

*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

ODR No. 1711-1011AS

Child's Name: M. D.

Date of Birth: [redacted]

Dates of Hearing: 7/21/11, 10/3/11, 10/5/11, 10/10/11

CLOSED HEARING

Parties to the Hearing:

Parents  
[Parents]

School District  
Avon Grove  
375 South Jennersville Road  
West Grove, PA 19390

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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November 2, 2011

November 17, 2011

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student in this case attended school in the District very briefly, from kindergarten through the middle of 1<sup>st</sup> grade. Significant academic and behavior difficulties in kindergarten prompted a multidisciplinary evaluation that resulted in the conclusion that Student was not IDEA eligible, although the District did offer a §504 Service Agreement.

Student's difficult behaviors continued in 1<sup>st</sup> grade, with numerous disciplinary "time-outs" and minimal academic progress at best, leading Parents to enroll Student in a private school after the winter holiday. A second evaluation requested by Parents a few months later again resulted in the District concluding that Student was not IDEA eligible.

Student continued in the private school through 3<sup>rd</sup> grade, still exhibiting serious behavior issues. During the summer between 3<sup>rd</sup> and 4<sup>th</sup> grades, an independent evaluation identified a number of deficits that the evaluator attributed to language-based learning disabilities. The District then conducted a third evaluation, concluded that Student is IDEA eligible and offered an IEP, but Parents rejected it.

In April 2011 Parents filed a due process complaint seeking tuition reimbursement for the 2 years immediately preceding the date of the due process complaint, and continuing until the District offers an appropriate program and placement, as well as reimbursement for the 2010 IEE. The due process hearing was conducted in 4 sessions between July and October 2011. Although the District should have concluded that Student was a child with a disability after the 2008 evaluation at the latest, and offered special education services, tuition reimbursement must be denied for the period April 2009 to December 2010 because the private school was not an appropriate placement. For the same reason, tuition reimbursement is also denied from December 2010 forward.

## **ISSUES**

1. Did the School District fail to timely identify Student as IDEA eligible and thereby fail to provide Student with a free, appropriate public education (FAPE) prior to December 2010?
2. Did the School District fail to offer Student an appropriate IEP after Student was identified as IDEA eligible in December 2010 and thereby deny Student a FAPE from that point to the present?
3. Are Parents entitled to reimbursement of the costs of educating Student in the private school they selected beginning April 15, 2009 and continuing through the present?

## **FINDINGS OF FACT**

1. [The student] (Student) is [a pre-teen aged] child, born [redacted]. Student is a resident of the Avon Grove School District and is eligible for special education services. (Stipulation, N.T. pp. 16, 17)
2. Based upon the District's most recent evaluation, the eligibility categories that qualify Student for special education services in accordance with Federal and State Standards are Other Health Impairment (OHI) and Speech/Language Impairment. 34 C.F.R. §300.8(a)(1), (c)(9), (11); 22 Pa. Code §14.102 (2)(ii). (P-26, p. 18)
3. Due to academic and behavior issues, Student was first referred for an evaluation close to the end of kindergarten. Despite receiving instructional support services in kindergarten, numerous concerns about Student's functioning in school were identified at the time of the evaluation, such as difficulty recognizing name, colors, numbers 1—10, inability to work without direct supervision, difficulty with transitions, speech articulation and expressive language. (N.T. pp. 161—166; P-5, P-6)
4. The District school psychologist asked both the kindergarten teacher and Parents to assess Student's behavior using the BASC-II (Behavior Assessment System for Children-Second Edition) behavior rating scales. The teacher's ratings placed Student in the "clinically significant" or "at risk" range for all composite scores. Comparison with Mother's consistently average ratings for the same composites highlighted extreme differences in Student's behaviors between home and school. (P-6, pp. 13, 14)
5. Classroom observations and the school psychologist's observations during testing confirmed Student's difficulties in remaining seated and remaining on task, consistent with the kindergarten teacher's reports of hyper-active and off task classroom behaviors. The school psychologist concluded that because the same behaviors were not observed at home, Student did not meet DSM-IV diagnostic criteria for ADHD, that the problematic classroom behaviors were most likely related to sensory needs and that the behaviors negatively impacted Student's ability to meet educational expectations independently,

noting that the behaviors may improve when sensory needs are met. (N.T. pp. 438—440, 460, 468; P-6, pp. 10, 11, 14—16)

