceding Student's Dismissal from the APS.

36. Student's father was usually notified by telephone when there were behavioral incidents and he had been called into the APS many times to discuss Student's behavior. [NT 217, 406]
37. The APS had made a plan that if Student was having a hard time the school counselor would come in immediately to see if the counselor's presence would help Student calm down. However, this often did not work. The only person to whom Student would respond was the head of school. [redacted] [NT 208-209, 220]
38. On February 8, 2017 the APS called an IEP meeting following a suggestion it had made that Student be placed elsewhere. [NT 197-198; S-14, S-16]
39. At the meeting the IEP team revised Student's IEP and the School agreed to have a Board Certified Behavior Analyst (BCBA) conduct an FBA and create a positive behavior support plan (PBSP). [NT 199; P-61, J-9, J-10]
40. At the same February 8, 2017 IEP meeting Student's father requested a one-on-one for Student, and the APS joined in that request. [NT 48, 200, 404-405]
41. During the time following the IEP meeting the APS was frustrated about the pace at which the FBA was being conducted, perceiving a lack of "expediency" on the part of the BCBA. [NT 199-200]
42. The FBA was not completed by the time Student was dismissed from the APS. The BCBA who completed the FBA after Student had left the APS did not find a one-to-one to be necessary for Student, although one of the motivators for Student's inappropriate behaviors was gaining attention from staff and peers. [NT 216; J-11, J-13]
43. On March 13, 2017 the township police came to the APS pursuant to a report that [redacted]. The incident was witnessed by a staff member who intervened. [NT 202; S-36, P-80]
44. Later in the morning Student repeated this behavior; [redacted]. [NT 203]
45. The police officer, who was the APS's community liaison with expertise in working with teenagers, interviewed both students [redacted]. [NT 203]
46. This APS contacted Student's father, but did not dismiss Student because of these two incidents. The APS believed that Student was impulsive rather than being "really

negative” but also made it clear that there could not be any more situations such as this. [NT 203-204]

47. On March 14, 2017 the APS followed up with an email to the School asking about the status of a one-on-one because although Student’s behaviors were continuing to increase the APS actually wanted Student to be able to stay there. The School suggested that perhaps one of the paraprofessionals the APS had hired could be Student’s one-on-one person. [NT 200-201]
48. On April 4, 2017 there had been “minor incidents” such as repeatedly talking during lessons and being disrespectful and defiant as well as “major incidents” involving blatant disrespect and/or defiance. [NT 207-208]
49. On April 6, 2017 Student was having a “rough day”. [redacted]. [NT 206]
50. The head of school and the school counselor intervened but Student continued to have numerous negative interactions. [redacted]. [NT 206-207]
51. [redacted] [NT 207]
52. [redacted]. [NT 205]
53. The head of school was brought in and she was able to calm Student down. [redacted] [NT 213]
54. On April 6, 2017 the APS notified the Parents and the School that Student was being expelled from the APS. On April 10, 2017 the School began the process of sending packets to other possible placements for Student. [NT 456-457; S-23, S-64]

Educational Services Offered to Student Post-Expulsion

55. April 17, 2017 was the School’s first day back after the spring break which immediately followed Student’s dismissal from the APS. On April 22, 2017 the School sent an email to the Parents offering a remediation program of 1½ hours per week (one hour academic instruction with Pennsylvania certified special education teachers and a half hour counseling with a Master’s level school counselor) at the School at the end of one school day. No transportation was offered. No NOREP was issued. [NT 146; S-34]
56. On April 26, 2017 the School increased the offer to 2½ hours per week (two hours of academic instruction with special education teachers and a half hour counseling with a Master’s level school counselor) with the instruction being offered at the School on two separate days. Again, no transportation was offered and no NOREP was issued [NT 147-148; S-37]
57. The Parents did not accept either offer of a remediation program because father did not know the details of what was being offered. [NT 421-422]

