

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: M.F.
ODR #01531/10-11 KE

Date of Birth:
[redacted]

Dates of Hearing:
November 5, 2010
November 15, 2010
November 18, 2010
December 13, 2010

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Tredyffrin-Easttown School District
940 West Valley Road Suite 1700
Wayne, Pennsylvania 19087

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Mark Voigt, Esquire
Plymouth Meeting Executive Campus
600 West Germantown Pike Suite 400
Plymouth Meeting, Pennsylvania 19462

Lawrence Dodds, Esquire
Wisler Pearlstine
484 Norristown Road Suite 100
Blue Bell, Pennsylvania 19422

January 8, 2011

January 20, 2011

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

Background

Student¹ is an eligible student residing in the Tredyffrin-Easttown School District (District) and attending a private school (Private School) for students with disabilities. The Parents requested this hearing seeking tuition reimbursement, compensatory education for ESY services and reimbursement for a private evaluation. The District maintains that it offered Student appropriate programs, that ESY was neither requested nor required, and that it completed an appropriate re-evaluation.

Issues²

1. Did the District offer Student a free appropriate public education in terms of program and placement (FAPE) for the 2008/2009, the 2009/2010, and the 2010/2011 school years?
2. If the District did not offer Student FAPE for any or all of these school years, is the placement chosen unilaterally by the Parents appropriate?
3. If the District did not offer Student FAPE for any or all of these school years, and if the placement chosen by the Parents is appropriate, are there equitable considerations that reduce or eliminate the District's responsibility for tuition reimbursement?
4. Is Student entitled to compensatory education for extended school year (ESY) services for the 2009/2010 school year, and if so in what form and in what amount?
5. Must the District reimburse the Parents for the independent educational evaluation they obtained for Student?

Findings of Fact

1. Student is a ninth grade³ eligible student with specific learning disabilities in reading comprehension, reading fluency and writing. Student has ADHD, and has been diagnosed with Tourette's syndrome and an anxiety disorder. [Redacted.] [NT 45]
2. For purposes of special education Student is currently classified as Other Health

¹ The decision is written without further reference to the Student's name or gender to provide privacy.

² The issue "Is Student a special needs student under the IDEA given [Student's] ADHD, Tourette's Syndrome, Specific Learning Disabilities and Speech/Language Impairment?" may be addressed as appropriate under the other issues. The only area of disagreement is in regard to Speech/Language Impairment, and no substantial testimony was offered by either party in that regard. Furthermore, the District intends to perform a Speech/Language assessment if and when Student enrolls and attends public school.

³ Private School is credentialed only through eighth grade. Student completed eighth grade in 2009-2010 but enrolled for an extra year in Private School [Student is considered "a third year middle school student"]. Student would be considered a ninth grader in the District this school year. [NT 518-520]

Impaired, Learning Disabled, and [redacted]. [S-6]

Tuition Reimbursement

3. Student attended school in the District through fourth grade. Student became increasingly anxious, required academic tutoring and had difficulty forming friendships. [NT 51-54]
4. Student received special education in the District during third and fourth grades. [S-8]
5. For fifth grade,⁴ the 2006-2007 school year, the Parents unilaterally enrolled Student at Private School, a small private school for disabled students where Student remains. [NT 54, 74]
6. The IEP team, District and Parents, created IEPs for fifth [2006-2007] and sixth [2007-2008] grades but Student did not attend school in the District. [S-8]
7. In December 2007 the Parents filed a due process complaint alleging denial of FAPE from third grade, seeking compensatory education and tuition reimbursement. [S-8]
8. A former hearing officer found that Student's IEPs during the time Student attended school in the District were appropriate and that Student had made "steady" progress in third and fourth grades. [S-8]
9. The former hearing officer also determined that the IEPs offered for Student's fifth and sixth grades [2006-2007 and 2007-2008] were appropriate and represented an offer of FAPE. [S-8]
10. The former hearing officer denied the Parents' request for compensatory education and tuition reimbursement. On appeal, the Special Education Appeals Panel affirmed the Hearing Officer's decision. [S-9]

2008-2009

11. On August 11, 2008, fewer than six months after a hearing officer and an appeals panel had found the District's IEPs for 2006-2007 and 2007-2008 appropriate, the Parents wrote requesting an IEP, a NOREP, and "compensatory education services" for the 2008-2009 school year.⁵ [NT 287-288; P-28, p.1]
12. At no time prior to their August 11, 2008 letter did the Parents approach the District about developing a program for the 2008-2009 school year. [NT 288-289; S-13]

⁴ The District's middle school begins in fifth grade. [S-8]

⁵ The 2008-2009 school year had not yet started when the Parents requested compensatory education for that year. [NT 311-312; S-13] The IDEA authorizes hearing officers and courts to award "such relief as the Court determines is appropriate" 20 U.S.C. § 1415(h)(2)(B), but compensatory education is an appropriate remedy only when a school district has failed to provide a student with FAPE, *Lester H. v. Gilhool*, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the school district's failure. [*Id.*]

13. Given that the Parents shared the letter with the Office for Dispute Resolution, the District considered the Parents' letter to be a Due Process Complaint and filed a Sufficiency Challenge in a timely manner.⁶ [NT 386; S-13, S-14, S-15, S-16]
14. The District proposed, and the Parents agreed to, providing Student with a reading assessment on Monday August 25, 2008 to determine the then-current level of performance. Although the Parents confirmed the date and time of the assessment, they called on Friday August 22, 2008 to cancel the assessment. [NT 295-296; S-16]
15. Although a date to meet and develop an IEP for 2008-2009 was tentatively scheduled for 8/25/2008, the District offered to temporarily implement the August 28, 2007 IEP that had been found appropriate by the former hearing officer and the appeals panel if a new IEP was not finished by the first day of school. [NT 298; S-15, S-16]
16. On August 25, 2008 the District sent the Parents the Procedural Safeguards Notice and on August 26, 2008 the District sent the Parents an Invitation to an IEP meeting. [NT 298-299; S-17, S-19]
17. A meeting to draft the 2008-2009 IEP was held on August 28, 2008, the Thursday before Labor Day weekend. Both parents attended. A regular education teacher, special education teacher, LEA representative, guidance counselor, [redacted], assistant principal, and reading specialist participated in formulating the IEP. [NT 574; S-20, p. 2]
18. The IEP team identified a need for Student to increase use of self-monitoring strategies, and formulated a self-regulation goal to demonstrate coping strategies to monitor and manage anxiety. The specially designed instruction [SDI] addressing this goal included teachers' providing cues through physical and verbal prompting and clear expectations to encourage attention and focus on academic tasks. [NT 578-579; S-20, pp. 8, 13, 16]
19. During Student's first month in school the District would conduct a functional behavior assessment [FBA] to clearly discern the antecedents to dysregulation in that specific setting so interventions would be targeted to Student's needs in the District. Results of the FBA would be incorporated into a positive behavior support plan to address Student's self-monitoring needs. [NT 580, 610-612, S-20, pp. 7, 16]
20. The IEP supported the self-regulation goal through provision for social skills classes with three to six 7th grade students⁷ once or twice per week throughout the school year, depending on the particular week's schedule. [NT 580-584; S-20, pp. 13, 16]

⁶ If an LEA wants to challenge the sufficiency of parents' complaints it must do so within 15 days of receiving the complaint.