6. Standardized tests of cognitive ability and achievement yielded scores in the average range, indicating no learning disabilities based upon a discrepancy analysis and kindergarten classroom performance. Although Student met the IDEA criteria for OHI as a disability category, the school psychologist concluded that Student did not need specially designed instruction. The ER concluded that Student showed no evidence of meeting the criteria for any disability category. (N.T. pp. 440, 441, 447, 448, 462, 463; P-6, pp. 12, 15)
7. Because Student exhibited a need for occupational therapy (OT) due to sensory processing issues and fine motor skill deficits, the District offered a §504 Service Agreement (SA) that provided for 30 min./week of OT services, and included a number of annual goals and recommendations for classroom accommodations. (N.T. pp. 445, 446; P-8, pp. 1—3)
8. The District identified the disability that qualified Student for a §504 SA as an occupational therapy disorder manifesting through behaviors. (N.T. pp. 463, 464)
9. Through the beginning of 1<sup>st</sup> grade, Student continued to engage in disruptive, inattentive and off-task behaviors in the classroom and spent a considerable amount of time segregated from the class in “time out” for disciplinary reasons. (N.T. pp. 160, 173—175)
10. During Student’s approximately 1½ school years in the District, Student’s academic progress was slow. At the end of kindergarten, Student had met expectations in only one area, spatial relations, a math skill. At the end of the 1<sup>st</sup> quarter of 1<sup>st</sup> grade, Student had not met expectations in any area listed on the K-2 report card. (N.T. pp. 176, 177; S-12, S-29)
11. Parents enrolled Student in a small private school in the middle of 1<sup>st</sup> grade. The family is acquainted with the director and has been able to defray some of the costs by providing part-time clerical and other volunteer services. During the 2010/2011 school year, Parent spent app. 2.5 –3 hours at the school 2 days/week. (N.T. pp. 159, 160, 210, 212, 241)
12. A few months after Student left the District, at the suggestion of the private school, Parents requested another evaluation from the District to determine whether Student has an autism spectrum disorder. (N.T. pp. 181, 182; P-13, P-18, p. 1)
13. A different school psychologist, under contract with the District, conducted the second evaluation during the summer of 2008, concluding that despite the deficiencies demonstrated in the evaluation, Student did not need special education services. The evaluator considered Student’s scores on the standardized tests of cognitive potential and achievement to be questionable, believing that the results were adversely affected by Student’s unruly and “manipulative” behaviors observed during the evaluation, which the

psychologist concluded were used to avoid completing the required tasks. The psychologist admitted that if the observed behaviors interfered with the validity of the test results, the behaviors also negatively impacted Student's ability to achieve in school. (N.T. pp.279, 280, 283, 284, 297, 298, 301—304; P-18, p. 8)

14. Although the private school teacher's ratings on the BASC-II placed Student's behavior in the "at risk" or "clinically significant" range for numerous behaviors, similar to the kindergarten teacher's ratings in the first evaluation, and the evaluator observed similar behaviors during his testing, the evaluator relied more heavily on Mother's universally average ratings and a conversation with Mother, memorialized in the evaluation report, indicating that Parents did not believe that Student was "a special needs student." Parent, however, did not recall making that statement and disputed it at a meeting about the evaluation (N.T. pp. 219, 244, 299—301, 303; P-18, p. 1)
15. The District again concluded that Student was not IDEA eligible, but the psychologist recommended a functional behavioral assessment (FBA). (P-18, P-19)
16. In the middle of the 2009/2010 school year, Parents considered re-enrolling Student in the District for the following school year, but when informed that Student could not be placed into the multi-age class Parents requested, they ultimately decided to have Student continue in the private school. (N.T. pp. 189—193; P-22)
17. The private school Student attends currently has a population of [redacted] students. During this school year, Student is in a class of [redacted] students and is assigned to the same teacher for the 4<sup>th</sup> year. The teacher's primary duties consist of creating and implementing a customized curriculum for each child in her class. A plan is presented to the parents of each student, who are free to accept or reject implementation of the school's suggestions. (N.T. pp. 318, 319, 320, 322, 323)
18. Student's teacher is not certified and does not have a college degree. Education for her current position as primary lead teacher included a 3 year training program with the school's director, master's level course credits at [a local] University, training in autism spectrum disorders and augmentative devices from PaTTAN (Pennsylvania Training and Technical Assistance Network), as well as training in particular methodologies, such as Lindamood Bell. (N.T. pp. 318—320, 357—359)
19. When assigned to the current teacher's class at the beginning of [redacted] grade. Student was functioning, academically, at the kindergarten level, and in some areas below that. During the first 2 years in the private school (corresponding to 2<sup>nd</sup> and 3<sup>rd</sup> grades), controlling Student's behavior was the primary focus of every school day. The teacher implemented many behavior plans and the school tried various strategies to address Student's disruptive behaviors. (N.T. pp. 324—326, 371—373, 382—384, 418—421; P-32, pp. 3—5)
20. Student has become more self-aware and less reactive since enrolling in the private school, and attention has improved to the extent that Student no longer engages in