58. On May 15, 2017 the School issued a NOREP offering separate extended school year (ESY) programming and instructional remediation at the IU Program. Student's father received the NOREP by email on May 15, 2017 but did not return it signed. The Parents received the NOREP again on May 24, 2017. [NT 417, 419-420, 459-460; J-17, S-43]
59. The May 24, 2017 NOREP provided ESY from June 26th-July 25, 2017 (exclusive of July 3rd and 4th) on Monday and Tuesday of each week from 10 AM-12 PM (2 hours daily/4 hours weekly) that included reading, writing and math instruction and two 1/2 hour counseling sessions weekly. [J-17]
60. The May 24, 2017 NOREP further offered remedial instruction from June 28-July 27, 2017 on Wednesday and Thursday of each week from 10AM-12PM (2 hours daily/4 hours weekly). [J-17]
61. The NOREP called for remedial instruction based on the 8th grade Reading and Math content using the School's curriculum mapping as was taught from April 17th-May 25th (the time Student had been out of school). [J-17]
62. The School was offering the School's curriculum to Student so that Student could complete 8th grade, in accord with Pennsylvania common core standards and content. [NT 474-475; J-17]
63. On May 25, 2017 the School informed Student's father of the transportation arrangements for the program that was to begin on May 26, 2017. Transportation was to be on a school bus operated through the school district of residence. Since ten days had passed, the School, not having yet received the signed disapproved NOREP, had the school district of residence send a school bus to transport Student to the IU for the end-of-year programming. [NT 461-462, 474-475; S-42, S-45]
64. Although Student's father had visited the IU Program, he disapproved the NOREP for the IU Program/ESY on May 26, 2017 for reportedly the same reasons he had not approved the original offers of remediation, *i.e.* that he did not understand exactly what was being offered. Student did not attend the end-of-year IU Program or the ESY program. [NT 144, 432; P-72]

The IU Program

65. The IU Program offers students both an academic program and a vocational/technical program. [NT 229]
66. The IU Program currently has approximately 30 students; in general students in the program are identified as being IDEA-eligible. There are about 7 or 8 students going into 9th grade in September. [NT 235-236, 282-283, 363]
67. Academic classes are staffed by special education teachers while the gym, health and vocational classes are staffed by regular education teachers. Teaching assistants rotate through the classrooms. [NT 236-237]

68. Teaching assistants/paraprofessionals have an Associate's Degree or the equivalent and receive 20 hours of training per year. [NT 236-237, 246-247]
69. Students take four 45-minute core content academic classes daily – math, science, social studies and English. The IU Program follows a Pennsylvania Standards-aligned curriculum and Students earn the required credits toward a high school diploma. [NT 237, 252-253, 257]
70. The IU Program uses AimsWeb for academic progress monitoring. [NT 259]
71. As most of the students are not self-directed, self-guided, independent learners, the IU provides direct instruction, *i.e.* a teacher conducts the classes in person either individually or in small groups. [NT 237-238, 240]
72. All instruction is individualized to meet the needs of each student, many of whom have learning disabilities or have previously missed instruction because of behavioral issues. [NT 238]
73. Teachers have access to the Odyssey Ware online teaching resource to help them develop course content to enhance their direct instruction. [NT 239, 258-259]
74. The IU Program gives students access to technology such as laptops and use of a Smartboard, but it is very rare for a student to be working alone directly on a computer unless that student needs access to a specific course such as a foreign language or a higher level science course to fulfill credit requirements. [NT 239-241, 384-385]
75. The IU program uses research-based reading programs such as Corrective Reading, Project Read and Rewards, but if Student required reading instruction through the Wilson Program the IU likely could procure a Wilson-certified teacher. [NT 241-242]
76. Students have a choice of two vocational technical courses – culinary or carpentry; the courses are hands-on affording experiences in the trade. [NT 254-255]
77. In the upper grades a student could choose to attend classes at a vocational/technical high school where there are additional types of vocational courses. [NT 256-257]
78. If a student in the lower grades didn't want to participate in culinary or carpentry, the staff could work to create an individualized program, although this has not yet been necessary for any of the students. [NT 256-257]
79. The IU Program does not aim to keep students for four years of high school and expects them to return to their home LEAs. The program offers coursework that will fulfill cumulative graduation requirements in Pennsylvania. [NT 386-387]