⁷ With an occasional 8th grader.

21. The social skills classes were taught collaboratively by the learning support teacher and a mental health specialist using the Penn Resiliency Program, a cognitive behavioral approach with specific lessons developed and researched through the University of Pennsylvania. [NT 580-584]
22. The mental health specialist is a certified school counselor and licensed social worker, and the learning support teacher was trained in the Penn Resiliency Program by staff from the University of Pennsylvania in a week-long District in-service, with follow-up trainings. [NT 583, 607]
23. The IEP included individual counseling for forty minutes a week with the mental health specialist who co-led the social skills classes to work on skills to cope with anxiety. Additionally Student could see guidance counselors at the middle school at any time necessary. [NT 606; S-20, p. 17]
24. Student would also have had a middle school teacher as a mentor. Student would have been able to meet with the mentor before school, after school, at lunch, or at other available periods during the day. [NT 607-608]
25. If Student still experienced anxiety despite the interventions, a number of adults in the school (e.g., assistant principal, school counselor, learning support teacher, mental health specialist) would have been available to talk over the situation. [NT 617-618]
26. On the first day of school, Student would have met with the guidance counselor, been given a tour, been personally introduced to the learning support teacher, and been paired with another student acting as a guide through the day. The team would have offered to meet with the Parents after the first day of school to develop strategies to prepare Student for the next day. [NT 616-617; 805-808]
27. During the first thirty days of school, as the FBA and the positive behavior support plan were being developed, Student's supports would include the weekly counseling with the mental health specialist, the social skills classes, and the availability of guidance counselors and other relevant adults. [NT 612]
28. The learning support teacher is available when parents have concerns. [NT 618-619]
29. The District's reading specialist administered an Informal Reading Inventory (IRI) to Student and supplied the result to the learning support teacher who reviewed Student's 2007 ER in preparation for drafting the IEP. Student had reading needs, specifically in word recognition, content vocabulary, comprehension, and fluency. The IRI results were included in the Present Education Levels [PLEPs] of the IEP. [NT 572-574, 645; S-20, pp. 5, 6, 8]
30. At the time the IEP was written, neither the District nor the Parents had end of year reports from Private School to provide information on curriculum-based performance or baseline data. Despite requests from the District, the Parents did not supply the

results of a private reading evaluation they had obtained a few weeks before the IEP meeting, nor did they forward the Private School information when it became available. [NT 302-304, 316, 574, 608-610, 643; S-20, S-26]

31. The IEP included a reading fluency goal which was based on the Pennsylvania Education Standards. The learning support teacher was to collect baseline data on fluency at the beginning of the year. Progress in reading fluency was to be monitored with weekly Aimsweb Program probes. Student's fluency goal was to increase by 36 correct words over baseline, graded per minute, the expected gain for an average student in a school year.⁸ [NT 584, 590-591, 645-646; S-20, p. 13]
32. The IEP included a reading comprehension goal based on Student's performance on the IRI and the expectation of a full year's growth in reading in a full year.⁹ Comprehension was to be monitored through the use of expository passages from the textbooks with questions and retellings. [NT 592-593]
33. Student would receive reading instruction from the learning support teacher in the resource room and from the reading specialist in a reading class. Both professionals work as a team and share progress monitoring results from which they adjust instruction. [NT 584-585, 594]
34. The reading specialist has a background in the Orton Gillingham methodology¹⁰ and uses this method for teaching decoding with additional programs for fluency and comprehension. [NT 594-595]
35. Specially designed reading instruction included the computerized Kurzweil Reading Program which can also be used at home; the District provides training in the program to families. [NT 587-590; S-20, p. 16]
36. Specially designed reading instruction also included previewing and reviewing content area main points and vocabulary in courses such as science. [NT 585-586]
37. Given needs in written expression, Student was assigned a writing goal tied to proficiency on the PSSA rubric. [NT 595, 597; S-20]
38. Student would have been assigned to a team-taught differentiated English class where the regular education teacher and learning support teacher shared providing direct instruction in written expression to the whole class, divided the students into smaller, flexible groups of thirteen to fourteen students with one adult, created sub-groups based on a student's particular needs, and utilized support staff for additional help. [NT 599- 600, 602-603]

⁸ Although [redacted], Student also has a specific learning disability in reading, such that the goal of a year's progress in reading in one year is reasonable.

⁹ See above.

¹⁰ A multi-sensory approach to teaching reading.

39. Student would have worked on writing assignments in the regular education classroom and then received assistance from the learning support teacher in the resource room. Student could access written work from computers in either room. [NT 599-600]
40. Writing instruction would have included writing prompts, breaking down requirements, using graphic organizers as per the My Access tasks. Specially designed instruction for writing included graphic organizers for all writing assignments, opportunities to proofread written work with support, and access to a computer for spelling and editing. [NT 595-598, 604; S-20, pp. 15, 16]
41. Writing progress would be monitored by writing probes using the My Access program, which provides computerized, objective scoring based on the PSSA rubric. [NT 596-598]
42. The resource room would have been available should Student need it during another period in the day. [NT 635]
43. The IEP included [redacted]. In four group projects during the year, Student would have practiced social skills and time management skills. [S-20, pp. 13-16]
44. Student would have been assigned to a team and had the same five regular education teachers for the year teaching the daily periods. [NT 625]
45. The team of teachers would have been located in a small section in the building. The teachers supervise the students at all times as they transition in hallways between classes. [NT 628-629]
46. The learning support teacher would have met with Student's team of teachers in the beginning of the year to review background, share the most important parts of the evaluation report, invite the teachers to read the entire evaluation report, and share the IEP. [NT 612-613]
47. In addition to seeing the teachers on a daily basis, the learning support teacher would have met with Student's team of teachers weekly on a formal basis to learn about behavior, progress, and academic achievement. She also would have provided data checklists to obtain weekly updates. [NT 613]
48. Ensuring that all instruction is differentiated is one of the District's initiatives; teachers have in-services and training in differentiation throughout the year. The learning support teacher works with the core regular education teachers to differentiate instruction for students in their classes. The academic program, including assessments, class work, and homework is individualized for students with IEPs. [NT 630-633]