extreme behaviors and can be more easily re-directed, but significant behavior issues continue, requiring frequent re-direction. (N.T. p. 344, 367—369, 372)

21. During the summer of 2010, Parents obtained an independent educational evaluation (IEE) at the suggestion of the private school because the reading instruction Student was receiving, including aspects of Wilson, Open Court and SRA, was not working. Student was not receiving any of those programs exclusively or entirely. (N.T. pp. 404, 405, 410, 411)
22. After conducting a number of standardized assessments, reviewing information obtained from Parents and Student's private school teacher and observing Student in classes at the private school, the evaluator identified a number of specific deficits in reading, writing and math arising from language-based learning disabilities. (P-23)
23. Based upon observations during the testing session, the evaluator noted that as the language demands of the test items increased, Student's responses to test items became slow, hesitant, lengthy and disorganized. Student exhibited confusion about concepts such as months/seasons of the year, had difficulty selecting conceptually similar items and completing a logical sequence. (P-23. pp. 1, 2)
24. Due to widely disparate index scores on the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), the evaluator concluded that the FSIQ of 79 (borderline range) was not a valid measure of Student's cognitive potential. Student's scores on the Verbal Comprehension Index (95) and Perceptual Reasoning Index (94) were in the average range, but scores on the Working Memory Index (68) and the Processing Speed Index (70), were in the extremely low and borderline ranges, respectively. (P-23, pp. 2, 11)
25. Standardized achievement test scores on the Woodcock-Johnson Tests of Achievement-Third Edition Normative Update (WJ-III NU) placed Student in the borderline range for basic reading skills, oral comprehension and math calculation. Student's scores were in the deficient range for reading fluency, passage comprehension, spelling, writing samples, handwriting and math fluency. (P-23, p. 3)
26. The independent evaluator also administered the Comprehensive Test of Phonological Processing (CTOPP) and concluded that Student has a significant language processing disorder. Student's scores were below average for phonological awareness, in the borderline range for phonological memory and in the deficient range for alternate rapid naming. In general, Student has extreme difficulty taking in verbal information, then remembering, processing and expressing it. The evaluator concluded that this set of issues fits the criteria for language-based learning disability. (P-23, pp. 4, 5)
27. The evaluator made a number of recommendations for instruction in reading and written expression, including several programs from Lindamood-Bell: LiPs, Seeing Stars, Visualizing and Verbalizing for Language Comprehension and Thinking, as well as PhonoGraphix by Read America. The evaluator also recommended direct, explicit

writing instruction using a program such as Basic Writing Skills (Hochman) to develop oral and written communication skills. Other choices could be Writing Skills (Hanbury King) or Framing Your Thoughts by Project Read. Handwriting Without Tears was suggested for learning to write, since Student's printing was illegible due to very poor letter formation and orientation. (P-23, pp. 2, 6—9)