80. The IU Program offers emotional and behavioral supports within a therapeutic environment. [NT 228-229]
81. In addition to an IEP students receive a clinical treatment plan. [NT 293]
82. There is a psychiatrist from a local hospital at the IU Program three days a week. The psychiatrist evaluates new students, prescribes and monitors medication as needed and/or coordinators with families' private psychiatric providers. [NT 242-243, 391]
83. The IU Program has an assigned social worker. [NT 252]
84. There is a contracted school psychologist at the IU Program three days per week. [NT 394]
85. Four mental health counselors from the local hospital provide the therapeutic program and offer individual and group counseling as well as crisis intervention if needed. There are more than one counselor physically at the IU Program five days per week throughout the program day. [NT 229, 393-394]
86. Students at the IU Program are assigned to a mental health counselor for individual treatment. Each counselor has a caseload of seven to eight students. [NT 391]
87. The principal of the IU Program is a trained trainer in the Devereux Safe and Positive Approaches crisis de-escalation program. The program includes strategies from classroom management, controlled antecedents of behaviors, and keeping yourself and others safe, to physical interventions of escorts and physical restraints. [NT 380-381, 390]
88. All staff in the IU Program receive Devereux Safe and Positive Approaches training and there are also specifically designated crisis managers throughout the building. They perform the usual paraprofessional/aide duties as well as recording data collection and intervening in a crisis if needed. [NT 247-248, 267]
89. The IU's director of special programs oversees the IU Program. She holds a Master's Degree in educational leadership and is certified in Pennsylvania as a special education supervisor, a K-12 special education teacher and a reading specialist; she has a superintendent eligibility letter. [NT 226-227; S-50]
90. The IU's director of special programs is on-site at the IU Program at least every two weeks but often more frequently. [NT 243]
91. The principal of the IU Program was formerly the IU's assistant supervisor of elementary and middle school emotional support. He began in his current position on or about May 5, 2017. [NT 230-231, 337]

92. The principal of the IU Program holds an undergraduate degree in business, and a Master's Degree in special education. He holds a principal's certification, a supervisor of special education certification and a curriculum supervisor certification. [NT 380-381]
93. There is a weekly meeting between the IU Program's teaching staff and the mental health staff, and the supervisor of the mental health staff meets on an ongoing and frequent basis with the principal. [NT 249]
94. A typical referral to the IU Program is similar to Student's profile, *i.e.*, a student with a learning disability and other health impairment who has a history of behavioral incidents and requires emotional support in addition to learning support. [NT 233, 284]
95. Identified IDEA-eligible students enter the IU Program with the IEP from their previous placement. They are assessed for a four-to-six week period to establish baselines, check appropriateness of goals and monitor academic progress on a short term basis before the IEP is finalized. [NT 296-297, 386-387]
96. Each student at the IU Program receives a Functional Behavior Analysis (FBA). There is a Positive Behavior Intervention System (PBIS) that rewards students for appropriate behaviors that are identified for the entire group of students and then also individualized according to each student's needs as assessed through the FBA. [NT 268-270]
97. An IEP for Student dated July 10, 2017 was prepared based on the former APS IEP but incorporating services to be offered at the IU Program. The APS IEP was formulated upon the comprehensive multidisciplinary evaluation performed at the School in April 2016. The July 17, 2017 IEP also incorporated results of the recent FBA and PBSP. [NT 339-340; J-1, J-3, J-19]
98. The father and Student visited the IU Program after Student had been accepted into the Private School. The father believes that he went into the visit with an open mind. [NT 413]
99. Student's father raised concerns he had during the tour of the IU program. In particular he was concerned about hearing cursing, about seeing students walking around the classroom while the teacher was conferring with one student, and about witnessing some verbal altercations. [NT 358-359, 415-416]
100. The behaviors of concern father noted at the IU Program were some of the same sorts of behaviors Student had exhibited at the APS. [NT 429-41]
101. Student's mother understands that Student is welcome to return to the School upon completion of IEP goals at the IU Program. [NT 443, 463-464]