49. The 7th grade team has a history of working effectively with students with reading and writing difficulties. [NT 629]
50. There are 25 to 28 students in each core class with the possibility of two to three adults; there are instructional assistants who assist the special education students in their core classes. The student-teacher ratio for classes with team teaching and for the reading classes is small. [NT 602-603, 626, 629-620]
51. Student would have been placed in an above-level math class but would have been given a math placement test in the beginning of the year to ensure that Student was in a correct math class. [NT 656-657]
52. Student's reading class would have had twelve to thirteen students and a minimum of two adults. [NT 626-627]
53. During one of Student's resource room periods, the maximum number of students was six with a teaching assistant. During the other period, there were three students; at that time, a teaching assistant was shared between Student's learning support teacher and another teacher who had more students. [NT 627]
54. Every day Student would participate in Core Extension, a class of 12-13 students [redacted]. [NT 622, 649]
55. Student would have a daily activity period, and could choose to participate in outdoor recess or a gym activity, to seek assistance from core area teachers or the learning support teacher, to talk with peers, or to see a guidance counselor. [NT 623-624]
56. Student's IEP would have been implemented upon Student's entrance into the District. The IEP would be revised if the IEP team recommended it. [NT 635]
57. The IEP that was developed for the 2008-2009 school year had similar goals to the 2007-2008 IEP which was found to be appropriate by a hearing officer and an appeals panel. [NT 311-312; S-7, S-20]
58. Student's mother testified that between August 2007, when the sixth grade IEP was developed, and August 2008, when the seventh grade IEP was developed, Student had progressed. [NT 287, 290-294]
59. After receiving the finalized 2008-2009 IEP and NOREP in September 2008, the Parents made no contact with the District regarding Student during the remainder of the 2008 calendar year. [NT 318; S-20, S-25]

2009-2010 School Year

60. In May and June 2009, the Parents were still working with the attorney who represented them in the 2008 due process hearing, and in May 2009 they were still working with a special education advocate. [NT 324-327; S-34]
61. On May 12, 2009 the District sent the Parents a letter stating that it was “ready, willing and able to provide a free, appropriate, public education for [Student] for the 2009-2010 school year” and asked them to contact the District if they intended to enroll Student in the District so that an IEP meeting could be arranged. [NT 319-320; S-32]
62. The Parents did not contact the District to set up an IEP meeting. [NT 320]
63. The Parents are knowledgeable about their right to request an IEP meeting. In addition to participating in the previous due process hearing, the mother has worked as a public school [position redacted] for seven years, the Parents had received Procedural Safeguards Notices from the District since the 2003-2004 school year, and the Parents retained both a special education advocate for a number of years prior to 2008 and their first attorney since at least 2007 until July 2009. [NT 278, 308, 323-325, 337, 389]
64. In June 2009 the Parents decided to enroll Student in Private School for the 2009-2010 school year. [NT 328-329]
65. By the end of September 2009 the Parents still had not responded to the District’s May 2009 letter inviting them to request an IEP meeting for the 2009-2010 school year. However, on September 25, 2009 they requested that the District’s lawyer provide them with the 9/3/2008 Sufficiency Challenge, 11/14/2008 Subpoenas, and a Rule 15(b) Motion. [NT 330; S-37]
66. On October 7, 2009, the District sent the Parents another letter informing them of their right to request an IEP team meeting and/or a reevaluation. The Procedural Safeguards Notice was enclosed with this letter. [NT 331-332; P-29, p. 2]
67. The Parents sent a letter on October 18, 2009 stating that they would attend an IEP meeting if the District was legally required to meet, that they did not have legal representation at that time, and that they would bring an advocate to the meeting. [NT 332; P-29, p. 3]
68. On October 26, 2009, the District sent a response to the Parents clarifying that the purpose of the District’s October 7th letter was to reiterate to them that the District was willing and able to develop a program for Student in the District, to remind them of their rights and send another copy of the Procedural Safeguards Notice, and to offer an IEP meeting in the week of November 2, 2009. [NT 333-334; P-29, p. 4]

69. The Parents did not contact the District regarding the invitation to schedule an IEP meeting for early November 2009. [NT 336-339]

2010-2011 School Year

70. The Parents through counsel sent the District a letter dated March 11, 2010 requesting an IEP meeting to discuss Student's program for the 2010-2011 school year. The letter noted that although Student was making excellent progress at Private School the Parents were willing to consider any alternate District placement the District may propose. The Parents also noted failing that, they expected the IEP team to place Student at Private School at District expense. [NT 340-342; P-29]

71. The District's attorney sent a letter to the Parents' attorney on March 24, 2010 seeking confirmation that the Parents were looking for a program for the 2010-2011 school year. The Parents' attorney wrote a March 29, 2010 letter confirming that the Parents were looking for a program for the 2010-2011 school year. [NT 345; S-54, P-29, p. 6]

72. In response to the Parents' March 11th request for an IEP meeting, on March 15, 2010 the District sent a Permission to Reevaluate. The Parents signed consent to the proposed reevaluation on March 25, 2010. [NT 342-343; S-48]

73. However, on April 5, 2010, the Parents through their attorney sent the District another letter, this time indicating that the District should pay for Student to attend Private School for the 2010-2011 school year. [NT 346; S-57]

74. The District completed a reevaluation and issued the report on May 12, 2010. [NT 348, 399; S-64, P-13]

75. Pursuant to an Invitation to the Parents sent on May 10, 2010 the IEP team met on May 16, 2010 for three hours. Father and the Parents' attorney attended the entire meeting; mother had to leave early. [NT 347-348, 685-686; S-63]

76. Because baseline testing was not yet able to be completed¹¹ the IEP included present education levels from the IRI which the District reading specialist had administered as part of the reevaluation. Student was instructional in reading at the 8th to 9th grade level. Based on the reading assessments, Student was recommended for a regular education World Literature Seminar class and would receive additional reading instruction in the special education setting. [NT 707-710, 713; P-20, p.7-8]

77. At the IEP meeting, the team discussed strategies to address the Parents' concerns about Student's transition to high school and the need for current baseline testing. [NT 686-687]

78. The IEP team discussed transition programs available at the high school, including a full-day orientation in the spring for all incoming 9th grade students coming from the

¹¹ The Parents requested this be done in June rather than May – see below.