28. The evaluator suggested the Lindamood-Bell math curriculum, On Cloud Nine, as well as a multi-sensory format for practicing math facts, incorporating music and movement. (P-23, p.8)
29. An OT evaluation and assistive technology evaluation were suggested to address Student's handwriting difficulties and determine whether Student would benefit from using a typing program or other computer-based equipment. (P-23, pp.8, 9)
30. In the 2010/2011 school year, Student began receiving daily, pull-out, 1:1 reading intervention at the private school from a staff learning specialist for 2 hours/day (app. 11 hours/week). During the current school year, Student receives app. 8—9 hours of individual reading intervention weekly. (N.T. pp. 326, 327, 490, 492)
31. The learning specialist, a Pennsylvania certified special education teacher who holds bachelor and master's degrees in special education, is in her first professional position. She has received additional training through educational workshops in autism, ABA, verbal behavior, assistive technology and a half-day Lindamood-Bell training session. Her primary responsibility is to implement specific programs and intervention services for students at the private school. (N.T. pp. 489, 490, 525)
32. In the fall of 2010, Student's regular teacher reported that Student was functioning at the pre-kindergarten to kindergarten level in reading decoding, fluency and comprehension, as well as in math problem solving, and at the 1<sup>st</sup> grade level in math calculation. Student was also well below grade level in all areas of writing. The private school reported no academic strengths. (P-26, pp. 4, 5)
33. At the time the reading intervention began, the learning specialist noted that Student was well below grade level in reading and was exhibiting problem behaviors that interfered with Student's learning and progress in reading. Although improving slightly, the behaviors continue to negatively impact Student's learning despite the 1:1 setting, frequent breaks, prompts and various other strategies to assist Student in maintaining focus and body control. (N.T. pp. 491, 500—502, 516, 517; P-32, pp. 21—23 )
34. The learning specialist began working with Student late in the fall of 2010, when Parents requested a structured reading program after receiving the IEE report, which they provided to the school. (N.T. pp. 490, 491, 531, 532)
35. The learning specialist implements the Lindamood Bell "Seeing Stars" program, a phonics-based, sequential, multi-sensory, symbol-imagery program designed to help

- Student visualize letters as well as learn letter sounds. (N.T. pp. 493—495, 498; 510, 512, 513, 520, 521, 529, 530, 532)
36. At the beginning of the 2010/2011 school year, Student’s reading instruction was delivered in the regular classroom using teacher-made materials and Reading Reflex, a phonological program for reading decoding and a music therapy/handwriting program, Retrain the Brain. Student continues to receive supplemental reading instruction in the regular classroom with those programs, as well as IdeaChain /MindPrime. In addition to Seeing Stars, the learning specialist uses Handwriting Without Tears when Student is receiving reading intervention. (N.T. pp. 327, 492, 493, 495—500, 510, 522; P-32, p. 23)
  37. The Reading Reflex program is comparable to Lindamood-Bell LiPS and the Phono Graphix programs recommended by the independent evaluator. IdeaChain/MindPrime is comparable to the Lindamood-Bell Visualizing and Verbalizing program recommended by the independent evaluator. The math curriculum used by the private school shares core concepts, such as multi-sensory instruction and use of manipulatives, with the math program recommended by the independent evaluator and is suitable for Student at present. Math is not currently the primary area of focus for Student’s instruction. (N.T. pp. 337—339 P-23, pp. 7, 8)
  38. After a year of intensive reading intervention, Student remains at the “first step process” of the “Seeing Stars” program, working on achieving automaticity and zero error responses for sounds and letter names, as well as beginning to work on blends and some vowel combinations. (N.T. pp. 494, 495, 513—515)
  39. The learning specialist has seen some progress since beginning to work with Student. At the end of the 2010/2011 school year, Student was reported to have progressed through the alphabet with mastery of individual letter sounds and air writing the letters. Student can read up to 300 sight words in isolation, but continues to have difficulty recognizing the words in context, such as in a book or on a worksheet. (N.T. pp. 506—508, 532, 533; P-32, p. 21)
  40. The learning specialist is delivering the Seeing Stars program as prescribed, but did not administer a pre-test before beginning the instruction and does not use assessments provided by the program because Student has not yet progressed to the level at which assessments begin. (N.T. pp. 496, 512, 514)
  41. Progress reporting by the private school is descriptive only in the progress reports provided to Parents, and Student’s current performance is compared only to previous performance, not to an objective, grade level standard. At the end of 2010/2011 school year, the private school reported to Parents that Student was performing to ability in some areas of math, but had not met goals in reading/language arts, except for dictionary skills. In that area, Student was reported to be performing to ability with respect to alphabetizing and finding words in a children’s dictionary. On. (N.T. pp. 345, 348—352; P-32, pp. 17, 18 )