The Private School

102. Several days after Student was dismissed from the APS Student's father through counsel requested that the School send an application packet to the Private School. The

School complied on April 10, 2017 and father and Student visited the Private School shortly after. Student was accepted for admission. [NT 408-409, 411; S-39, S-24]

103. The Private School serves regular education students as well as those who have been found IDEA eligible for special education. The facility focuses on students with anxiety disorders who generally cannot succeed or thrive in a regular school environment with a larger population, larger class sizes, and less individualized attention to the student. [NT 157-158, 166, 464-465; S-49]
104. About half the students are able to leave the Private School and return to their LEAs. Eight students graduated from the Private School this year; two went on to academic and two went on to vocational/technical post-secondary programs. [NT 167-168]
105. The Private School has two campuses serving 4th through 12th grades with a current combined student population of 26; the campus under consideration for Student has a population cap of 18 while the other campus has a cap of 24. Some students are high-functioning academically and some have learning issues. The gender ratio is two males to one female. [NT 157-158, 162-163, 171-172]
106. The Private School's special education teachers assess students' present academic levels within a week or two of their entrance. [NT 168-169]
107. The class size is two teachers to six students; in most cases both teachers are certified. There are two special education teachers on staff⁶ as well as a certified reading teacher who is working towards Wilson certification. [NT 160-162]
108. Student would be the only incoming 9th grader at the campus under consideration, although there is another possible incoming 9th grade student. At the campus under consideration 9th and 10th graders are combined and the class size would be 4 or 5 students. [NT 162-163]
109. Students in 9th grade receive morning classes in English, math, social studies and science. In the afternoon they take Introductory Spanish, health and wellness/physical education and a combination of art and music appreciation. If a student wants or needs another subject the Private School contracts out to procure a teacher. The curriculum follows that of a local school district. [NT 163-164]
110. The Private School employs direct teaching 80-90% of the time; students use computers mainly for word processing. [NT 164-165]
111. Students at the Private School are involved with private outside mental health providers who can come into the school and conduct counseling sessions there. [NT 165-166]

⁶ The record is silent as to whether there is one at each campus or if one or the other campus has both.

112. If a student has an IEP with a Positive Behavior Support Plan (PBSP) the Private School “generally” is able to implement the PBSP. [NT 166]
113. There is neither a school psychologist nor a mental health counselor, nor a behavior specialist, on staff at the Private School. If a student required behavioral consultation the Private School would work with the sending LEA to procure the service. [NT 166-167, 183]
114. The Private School uses selected parts of OASIS, a national bullying program which includes some segments concerning de-escalation, on which some of the staff was trained. One student was cited for bullying at the campus under consideration this past year; the special education teacher(s) wrote a crisis plan for that individual. The individual did not need/receive a one-to-one support person. [NT 173-175]
115. The student involved in bullying behaviors at the campus under consideration was the only student not fitting the profile of having anxiety issues. [NT 175]
116. The Private School has not had incidents of students “squaring up” (threatening) staff, but police have had to be called in the past year for two students who were subsequently expelled for weapons or fire-setting. Both had behavior support plans, neither had school-provided professional mental health counseling; they met with the principal or the special education teacher(s). [NT 182-183]
117. The Private School accepts students with mild to moderate behavior issues but does not accept students with severe acting out behaviors, defined as anything that would jeopardize human safety or property safety such as bringing weapons to school, or lighting fires in the building. The program coordinator does not view fighting as severe behavior, as it is in the “human nature” of adolescents. [NT 158-159, 177, 465; S-49]
118. The Private School’s program coordinator did not interview Student, or review Student’s evaluation report or discipline record and relied on the now-retired Private School principal’s admission decision. [NT 176]
119. The Private School’s program coordinator was associated with the facility when it was founded approximately 30 years ago and was re-employed there in 2016. He holds a Bachelor of Science Degree in education, geology and astronomy and a Master's Degree in physics and electron microscopy with 74 credits beyond the Master's. He is a Pennsylvania certified secondary science teacher (regular education), and retired after about 34 years teaching 7th to 9th grade middle school science. [NT 156-157, 183-184]
120. The current head of school (“lead teacher”) does not have special education certification. [NT 184]
121. Following several conversations with the individual who had accepted Student into the Private School, the School’s special education coordinator did not issue a