District and/or transferring from private schools; availability of tours and meetings with the guidance counselor and assistant principal in the summer; a picnic before the first day of school; and special activities on the first day of school. [NT 814-815]

79. Student would have participated in the LINKS program, where specially trained peer mentors help students orient to the high school and provide support throughout the year for things such as midterms. The support is given to all students in small groups; students who need additional support can be linked to a peer mentor for individual support. [NT 729, 731-732; P-20, p. 22]
80. The learning support teacher had proposed doing baseline testing in May, but the Parents opted to wait until early June so as not to interrupt Student's year-end activities at Private School. On June 7th at the District high school the learning support teacher administered baseline testing in reading fluency, reading comprehension, and written expression¹². [NT 682, 688-692; S-68]
81. In June 2010, Student's final Private School report card noted the teacher was looking forward to seeing Student the next year, and Student met the new teacher for the next year.¹³ [NT 542-543, 547; P-32, p. 18]
82. The Parents obtained a private evaluation and shared the report with the District in July 2010; the learning support teacher reviewed the private report and the District's May 2010 report in preparation for a second IEP meeting. [NT 683, 711; P-13, P-16]
83. The private evaluator found that Student to be a very complex student who [redacted] has ADHD, Tourette's syndrome, dysregulated arousal syndrome and various areas of specific learning disability. [NT 206-208; P-16, p. 23]
84. The private evaluator recommended specially designed instruction for reading to include, among other things, the Fast ForWord® program to improve Student's phonological processing. She recommended that Student receive one on one or very small group instruction utilizing the Wilson® Reading Method to improve basic reading skills and reading fluency. She recommended Student have access to assistive technology such as the Kurzweil 3000® program. She recommended that Student receive direct instruction to improve social skills. [P16, pp. 26-29]
85. The District convened a second IEP meeting on August 24, 2010 to go over the findings of the private report with the Parents and to integrate relevant information into the IEP. The meeting lasted approximately two and a quarter hours. The father and the Parents' attorney were present, mother was not present. [NT 711; P-20 p. 2]

¹² Line 14 on N.T. at 691 is incorrect. "reading expression" should read "written expression." There is no test for reading expression.

¹³ Although there is a possibility that Parents were keeping an open mind about enrolling Student in the District, their concern about transition issues suggests that if they were going to transfer their child they would have prepared Student ahead of time so that Student could say good-bye to teachers and classmates.

86. The baseline information obtained in June for the IEP was shared with the father at the IEP meeting. [NT 707]
87. The Read Naturally Program and the AIMSweb program had been utilized to establish a reading fluency baseline and goals for the IEP. [NT 692-698, 715-716; S-71, P-20, p. 6]
88. Student read an average of 137.75 words per minute with a 96.25% accuracy rate at an eighth grade level, which falls between the 25th and 50th percentile. [NT 697]
89. The Scholastic Reading Inventory had been used to establish a reading comprehension baseline and goals for the IEP. [NT 698-701; S-72, S-114, P-20, p. 6]
90. Student's reading comprehension was at a Lexile level of 1127, which is in the proficient range. [NT 699; P-20, p. 7]
91. The My Access Program had been used to establish a written expression baseline and goals for the IEP. [NT 702-706, P-20, p. 6]
92. Student's written expression was in the proficient range at the high school level according to the computer-based scoring program. [NT 701-702, 704-706]
93. The IEP included 12 periods of special education per cycle, which includes 8 periods in the Academic Seminar and 4 periods of reading instruction in the Academic Reading class. The high school's cycle is six days and the periods are 43 minutes long. The 12 periods would have been evenly spread out so that there were two periods of special education classes in each of the six days. [NT 746-747]
94. The Academic Seminar class is a special education class with two to six students, the special education teacher, and at least one other support staff member. The class to which Student would have been assigned often has another special education teacher, and at times a second adult support person is there as well. Student would have participated in the Academic Seminar class at a time when a non-exceptional student would have a study hall. [NT 710, 727-728, 827]
95. The Academic Reading class has three to seven students; often there is another adult in the class in addition to the teacher. [NT 827]
96. The proposed IEP is aligned with the Pennsylvania state standards. [NT 641; S20, p. 13]
97. The IEP carries goals addressing needs in the areas of word recognition, reading fluency, reading comprehension, writing, organization, self-regulation and [redacted]. The private evaluator testified that she agreed that Student has needs in these areas. [NT 231, 712; P-20, p. 15-19]

98. The IEP addresses Student’s needs in various areas of reading. Specially designed reading instruction included research-based systematic multisensory instruction in reading fluency and comprehension, text-to-speech technology, a testing center to compensate for additional time Student needed to read a test, and electronic textbooks. The IEP notes if an electronic textbook was not available, Student would be given an extra hard copy textbook for direct highlighting. [NT 712-713; P-20, p. 20-23]
99. Student would receive reading instruction four times per cycle in the special education classroom, two days with the Rewards Program to address reading fluency, and two days with the Rewards Plus Program to address comprehension. The reading instructor would be a special education teacher trained in Rewards and Rewards Plus. There would be four to six students in the reading classes.¹⁴ [NT 716-717, 719]
100. The Rewards Program is “specifically written to provide word identification skills to students using words that are within the social studies and science high school context [and provides] nice transfer for students from this program to their regular education classroom.” [N.T. at 722; S-107]
101. The Rewards Plus Program addresses “reading comprehension...specific to science and social studies curriculum [and the] activities that are done within the program are very similar to what students are being asked to do in their regular education classroom” [NT 723; S-108]
102. The IEP addresses Student’s needs in the area of written expression. Student would receive systematic writing instruction in the Academic Seminar class through “Step Up To Writing,” which focuses on the writing process with a heavy emphasis on graphic organizers. [N.T. 724, 726-727; P-20, p. 21]
103. Student’s progress in written expression would be monitored with the computerized objective-scoring program, the My Access Program, that was used to establish the baseline. [NT 724]
104. The IEP addresses Student’s needs in the area of self-regulation. The IEP includes a self-regulation goal, involving direct instruction in social skills to increase coping skills for managing anxiety. [NT 729; P-20, p. 19]
105. Student would participate in a social skills group once a week with two or three other students throughout the year at rotating time periods. The social skills groups follow a specific, research-based curriculum. [NT 735, 787, 900-901; P-20, pp. 22, 24]

¹⁴ The private evaluator recommended the Wilson Reading Program which was previously used with Student in the District in the elementary grades. As Student had progressed to grade level it was not necessary to repeat that program. Additionally Private School is using neither the Wilson program nor any other research-based program with Student and is not providing direct instruction to Student in reading. (N.T. at 515, 566; S-8, S-9).