42. The private school collects and memorializes limited data concerning skill development on progress reports not provided to Parents. At the end of the 2010/2011 school year, Student had made limited progress toward goals in a number of areas, compared to the middle of the school year, but met none of the listed goals. Student remained at the kindergarten level in reading and at the first grade level in math. (N.T. pp. 350—353; P-32, pp. 15, 16)
43. Student also receives an hour of “Lego Therapy” twice/week. Lego Therapy is a program designed to foster fine motor skills and develop social skills as small groups of students collaborate to build structures with Lego blocks. (N.T. pp. 502—505, 518)
44. The private school considers Lego therapy an adequate substitute for the OT services that had been provided by the Intermediate Unit during the previous school year. OT was dropped due to taking too much time out of the classroom and the private school’s belief that the issues addressed via the OT services could be addressed within the classroom. (N.T. pp.341, 342)
45. After Parents also provided the 2010 IEE report to the District and discussed it with a school psychologist, the District offered a 3<sup>rd</sup> evaluation, to which Parents agreed. The District’s evaluation, including an OT and a speech/language evaluation, was completed and a report issued in mid-November 2010. The District concluded that Student is IDEA eligible under the OHI disability category based upon Pervasive Developmental Disorder, Not Otherwise Specified (PDD/NOS), as well as a speech/language impairment and need for specially designed instruction. (N.T. pp. 194, 195, 539—547; P-24, P-26)
46. During the evaluation, the District’s school psychologist noted many atypical and immature behaviors. The BASC-II behavior rating scales completed by Student’s teacher yielded results similar to the teacher ratings in the prior District evaluations, *i.e.*, almost all composite scores were in the “clinically significant” or “at risk” range. (N.T. pp. 548—550; P-5, pp. 6, 7, P-18, p. 6, P-26, pp. 10, 11)
47. The rating scales completed separately by each Parent resulted in most composite scores falling into the “average” range according to Mother’s ratings, but in the “clinically significant” or “at risk” range on Father’s ratings. (N.T. p. 558; P-26, p. 10)
48. The District’s standardized assessments of Student’s cognitive ability and academic achievement yielded results similar to the results reported in the IEE and in the first District evaluation in 2007, *i.e.*, Student’s cognitive abilities are in the average range. Both the IEE and the District’s 2010 evaluation also showed a significant discrepancy between Student’s ability and achievement. (N.T. pp. 557, 558; P-6, p. 5, P-23, pp. 5, 6, P-26, pp. 8, 9)
49. Based upon Student’s behaviors, however, the District’s school psychologist concluded that the primary disability underlying Student’s academic difficulties is PDD/NOS rather than specific learning disabilities. (N.T. p. 562, 576, 577; P-26, pp. 16—18)

50. Parents and the District met for an IEP meeting in December 2010, at which the District offered an IEP that provided for Student to spend approximately half the school day in an age appropriate regular education class and receive reading, writing and math instruction in a special education class, as well as 30 min./week of OT and speech/language therapy and 60 min./week of social skills instruction, to equal approximately half of the school day. (P-27, pp. 31, 32, 34, 36, 37, 39)
51. The proposed IEP provides for an additional speech/language and OT evaluation, and includes goals in the areas of speech/language (improve receptive language), OT (handwriting, fine motor dexterity and sensory processing skills), reading (decoding, fluency, comprehension), written expression, math (computation and problem solving), attention/focus/time on task and social skills. (P-27, pp. 21—30)
52. As part of the specially designed instruction, the proposed IEP provides for multi-sensory instruction, social skills instruction, sensory breaks, strategies to improve organization skills, specific strategies to support speech language goals, as well as general strategies and accommodations to be provided in the regular classroom. (N.T. P-27, pp. 31—33)
53. Parents rejected the NOREP dated District's December IEP proposal because they were concerned about the level of support that would be provided in the regular education classroom and Student's ability to participate effectively in the regular education curriculum in light of Student's significantly below grade level academic skills. In a letter to the District in March 2011, Parents stated that the proposed IEP does not address all of Student's needs and that Student is doing well in the private school. (N.T. pp. 197; P-27, pp. 41, 42, P-29)
54. Parents continued Student's enrollment in the private school through the end of the 2010 school year and into the current school year. (N.T. pp. 158, 198, 225; P-29 )