NOREP for Private School because it offered “nothing more, and arguably less” than the APS had offered Student. [NT 469-470]

122. Based on the Student’s behaviors at the APS the School believes that Student is in need of much more intensive emotional, behavioral and counseling supports than those offered at the Private School. [NT 466-467]

123. The School believes that because Private School does not offer the supports Student needs, Student would be expelled from there as had happened at the APS that had greater supports in place than the Private School, and that a new placement would again have to be sought for Student who would undergo yet another transition. [NT 472]

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 (3rd Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); The District Court “must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.” *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

It is noted that both persons responsible for insuring the implementation of the respective competing programs, the principal of the IU program and the program coordinator of the Private School, had an imperfect understanding of special education. The former was confused about the meaning of LRE and the latter was unfamiliar with research based programming. These flaws, while recognized, did not significantly undermine the credibility of these individuals’

testimony. However, while the professional background of the Private School's program coordinator certainly supported that he was well-qualified to be a regular education science teacher, there was scant support for his being in a position to assess Student's suitability for the Private School and the Private School's ability to manage Student effectively, and for these reasons his opinions about the Private School's appropriateness for Student were given little weight.

Other than for specific factual information that was corroborated by other witnesses or by documents, the head of school at the APS was not deemed to be a credible witness. With no training as a behavior specialist, and in light of the documentary evidence in the Discipline Log, her opinion that most of Student's behavior was due to "impulsivity" and that Student would have been successfully maintained at the APS if only there had been a one-to-one was not deemed to be reliable. Further, while she often referenced that she was virtually the only staff member who could control Student's behavior, and was the only staff member that the Student never disrespected, she may have been naïve in not recognizing that by [redacted] she was reinforcing Student's motivation for attention. Finally, given her position as head of school it was puzzling that she could not assist Student to generalize from herself to the rest of the staff. To be fair, the APS is not a facility for students with behavior problems and it appears that the head of school did her best within her limitations, including hiring additional staff, to address Student's behaviors.

Charter Schools: A charter school acts as the LEA for its students, and assumes the duty to ensure that a FAPE is available to a child with a disability in compliance with IDEA and Section 504 and their respective implementing regulations. 34 C.F.R. 300.209(c); 22 Pa. Code §§ 14.103, 711.3. Chapter 711 *et. seq.* of the Pennsylvania School Code, "Charter School and Cyber Charter School Services and Programs for Children with Disabilities", contains regulations specific to individuals with disabilities being educated in charter schools and cyber charter schools. Chapter 711 incorporates by reference all the IDEA regulations at 22 Pa. Code 711.3. Chapter 711 also incorporates relevant antidiscrimination provisions in Section 504 and its implementing regulations. Charter schools and cyber charter schools must comply with 22 Pa. Code Chapter 4 relating to academic standards and assessment, 22 Pa. Code Chapter 11 relating to pupil attendance, and 22 Pa. Chapter 12 relating to discipline of students 22 Pa. Code §711. *et. seq.* Further references therefore will be to the IDEA and/or its regulations as well as to Section 504 and/or its regulations.

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). Congress enacted the IDEA to ensure that all children with disabilities are provided a 'free appropriate public education which emphasizes special education and related services designed to meet their unique needs and to assure that the rights of such children and their parents or guardians are protected.' *Forest Grove School District v. T.A.*, 557 U.S. 230, 239, 129 S. Ct. 2484, 2491, 174 L. Ed.2d 168 (2009)(quoting *School Committee Of Town of Burlington, Mass. v. Department of Education Of Massachusetts*, 471 U.S. 359, 367, 105 S. Ct. 1996, 85 L. Ed.2d 385 (1985)). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or

child progress; and provided in conformity with an Individualized Educational Program (IEP). Further, a child's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982)). FAPE "consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction." *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Rowley*. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). The Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with "meaningful educational benefits" in light of the student's "intellectual potential." *Shore Reg'l High Sch. Bd. f Ed. v. P.S.* 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir. 1988)); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the U.S. Supreme Court considered a lower court's application of the *Rowley* standard, observing that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The Court concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 352. This standard is consistent with the previous interpretations of *Rowley* by the Third Circuit.⁷