106. The social skills classes utilize a program developed in 1995 by Michelle Garcia Winner, a speech and language therapist. Empirical research has shown that the program is successful for children with social-cognitive delays. The program is based on the Theory of the Mind and the Central Coherence Theory and reduces children's anxiety by teaching them how to understand others' thoughts and emotions, how to analyze social situations and how to evaluate social situations. [NT 901-907]
107. The IEP team specifically chose a social skills group which focuses on "interpersonal skills through [a] social-cognition approach" because that type of group was recommended for Student by the private evaluator. [NT 736-737; P-20, p. 22]
108. The IEP provided that Student would be scheduled to meet with the guidance counselor to discuss school-related issues up to three times a week. There are nine guidance counselors available to students during the entire school day and often outside school hours. [NT 730, 869, 871; P-20, p. 23]
109. A mental health specialist is at the high school full time, and there are additional support personnel who assist students in the school, including a school psychologist and two full-time nurses. [NT 442-443, 759-762]
110. Teachers mentor students through several formalized mentor programs at the high school. The District purchased the book, *Teaching the Tiger: A Handbook for Individuals Involved in the Education of Students with Attention Deficit Disorder, Tourette's Syndrome, or Obsessive-Compulsive Disorder*, which was recommended in the private evaluation; Student's IEP notes that this book is available for high school personnel. [NT 443-444, 733-734, 764-765; P-20, p. 25]
111. Student would have daily support from the special education teacher within Academic Seminar classes and would be able to meet with the special education teacher at other times during the day, as well as before school, during lunch, or after school. [NT 730-731]
112. The learning support teacher and other adult support personnel have the flexibility to assist Student during the 10:30 a.m. to 11:00 a.m. time period if Student experiences anxiety about receiving the medication dose. [NT 795]
113. Although Student did not manifest behavioral needs during the District psychologist's observation at Private School and the IEP Team checked "No" to the IEP question, "Does the student exhibit behaviors that impede his/her learning or that of others?" at the IEP meeting, team members discussed completing an FBA within Student's first month of school in the District, and timely completion of an FBA and creation of a Positive Behavioral Support Plan was included in the IEP. [NT 744-745, 748, 751, 754; P-20, pp. 6, 8, 24]

114. During the first month of school while the FBA was being done Student would have had available all the supports addressing the self-regulation need as noted above. [NT 754-755; P-20]
115. The Parents could have chosen to have Student participate in the Peer Mediation program which was explained to the father at the August IEP meeting. [NT 362; S-78]
116. The IEP addresses Student's needs in the area of organization. It includes an organization goal with specially designed instruction including adult support for all core subject area classes; verbal prompts; assistance with organizing materials and assignment book; daily afternoon check-ins to verify what the homework is and necessary materials; assistance in breaking down assignments and assessments into smaller chunks; multistep instructions; clear expectations; providing written and guided notes to accompany oral lectures and assignments; and concrete aids such as Post-It notes. [NT 737-739; P-20, pp. 15, 20-24]
117. A support staff person would travel to Student's core subject area classes and provide support in areas such as maintaining focus and attention, organization, and note-taking in a manner that is sensitive to Student's need not to stand out from nondisabled peers. [NT 797-798; P-20, p. 21]
118. Every Monday the special education teacher helps her students set up their 2010-2011 Student Assignment Books for the week and then monitors each student's use of the book throughout the week. [NT 740-741; S-44¹⁵]
119. Student would be given an extra set of textbooks to keep at home in case a book was inadvertently left at school. [NT 738; P-20, p. 21]
120. The IEP addresses Student's need for [redacted]. [NT 423, 743; P-20, p.18, 24]
121. The IEP included a consult to determine Student's need for assistive technology including Co-Writer Solo® and Dragon Naturally Speaking®. [NT 714-715; P-20, p. 21]
122. The District indicated it would conduct a speech/language assessment to determine Student's pragmatic language abilities and the need for the Fast ForWord® program. [NT 427-428, 742-743; P-20, pp. 22, 25]
123. Although math test results are in the IEP, there is not a math goal because no area of need or disability was present as determined by the testing done by the math curriculum supervisor and the private evaluator. [NT 434, 710-711; P-20, p.8]

¹⁵ SD-44 is a copy of the 2009-2010 Student Assignment Book given to Father at the August 2010 IEP Meeting as a sample because the 2010-2011 books were not yet available. [NT 360-361]

124. As recommended by the private evaluator the IEP Team waived Student's foreign language requirement. During the foreign language block, Student would have the opportunity to participate in the social skills group, meet with the guidance counselor, utilize the IEP's extended test-taking time provision, or receive extra support from teachers. [NT 774-775; P-20, p. 22-24]
125. Student would have taken the regular education Honors Geometry class which has about twenty-seven students and Student would have the support staff person there as well. If Student required additional math support, Student would have access to the staff math tutor during study hall or to the learning support teacher in the Academic Seminar period or to National Honor Society students who staff a tutoring center throughout the day and have also worked with students outside school. [NT 825-826]
126. Student's regular education World Literature class has an average class size of ten to eleven students with one teacher and typically another adult for support. Once or twice a week, a reading specialist assists the World Literature English teacher. [NT 874-875]
127. The World Literature class uses reading materials similar to an accelerated or honors class. The reading and writing activities are differentiated for students; there are three periods a day where the teacher can meet with students in addition to the regular class period. Student would receive one-on-one writing assistance in daily conferences. [NT 876-877, 884-885; 892-893, 895; S-102, 103, 104]
128. Student's regular education Academic Biology class would have had about ten students with a teacher and two other adults. [NT 825]
129. Student's regular education World Cultures class would have been accelerated and have about twenty students. Student would have had the adult support person there, making the student-adult ratio 10:1. [NT 824]
130. Student's regular education Health class has twenty to twenty-five students; Physical Education class sizes vary and could be ten to fifteen students. [NT 828-829]
131. The size of electives classes varies based on students' interests. [NT 828]
132. There are over one hundred student-generated clubs at the high school; a description of the organizations is in the Agenda Book. [NT 830-832; S-44]
133. The assistant principal and the head of guidance drafted a schedule for Student with openings to choose electives [NT 820-821; 823; S-101]
134. A 2010-2011 High School Curriculum Guide and a 2010-2011 Course Selection Form were provided to Father at the August 2010 IEP meeting. The head of guidance was at the IEP meeting and offered to meet with the Parents and Student to discuss

this form; the Parents did not complete the form or meet with the District about it. [NT 362-364; 792-793, 818-819, 829-830; S-95, S-97]