## **DISCUSSION AND CONCLUSIONS OF LAW**

This is a most unfortunate case in that Student has clearly not been provided with sufficient, appropriate instruction and necessary related services to meet Student's significant academic and behavior needs. Moreover, there is no remedy available for Student's utter lack of progress in acquiring essential academic skills in reading, writing and math after five years of school. (FF 19, 21, 22, 25, 32, 33, 38, 40, 42, 48) Although it is possible, even likely, that the District's failure to identify a disability and Student's urgent need for specially designed instruction and related services in either the spring of 2007 or the fall of 2008 was the underlying reason for this situation, Parents did not pursue a due process hearing within two years of

enrolling Student in private school at their own expense beginning in January 2008, Student was not enrolled in the District at the time of the second evaluation, and has not been re-enrolled, at least through the time of the due process hearing. (FF 3, 6, 11, 13, 15, 54). Consequently, Parents' decision to continue Student's education in a private school that was obviously unable to effectively educate a child with such significant needs, not the District's conduct, is the immediate cause of the loss Student suffered.

#### Underlying Legal Standards

The legal obligation to provide for the educational needs of children with disabilities has been summarized by the Court of Appeals for the 3<sup>rd</sup> Circuit as follows:

The Individuals with Disabilities Education Act ("IDEA") requires that a state receiving federal education funding provide a "free appropriate public education" ("FAPE") to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP "must be 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Shore Reg'l High Sch. Bd. of 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 (3<sup>rd</sup> Cir. 2009)

The substantive protections of the IDEA statute and regulations are enforced via procedural safeguards available to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T.*, 575 F.3d at 240.

#### Due Process Hearing Procedural/Substantive Issues

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the U.S. Supreme Court established the principle that in IDEA due process hearings, as in other civil

cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parents have challenged the appropriateness of the District's actions with respect to when the District should first have determined Student's IDEA eligibility, and the appropriateness of the IEP the District offered in December 2010, Parents have the burden of persuasion. Allocating the burden of persuasion, however, truly affects the outcome of a due process hearing only in that rare situation where the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

There is a second aspect of burden of proof, the burden of production or going forward with the evidence. In *Schaffer*, the Court limited its holding to allocating the burden of persuasion, explicitly not specifying which party is responsible for the second element of the burden of proof. Nevertheless, in most instances, the common sense notion that the party with the burden of persuasion should also bear the burden of production prevails, since a party cannot succeed if it fails to produce sufficient evidence to support a claim. In other words, the party seeking relief also necessarily bears considerable responsibility for going forward with the evidence and providing a substantive evidentiary basis for a decision in its favor on any claim raised in their due process complaint. Here, although both aspects of the burden of proof were allocated to Parents, the burden of persuasion was not outcome determinative, in that the evidence was overwhelmingly in the District's favor on an essential element of Parents' claim.

#### General Tuition Reimbursement Standards

With respect to tuition reimbursement, the IDEA statute provides as follows:

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

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

20 U.S.C. §1412(a)(10)(C)(ii).

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court first established the principle that parents do not forfeit an eligible student's right to FAPE, to due process protections or to any other remedies provided by the federal statute and regulations by unilaterally changing the child's placement, although they certainly place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE or otherwise acted appropriately.

In *Burlington and Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993) , the Court developed a three part test for determining whether parents are entitled to reimbursement from a school district for a unilaterally selected private school.

The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof.

Denial of FAPE/April 2009—December 2010

There are two distinct periods in dispute in this case, and the underlying denial of FAPE analysis is somewhat different for each period. Although Parents have limited their claim for relief to two years prior to the date they filed their due process complaint, the basis for the tuition denial of FAPE/tuition reimbursement claim from April 2009 through December 2010 originated, at the latest, with the District's September 2008 reevaluation and conclusion that Student was not IDEA eligible.