Local Educational Agencies need not provide the optimal level of service, maximize a child's opportunity, or even set a level that would confer additional benefits; the child must be offered a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988); *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3rd Cir. 2012). The IDEA entitles Student to an appropriate educational opportunity, but an IEP is not required to incorporate every program, aid, or service that parents desire for their child. *Mary Courtney T; Ridley*. An eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement, as noted in several recent federal district court decisions. See, e.g., *J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). In a homespun and frequently paraphrased statement, the court in *Doe v. Tullahoma City Schools* accepted a School District's argument that it was only required to "...provide the educational equivalent of a serviceable Chevrolet to every handicapped student." and that "...the Board is not required to provide a Cadillac..." *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993). *Andrew F.* did not disturb this standard which entitles a child to what is reasonable, not to what is ideal.

⁷ At least two federal District Courts in Pennsylvania have recently opined that the *Andrew* decision did not change Third Circuit jurisprudence regarding the standards for judging whether a special education program is appropriate. *E.D. v. Colonial School District*, No. 09-4837, 2017 U.S. Dist. LEXIS 50173, at *36 (E.D. Pa. Mar. 31, 2017); *Brandywine Heights Area School District. v. B.M.*, 2017 U.S. Dist. LEXIS 47550, at *29 n. 25 (E.D. Pa. Mar. 28, 2017).

Parental Participation: A placement decision is a determination of where a student's IEP will be implemented. Placement decisions for children with disabilities must be made consistently with 34 CFR 300.116. The IEP team, including parents, makes placement decisions. Like the formulation of an IEP, a placement decision is not a unilateral matter for LEA determination 34 CFR 300.116(a)(1) however, is also clear that parental preference cannot have been the sole nor predominant factor in a placement decision. The IDEA merely mandates parental participation in the placement decision 34 CFR 300.116(a)(1), but does not suggest the degree of weight parental preference should be given.

Numerous court decisions have noted that although Parents are members of the IEP team and entitled to full participation in the IEP process, they do not have the right to control it. *See, e.g. Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) [noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives"]; *Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002) ["[P]arents who seek public funding for their child's special education possess no automatic veto over a school board's decision"]; *Rouse v. Wilson*, 675 F.Supp. 1012 (W.D.Va.1987); 34 C.F.R. Pt. 300 App. A, at 105 9 "The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive [a free appropriate public education"]].

With respect to the reading instruction to be offered to Student, parents do not have a right to compel an LEA to provide a specific program or employ a specific methodology in educating a student. *Greenwood v. Wissahickon School District*, 571 F.Supp.2d 654 at 663 (E.D. Pa. 2008)(citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

Placement: Although this is not a tuition reimbursement case, the situation is similar in that the School has proposed a placement that it believes will provide Student with FAPE, while the Parents have located another placement that they believe is appropriate for their child. Thus the analysis of the issue of placement will be undertaken using the three-prong "Burlington/Carter" analysis: 1) Has the LEA offered an appropriate placement? 2) If the LEA has not offered an appropriate placement, is the placement chosen by the Parents appropriate? 3) IF the LEA's proposed placement is not appropriate, and the Parents' chosen placement is appropriate, are there equitable considerations that would remove or modify the LEA's obligation to fund the parentally-chosen placement? *Burlington School Committee v. Dept. of Educ.*, 471 U.S. 359, 374, 105 S. Ct. 1996, 85 L. Ed.2d 385 (1985); *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L. Ed.2d 284 (1993)).

Least Restrictive Environment [LRE]: There is a strong and specific preference in the IDEA that, (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.114(a)(2). The IDEA regulations also recognize, however, that

there are circumstances where “the nature and severity” of an eligible student’s disability makes education in a regular school setting unsatisfactory. For those situations, the IDEA regulations require an LEA to provide “a continuum of alternative placements,” such as “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals. 34 C.F.R. §300.115(a), (b).