135. On August 25, 2010, the day after the August 24th IEP Meeting, the Parents through counsel sent a letter to the District's attorney demanding that the District reimburse the Family for 2010-2011 tuition for their unilateral placement of Student at Private School. [N.T. at 364-366; S-87]
136. At the time the Parents sent the August 25th letter, they had not yet received the final IEP document or the NOREP from the District, both of which were mailed out on August 26th. [NT 366; S-86, S-88]
137. The Parents based their request for tuition reimbursement for the 2010-2011 school year on the draft copy of the August IEP. Mother did not attend the August 24th IEP meeting and relied on the father's notes which were not complete. [NT 356, 358, 361-364, 366]
138. Mother testified that she did not know: that Student would have a small class size in the Academic Seminar class, that the District would evaluate Student for the Fast ForWord® program, that the high school provides every student with an Academic Planner at the beginning of each school year and that the 2009-2010 planner which Father received at the meeting was a sample, that Father received a letter at the meeting explaining the peer mediation program, and that the District offered to meet with the Parents to discuss Student's course selections. Mother also did not know how the Links program works and what types of start-of-school-year activities were available for ninth grade students. [NT 356, 358, 361-364]

Student's Current Status

139. Student is prescribed Ritalin and Clonidine and has been stable on the medications since May 2007.¹⁶ Student no longer suffers the former diarrhea, anxiety, and stomach problems that were present in Student's elementary school years. [NT 46, 76-77]
140. However, Student continues to have behavioral difficulties in the classroom. The Private School mentor/algebra teacher noted difficulties in the areas of impulse control [including disrupting the class and interrupting lessons], following directions, organization, attention, and activity level. Student worries excessively and is fearful of new situations. [P-16, p.11]
141. If Student does not understand directions or is unsure how to proceed, Student will pick at fingers, and fidget with hands, pencils or whatever object is around;

¹⁶ Student is very dependent on the prescribed medication. When Student first started middle school at Private School, Student would start worrying about the 11:00 dosage as soon as Student arrived at school. Student still cannot focus as it gets nearer to 11:00 am, and on that hour Student runs quickly to get the medication. [NT 479, 481]

Student is much less fidgety and less anxious this year. [NT 478-481]

142. The Head of the Middle School at Private School has no knowledge of Student's being referred by Private School for outside counseling to deal with anxiety issues during the 2010-2011 school year. [NT 509-510].
143. Nevertheless, Student has made significant progress in using self-advocacy skills and handling frustration. [NT 84-85]
144. Student has grown socially and emotionally, and is enthusiastic and motivated. [NT 113-114]
145. Student now engages others in conversation and makes eye contact. Teachers note that Student is much more at ease socially with peers, and Student has been able to develop friendships. Student has close friends and is involved with others at recess. [NT 96, 114, 218, 474; P-32 p. 18]
146. Although Student was reluctant to speak up early in the school year, by the end of the 2008-2009 school year Student was so talkative that teachers encouraged Student to keep comments focused and brief. [NT 223-224]
147. Student successfully participated in Private School's musical production as a cast member and on the stage crew, and enjoyed a sense of camaraderie with fellow participants. [NT 86-87]
148. Student participated in [redacted]. [NT 91-92; P-42 p. 6]
149. Student's writing and verbal skills have increased. With support Student can read difficult books without losing focus and can follow proper protocols for math problems. Student's writing has greatly improved. [NT 94-95, 476]
150. Student is very strong in math and is in Private School's highest math class. [NT 489]
151. The Head of the Middle School at Private School testified that Student handles homework in social studies and science, is a good thinker and did well in social studies, and has a large fund of background knowledge in science. [NT 488, 499, 534]
152. Last school year Student was able to participate in class discussions at a much higher level than previously. [NT 491-493]
153. The Head of the Middle School at Private School has known Student for four years and sees Student every day in class and in the hallways, and sees Student in social situations such as lunch and recess. She noted Student's biggest issue is executive control, i.e. getting started, staying focused, and acknowledging anxiety. [NT 471, 473, 475]

154. However, the Head of the Middle School noted that Student has made progress in these areas, has learned to organize school materials and manage time, and is better at accepting feedback about writing. While Student still has executive control issues, Student can maintain focus and attention much better now and needs reminders from teachers to a lesser degree. [NT 475-476, 494]
155. When Student entered Private School Student required a great deal of counseling support, but by October 2009 Student no longer received individual counseling and received mentoring instead. [NT 224, 412-413, 507-509, 537; P-32, p.1]
156. Student has learned to seek out help from teachers at Private School. [NT 515-516]
157. Student's mother testified that Student loves Private School, the teachers and peers there. However, 2010-2011 is Student's last year at Private School. Student will need to transition to another school for the 2011-2012 school year. Private School is prepared to assist Student's transition to another school. [NT 128, 501]
158. Private School recommends that Student's educational program for the 2010-2011 year include an IEP providing daily learning support, inclusion [into regular education] classes, access to a computer, provision of class notes, extended time for tasks and tests, and a scribe for tests. [NT 537-539; P-32, p. 3]

Private School

159. In the 2008-09 school year only one of Student's Private School teachers was certified in special education. Student had no certified special education teachers in the 2009-2010 school year. In the current 2010-2011 school year, only one of Student's teachers is certified in special education. [NT 527-528]
160. Private School does not follow the Pennsylvania curriculum standards and does not have a written curriculum. There are no clearly defined expectations for what students will learn at each grade level. Teachers are free to choose the materials they will use based on students' interest levels and needs. [NT 522, 548-550]
161. Private School uses a word identification program that was developed in-house by a staff member based on her experiences as a tutor. The only studies of the program's effectiveness have occurred at Private School. [NT 513-515, 553]
162. At Private School Student does not receive direct instruction in phonemic awareness, fluency, or the mechanics of reading. [NT 566]
163. Private School does not have a specific program for teaching written expression. [NT 567-569]

164. Private School does not assess pupils on standardized criteria such as words read per minute, and relies on informal observational methods of assessment. [NT 473, 550]
165. When teachers report whether students are meeting expectations, they are relying on their own subjective expectations and are not comparing students' skills to the Pennsylvania Standards. [NT 551-552]
166. Private School students do take the standardized test put out by the Educational Records Bureau ["the ERB"], an instrument to assess academic achievement commonly used by private independent schools. However, as the test is administered to Private School's pupils with the accommodation of having all parts of the test read aloud to them, the students' independent reading skills compared to the norm group of peers are unknown. [NT 557-558]
167. There is no specific research-based social skills curriculum for students in Private School's middle school. The only regularly scheduled middle school activities to develop social skills occur during town hall meetings every other week. [NT 510-512]

Extended School Year¹⁷

168. Student was never found eligible for extended school year services [ESY] before or during sixth grade. Student's third through sixth grade IEPs, without ESY services, were determined to be appropriate by the former hearing officer and the appeals panel. [NT 312; S-7, S-8, S-9]
169. In March 2010 when the Parents' current attorney contacted the District the Parents through counsel did not notify the District that they wanted Student to have ESY for summer 2010. [S-54]
170. The mother testified to the significant improvement Student had made, and this improvement was in the absence of ESY programming. [NT 85-86, 93-96, 112-115]
171. Student received no academic instruction or programming in the summer of 2010. Student went on vacation with the family and attended a sailing camp. [NT 131, 276]
172. The private evaluator acknowledged that she saw no evidence that Student regressed during summer breaks in her review of the records. [NT 259-260]

¹⁷ Relatively little in the way of testimony or documentation regarding ESY was offered for the record.