Both the federal IDEA and Pennsylvania special education regulations require school districts to seek children who may be eligible for special education services, evaluate them and appropriately determine eligibility. 34 C.F.R. §300.111; *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3<sup>rd</sup> Cir. 2007); *Annika T. v. Unionville Chadds-Ford School District*, 2009 WL 778350 (E.D.Pa. 2009); *A.P. v. Woodstock Bd. of Education*, 572 F.Supp.2d 221 (D.Conn. 2008); *Charlotte-Mecklenburg Bd. of Educ. v. B.H.*, 2008 WL 4394191 (W.D.N.C. 2008); 22 Pa. Code §14.121, 122.

Here, the District clearly fulfilled the first part of its child find obligation in 2007, since it sought an evaluation of Student at the end of the kindergarten year and conducted a thorough evaluation. (FF 3, 4, 5, 6) There is, however, a considerable question with respect to whether the District correctly concluded that Student was not IDEA eligible at that time, since the school psychologist concluded that Student met the standards for the OHI disability category, but demonstrated no need for specially designed instruction. (FF 6) The non-eligibility determination is especially questionable in light of the District's determination that Student met the criteria for a §504 Service Agreement, identifying "an occupational therapy disorder manifesting through behaviors." (FF 7, 8) Under the circumstances of this case, however,

further analysis of the District's conclusion in 2007 is unnecessary, since Student withdrew from the District to enroll in a private school less than a year later and did not seek tuition reimbursement at that time. (FF 11)

Moreover, within a few months, the District had a second opportunity to evaluate Student and make an appropriate eligibility determination. (FF 12) Again, the District undertook an appropriate evaluation, but again concluded that Student was not IDEA eligible. (FF 13, 14, 15) The District's conclusion in 2008, however, was clearly wrong. Reviewing the evaluation report and hearing the testimony of the contracted school psychologist who conducted the evaluation for the District left the disquieting impression that the non-eligibility determination arose from the psychologist's annoyance with the Student's behaviors during the evaluation, which caused him to conclude that the results of the evaluation were of questionable validity. *See*, N.T. 301.

The psychologist conceded that the same kinds of behaviors that interfered with the evaluation could also have interfered with Student's functioning in school, and that the behaviors he observed during the evaluation were entirely consistent with teacher ratings of Student's behaviors provided in connection with both the 2007 and 2008 evaluations. (FF 5, 13, 14) Inexplicably, however, the evaluator apparently did not even consider that the behaviors might have been a manifestation of a disability, and rather than further investigate the reason(s) for the behaviors, simply concluded that Student's behaviors were entirely volitional.

The consistency of the Student's behaviors in school noted by two different teachers more than a year apart should, at the least, have stimulated further inquiry into whether the behaviors could have been related to a disability such as ADHD, PDD, an autism spectrum disorder or emotional disturbance. At a minimum, the psychologist should have suggested additional evaluative measures and an observation. Even without the benefit of hindsight,

knowing now that Student has serious needs, the record establishes that there were sufficient questions, based on a very recent history, to further explore a number of possible disability categories and further investigate Student's functioning in school. The District failed in its obligation to appropriately interpret the data it compiled through the 2008 evaluation process and to correctly identify Student as eligible for special education services. The District's erroneous non-eligibility conclusion in the fall of 2008 precluded any possibility of offering Student a FAPE from April 2009 through the entire 2009/2010 school year and the beginning of the 2010/2011 school year, until the date the District offered Student an IEP, thereby establishing the first criterion for a tuition reimbursement claim for that period.

#### Denial of FAPE/ December 2010—Present

A second distinct period for which tuition reimbursement could potentially be awarded begins on the date the District offered an IEP to Student, if it was inappropriate, and continues through the present, since there is only one proffered IEP. It is, however, unnecessary to explore those issues in detail, since the second criterion for tuition reimbursement, the appropriateness of the private school selected by Parent, applies to both potential reimbursement periods, and in this case is determinative of the tuition reimbursement claim.

#### Appropriateness of the Parent-Selected Private School

Parents' burden of establishing an appropriate, unilaterally selected placement is not heavy:

A parent's decision to unilaterally place a child in a private placement is proper if the placement "is appropriate, i.e., it provides significant learning and confers meaningful benefit..." *DeFlaminis*, 480 F.3d at 276 (internal quotation marks and citation omitted). That said, the "parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA." *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir.1999). In fact, the Supreme Court has ruled that a private school placement may be proper and confer meaningful benefit despite the private school's failure to provide an IEP or meet state educational standards. *Florence County*



*Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 14-15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993)

*Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 242.