Extended School Year (ESY): Pennsylvania regulations establish seven factors that IEP teams must consider when making an ESY eligibility determination. 22 Pa Code § 14.132(a)(2)(i)-(vii). This is an enhancement of federal ESY regulations at 34 CFR § 300.106. The fourth of those seven factors is the “extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.” 22 Pa Code § 14.132(a)(2)(iv).

Compensatory Education: Compensatory education is an appropriate remedy that accrues from the time when an LEA knows, or should know, that a child’s educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d Cir. 1999); *P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 739 (3d Cir. 2009) (quoting *Lauren W. v. DeFlaminis*, 480 F.3d 259, 272 (3d Cir. 2007)). The “child is entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem.” *M.C. v. Central. Regional; Ridgewood*. Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). To compensate for past violations, “[a]ppropriate remedies under IDEA are determined on a case-by case basis.” *D.F. v. Collingswood Bd. of Educ.*, 694 F.3d 488, 498 (3d Cir. 2012).

Discussion

When Student was expelled from the APS a mere ten weeks before the close of the 2016-2017 academic year the School was faced with needing to develop a program quickly. Understanding that the School wanted Student to be able to complete 8th grade, it is unclear how, after a reasonable two weeks to propose a program, all the School offered was two hours of instruction a week and a half-hour of counseling a week. Given that Student was already in private therapy, I do not find the offer of a half-hour of weekly counseling unreasonable. I do find, however, that two hours a week of instruction was not sufficient to help Student catch up on the four major core subjects of English, math, social studies and science. While there is no formula, it seems reasonable that each of the four core subjects required at least one hour per week, for a total of four hours of instruction per week. While the Parents’ reason for rejecting the two hours per week was not clear, I find that the offer was inappropriate, and will award compensatory education in the form of four hours per week from April 24, 2017 through May 25, 2017, that is five weeks of instruction at four hours per week for a total of 20 hours. The compensatory education hours are to be used exclusively for educational, developmental and/or therapeutic services, products or devices that further the Student’s IEP goals. The value of these hours shall be based upon the usual and customary rate charged by the providers of educational, developmental and therapeutic services in the county of Student’s residence and geographically adjacent Pennsylvania counties. The compensatory services may be used after school, on

weekends and in the summers until Student's 16th birthday. The services are meant to supplement, and not be used in place of, services that are in Student's IEPs.

In deciding the placement issue in this case I am not charged with weighing two proposed programs and discerning which is better. The School must afford Student an appropriate program, not the better of two programs or the best program. Once the responsible educational agency has offered an appropriate program, other potential programs are not under consideration. Applying standards for FAPE to the above findings and the record as a whole, I conclude that in offering the IU Program the School has offered Student an educational program that was appropriate in view of Student's circumstances at the time it was created and that could be expected to confer meaningful educational benefit upon Student in view of Student's needs. The APS Discipline Log, in combination with information concerning Student's prior behaviors at the School, strongly suggest that Student requires a small, controlled educational setting where there are individual and group mental health/behavioral supports woven into the entire school day and where the academic teaching staff have special education training and certification.

Student's father raised concerns he had during the tour of the IU program. In particular he was concerned about hearing cursing, about seeing students walking around the classroom and about witnessing some verbal altercations. [NT 358-359] The IU's supervisor of special education candidly acknowledged that students in the school are placed there because of behavior issues, and that they do curse at times, also sometimes use cursing as a form of peer-to-peer communication, and may have been "showboating" because there were visitors. [NT 244-245] She also pointed out that on the day the father and Student visited the IU Program the students had just been informed that their former principal had left and that they were getting a new principal without having the chance to say goodbye to their old principal. [NT 245-246] She noted that it was not uncommon for students to be permitted to stand up and move about the classroom to take breaks between instructional segments. [NT 246]