Independent Educational Evaluation

173. The District's certified school psychologist completed a reevaluation on May 12, 2010. [NT 398-399; P-13]
174. Since Student had been given the Wechsler Intelligence Scale for Children – Fourth Edition [WISC-IV] at Private School a week before, the District psychologist did not repeat the test as this would have been inappropriate, but obtained the scores from the Private School's contracted examiner. [NT 435-436]
175. The District psychologist administered the Woodcock Johnson Tests of Cognitive Ability to supplement the WISC-IV that was recently administered. [P-13, pp. 13-14, 19]
176. The reevaluation also included a records review; academic testing; a Parent Report Form; the BASC Parent rating scale [social emotional assessment]; the BRIEF Parent rating scale [executive functioning]; four teacher rating scales; classroom [language arts] observation at Private School by the District psychologist; IRI administered by a District reading specialist¹⁸; integration of the intelligence testing completed at Private School; and math testing by the District's math curriculum supervisor.[NT 348-349, 424, 433-438; P-13]
177. An FBA would be completed at the District high school once Student entered there; an FBA conducted at the small and familiar Private School would not have yielded information pertinent to the larger public school that was new to the Student. [NT 428-429]
178. The Head of Middle School at Private School testified that Student has never been a behavior issue at Private School. Student has no behavior plan at Private School. [NT 475, 547].

Discussion and Conclusions of Law

The IDEA requires that a court reviewing an administrative agency decision must base its decision on the preponderance of the evidence. *See* 34 C.F.R. 300.516(c)(3); *L.E. v. Board of Education*, 435 F. 3d 384, 389 (2006). At an administrative hearing challenging an IEP, the burden of proof is properly placed upon the party seeking relief. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537 (2005). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). However, the burden of persuasion under *Schaffer* only comes into play when neither party introduces a preponderance of the evidence. In that event, evidence is evenly

¹⁸ Line 7 on NT 708 incorrectly names the person administering the IRI; it should state that the IRI was administered by [redacted] a District Reading Specialist.

balanced, or in "equipoise" as the Court put it, and the party having the burden of persuasion failed to tip the evidence scale in its favor and thus cannot prevail. The evidence was not in equipoise on any of the issues under consideration.

Tuition Reimbursement:

In the instant matter, the Parents have continued their child's unilateral placement from fifth grade through the present, and are seeking tuition reimbursement for the previous two school years as well as the current school year based upon their belief that the IEPs offered to Student were inappropriate. In a previous due process hearing they sought tuition reimbursement for the first two years of the unilateral placement, but did not prevail at the hearing officer or the appeals panel level as the District's IEPs were found to be appropriate.

Before becoming a matter of statute, the right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985). *Florence County Sch. Dist. Four V. Carter*, 114 S. Ct. 361 (1993) subsequently outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

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

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

(ii) Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a 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 deciding the issues in cases involving tuition reimbursement then, a hearing officer must conduct three lines of inquiry. First, was the program offered by the district appropriate? If the answer to that question is yes, the inquiry stops there. If the answer is

no, then it is necessary to determine whether the program the parents chose was appropriate. If that answer is no, the inquiry stops there. If the answer is yes, then the hearing officer must examine the equities, i.e. any actions by the parents that would reduce or eliminate the district's responsibility for tuition reimbursement.

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* LRP 109, 62289 (SEA PA 2009). Once disabled children are identified as being eligible for special education services the IDEIA requires the State to provide them with a "free appropriate public education". 20 U.S.C. § 1412(a)(1), 20 U.S.C. § 1401(9). Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.26.

School districts provide FAPE by designing and implementing a program of individualized instruction 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 benefit", a principle established by nearly 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *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 (3rd Cir. 2009).

"Meaningful educational benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk*.

Under the Supreme Court's interpretation of the IDEA in *Rowley*, and in interpretations rendered in other relevant circuit court cases, a school district is not required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity". There is no requirement to provide the "optimal level of services." *Mary Courtney T. v. School District of Philadelphia*; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), *cert. den.* 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). 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). Citing *Carlisle*, Pennsylvania's federal court in the Eastern District recently noted, "Districts need not provide the optimal level of services, or even a

level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Finally, an IEP’s appropriateness must be determined as of the time it was made, and the reasonableness of the school district’s offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010).

Federal regulation provides in pertinent part regarding individual education programs:

(a) *General*. As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324, and that must include—

(1) A statement of the child’s present levels of academic achievement and functional performance, including—

(i) How the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or

(ii) For preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities;

(2)(i) A statement of measurable annual goals, including academic and functional goals designed to—

(A) Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child’s other educational needs that result from the child’s disability;

(ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(3) A description of—

(i) How the child’s progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and

(ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

(5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;

(6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments consistent with section 612(a)(16) of the Act; and

(ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or district-wide assessment of student achievement, a statement of why—

(A) The child cannot participate in the regular assessment; and

(B) The particular alternate assessment selected is appropriate for the child; and

(7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

(b) *Transition services.* Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include—

(1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.

(d) *Construction.* Nothing in this section shall be construed to require—

(1) That additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act; or

(2) The IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

34 C.F.R. § 300.320 (Authority: 20 U.S.C. 1414(d)(1)(A) and (d)(6))

Federal regulation provides as follows regarding development, review, and revision of IEP.

(a) *Development of IEP—(1) General.*

In developing each child's IEP, the IEP Team must consider—

(i) The strengths of the child;

(ii) The concerns of the parents for enhancing the education of their child;

- (iii) The results of the initial or most recent evaluation of the child; and
 - (iv) The academic, developmental, and functional needs of the child.
- (2) *Consideration of special factors.*

The IEP Team must—

- (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;
 - (ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;
 - (iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;
 - (iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and
 - (v) Consider whether the child needs assistive technology devices and services.
- (3) *Requirement with respect to regular education teacher.* A regular education teacher of a child with a disability, as a member of the IEP Team, must, to the extent appropriate, participate in the development of the IEP of the child, including the determination of—
- (i) Appropriate positive behavioral interventions and supports and other strategies for the child; and
 - (ii) Supplementary aids and services, program modifications, and support for school personnel consistent with § 300.320(a)(4).