Although Parents' choice of a private placement is entitled to considerable leeway under the applicable legal standards, the private school must, at a bare minimum, afford the Student services designed to provide a meaningful educational benefit and provide services comparable to those the public agency failed to make available to Student. In this case, the private school selected by Parents did not meet the minimal criteria for an appropriate program.

The record establishes that the private school is even now barely attempting to provide math instruction, and was primarily focused on controlling Student's behaviors from the time Student enrolled until the fall of 2010. (FF 19, 37) It was not until after Parents received and shared with the private school the results of the IEE they had obtained that the private school understood the severity of Student's needs and finally began providing Student with focused and intensive reading instruction. (FF 22, 23, 24, 25, 26, 30, 34, 35) Moreover, Parents arranged for the IEE at the suggestion of the private school, which conceded that the reading instruction it had been providing to Student was ineffective. (FF 21)

Although Student's teacher testified that the private school develops a customized curriculum plan for every child (FF 17), no detailed and coherent plan for systematically addressing Student's significant academic and behavior needs was entered into evidence during the due process hearing. Most tellingly, however, the evidence in the record overwhelmingly establishes that Student made absolutely no academic progress in the private school and very little behavior progress during the entire period of enrollment. (FF 19, 20, 25, 32, 33, 38)

The District cannot be required to reimburse Parents for Student's attendance at a private school that afforded Student no opportunity for meaningful progress, and, indeed produced no

progress whatsoever. Consequently, although the District's child find violation began with the District's failure to identify Student as IDEA eligible as a result of the 2008 evaluation, extended into the potential recovery period that began in April 2009 and continued until the District offered an IEP in 2010 after belatedly concluding that Student is a child with a disability, Parents cannot obtain redress for that violation due to the inappropriateness of the private school placement.

#### Appropriateness of the District's Proposed IEP

Because the conclusion concerning the appropriateness of the private school placement forecloses tuition reimbursement for both periods in dispute, it is unnecessary to discuss the District's December 2010 IEP proposal in great detail. In addition, since that proposal was made nearly a year ago, it is impossible to determine whether it would still meet Student's needs. Clearly, however, the District's proposal is detailed and provides goals and specially designed instruction reasonably calculated to effectively begin meeting Student's academic, behavior, language, OT and social skills needs identified in the District's December 2010 evaluation, as well as in the independent evaluation. (FF 26, 48, 50, 51, 52)

Although it is possible that Parents are correct in their belief that the amount of time the District expects Student to spend in the regular education classroom might prove to be too difficult for Student after spending so much time in a much smaller environment, and it is possible that as the District staff gains experience with Student, frequent IEP revisions might be needed, those possibilities do not make the IEP inappropriate. A proposed IEP is the beginning of the process of providing Student with appropriate special education and related services, not the end. Parents may request an IEP meeting to consider revisions at any time, and the District has an affirmative obligation to review and revise the IEP if it becomes obvious that more or

different services are needed as the District staff learns more about Student and as Student's needs change and develop. The proposed IEP, as appropriately updated with new information at such time, if any, that Student re-enrolls in the District, provides an appropriate starting point for providing Student with necessary and appropriate services.

IEE Reimbursement

In the complaint and at the end of their closing brief, Parents requested reimbursement for the independent educational evaluation they obtained in 2010. (S-43, p. 4; Parents' Written Closing Statement, p. 24) That issue was not, however, identified on the record at the due process hearing, either in Parents' opening statement or in the restatement of the issues to which the parties agreed at the end of the opening statements, and neither party presented any argument on that issue in their closing briefs. *See* N.T. pp. 18—45; Parents' Written Closing Statement, pp. 1—23; Avon Grove School District's Written Closing Argument Brief, pp. 1—17. For that reason, the issue of Parents' entitlement to reimbursement for the IEE will not be discussed or decided here.

**ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parents' claim for tuition reimbursement from April 15, 2009 through the present is **DENIED**.

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER

November 17, 2011