With regard to the Parents' LRE arguments, I agree with the School's extensive analysis as set forth in its written closing argument which will not be repeated here. In brief, when Student's behaviors at the School indicated the need for a more restrictive environment the School and the Parents agreed on an integrated (special education students and regular education students) placement at the APS which provided some therapeutic supports as part of its educational program. However, the APS was not designed for students with significant externalizing behavior problems. Thus, even with small classes, a high adult to student ratio, individual and group counseling, social skills instruction, a good relationship with the head of school, outpatient therapy, psychotropic medication and a very involved father Student demonstrated severe acting out behaviors that threatened others' physical safety, interfered with Student's learning and disrupted the educational environment for peers. I respectfully disagree with the Parents' characterization of Student's behaviors as mild. On a nearly daily basis Student disrupted the APS educational setting [redacted]. Having offered less restrictive settings, the School is now offering the logical and appropriate next step, a program designed with intensive therapeutic and behavioral supports for students with serious acting out behaviors. It is notable that Student has exhibited similar acting out behaviors since at least the beginning of 5th grade. It is also notable that Student's well-meaning Parents have tried and are continuing to try to minimize Student's behaviors by attributing them to impulsivity due to ADHD. However, while most children with

ADHD are impulsive, most children with ADHD are not consistently verbally and physically aggressive.

When an LEA's last-offered program is appropriate, as is the case here, the LEA has met its obligations to the student, and the second and third steps of the *Burlington-Carter* analysis (respectively, whether the private placement is appropriate and whether the equities between the parties impact the tuition remedy) are not undertaken. However, I do note that Student does not fit the publicly promulgated profile of the Private School's population, and that the Private School has even fewer supports than the APS had. I share the School's concern that if Student were placed at the Private School, behavior management would be woefully inadequate. The Parents are not to be faulted for wanting to view their child's behaviors in the most benign possible light. Father in particular is to be commended for his steadfast involvement in his child's educational needs, and it is hoped that a combination of appropriate academic and mental/behavioral health programming at the IU Program, and some time for maturation, will yield a positive outcome.

Conclusions

Student's behaviors at the APS were by no means "mild" and many of the incidents documented were moderate to severe, clearly affecting Student's own learning and the educational environment in general and were indicative of the need for a highly specialized educational setting such as that offered by the IU Program.

After reviewing all the documents entered into evidence, reading the testimony from the two hearing sessions, and considering the parties' written closing arguments I conclude that the Parents have met their burden as to the lack of appropriate programming in the period after Student's expulsion from the APS, but have not met their burden of proving that the program/ placement the School offered to Student is inappropriate. Moreover, the Private School is not an appropriate placement.

Order

It is hereby ordered that:

1. Given a two-week grace period to develop appropriate remediation programming after Student's April 6, 2017 dismissal from the APS, the School failed to provide Student FAPE from April 24, 2017 through May 25, 2017. Therefore Student is awarded compensatory education in the form of four (4) hours per week for a five (5) week period for a total of twenty (20) hours. The compensatory education hours are to be used exclusively for educational, developmental and/or therapeutic services, products or devices that further the Student's IEP goals. The value of these hours shall be based upon the usual and customary rate charged by the providers of educational, developmental and therapeutic services in the county of Student's residence and geographically adjacent

Pennsylvania counties. The compensatory services may be used after school, on weekends and in the summers until Student's 16th birthday. The services are meant to supplement, and not be used in place of, services that are in Student's IEPs.

2. The remediation and ESY programs the School offered Student from May 26, 2017 through the end of the summer period were appropriate and no compensatory education is due for that period.
3. The IU Program the School is offering to Student for the 2017-2018 school year is appropriate.
4. Within 30 calendar days of Student's beginning attendance at the IU Program the IEP team must convene to consider baseline academic and behavioral data collected in that setting in order to review/revise IEP goals, review/revise SDIs, and review/revise progress monitoring methods and timetables in light of the current available information.
5. The Private Program is not an appropriate placement for Student.

Claims presented under Section 504 are DISMISSED as having been fully addressed under the IDEA.

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

August 16, 2017

Linda M. Valentini, Psy.D., CHO

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