Working with the Parents the District developed IEPs for Student's seventh and ninth grade years, as it had done for the fifth and sixth grade years as addressed in the previous due process hearing. As the Parents did not choose to participate, the District did not offer an IEP for the eighth grade [2009-2010] school year. Decisions of the federal district courts in Pennsylvania provide persuasive authority that districts are not required to offer annual IEPs to students placed in private schools unilaterally by their parents. *Gregory R. v. The Penn Delco School District*, 262 F.Supp.2d 488 (E.D. Pa. 2003); *M. F. v. The William Penn School District*, 2005 U.S. Dist. LEXIS 20636 (E.D. Pa. 2005); *Michael J. v. Derry Township Sch. Dist.*, Civil Action No. 1:03-CV-1104, 2006 U.S. Dist. LEXIS 5093 (M.D. Pa. 2006). Nevertheless in the instant matter the District exercised a greater degree of diligence than was necessary, making an overture to the Parents in May 2009 regarding holding an IEP meeting for the 2009-2010 school year, and another overture in October 2009. In May the Parents did not respond (at that time they were represented by their former counsel) and in October, no longer represented by counsel they indicated that they would attend an IEP meeting only if the District were required to hold one. In addition to a significant period of time being represented by an

attorney, the Parents had for several years received assistance from a special education advocate, as well as receiving copies of the procedural safeguards on various occasions. They had participated in a previous due process hearing. They were aware of how special education planning operates and knowingly decided not to pursue the District's offer to draft an IEP for 2009-2010. The District was not required to expend its resources on holding an IEP meeting when the Parents did not request a meeting, particularly when, on several occasions, the Parents were prompted to request a meeting and did not.

The program the District offered Student for 2008-2009 and the program it offered for 2010-2011 were clearly appropriate, and in fact went well beyond the fairly modest requirements of the IDEA. As set out in detail in the findings of fact above, which will not be repeated here, both the 2008-2009 and the 2010-2011 IEPs addressed all areas of Student's need – academic [learning disabled and [redacted]], social and emotional. The IEPs have appropriate measurable annual goals to address the areas of need, and an array of specially designed instruction and school-wide supports.

Although this hearing officer finds the District's IEPs to be entirely appropriate, the private evaluator spent a significant amount of testimony on IEP criticism. The readers' attention is invited to another case involving a parental challenge to a district's IEP, *Derek B. v. Donegal Sch. Dist.*, 47 IDELR ¶ 34, at *142 (E.D. Pa. 2007) wherein the federal district court commented, “[The offered IEPs] are relatively detailed, although not as detailed as [an expert witness/independent evaluator's] reports, and appear to have been thoughtfully designed to benefit [the Student]. It is entirely possible that an IEP written by [the expert witness/ independent evaluator] would have been better than the School District's... [but] the IDEA does not ask the public schools to guarantee the very best.” Moreover, insofar as the private evaluator criticized the District's choice of scientifically-based instructional programs, in *Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) which remains the leading case on methodology, the Court ruled that Parents could not force a school district to adopt what they perceived to be an even more effective educational program, recognizing, “Once it is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities.” *Lachman* at 292.¹⁹

In addition to offering IEPs that were far beyond the IDEA standard for appropriateness, they also offered Student the opportunity to be educated in the least restrictive environment.

Federal regulation provides in pertinent part regarding least restrictive environment:

(a) *General.*

(2) Each public agency must ensure 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

¹⁹ See also *M.M. v. School Board of Miami - Dade County, Florida*, 437 F.3d 1085 (11th Cir. 2006).

education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2) (Authority: 20 U.S.C. 1412(a)(5))

At the private school, Student is being educated with special education students with no opportunity for interaction with non-disabled students. Nothing in the testimony or the documents supported the premise that Student's needs were so extreme or unusual or extensive as to require that Student be educated away from typical peers for the entire school day. Although the private evaluator described Student as very complex, the Student is not unique in complexity among eligible students, and the District demonstrated that it was fully capable of designing a program to meet every aspect of Student's complexity. Two threads that initially promised to offer a reasonable foundation for the Parents' conviction that Student requires segregated education were anxiety and Tourette's syndrome. Although this hearing officer anticipated significant and possibly persuasive evidence regarding the disabling effect of these conditions on Student's ability to function in school, this turned out not to be the case. The descriptions of how anxiety manifests in Student, combined with the strengths Student exhibits currently, failed to create the picture of a Student so handicapped by anxiety that separate education is required. Moreover, although the question of experience with students with Tourette's syndrome was periodically raised by the Parents in cross-examination of District witnesses, the Parents did not present any evidence that Student's particular case of Tourette's involves the distressing and disruptive verbalizations or the frightening and striking physical movements that characterize severe or even moderate Tourette's. Although Student's math teacher at Private School referenced tics, none of the District evaluators who saw Student in potentially stressful situations, nor the private evaluator, nor the Head of the Middle School at Private School, nor even the Parent offered descriptions of a Student with Tourette's so disabling that separate schooling is necessary. The Parents did not establish that the nature or severity of Student's learning, emotional, neurological or social disabilities taken individually or together are such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily.

The Parents have failed to meet their burden of proof on the issue of tuition reimbursement. The testimony taken as a whole and the documents presented at the hearing all establish beyond question that Student was offered FAPE by the District. Since the first prong of *Carter* has been decided in the District's favor, this decision will not address the second and third prongs, although limited findings of fact relative to the Private School are presented above.

ESY

ESY as a component of FAPE must be considered by the IEP team. 34 C.F.R. §300.106. The IEP team must consider: Regression (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming; Recoupment (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the

interruption of educational programming; (iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives; (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted; (v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers; (vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process; and (vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities. 22 Pa. Code §14.132(a)(2).

In developing Student's IEP the IEP team considered ESY and determined that Student was not eligible. In the IEPs previously implemented and found to be appropriate, and in the two IEPs previously offered and not implemented but found to be appropriate, Student was not eligible for ESY. In the current hearing, the Parents presented credible testimony to Student's considerable improvement, and the Mother testified that Student received no educational instruction or programming in the Summer of 2010. There was no testimony or documentary evidence from the Head of the Middle School at Private School that Student experienced any regression or recoupment difficulties upon return to school after the summer of 2010, and the private evaluator acknowledged that in her review of the records she saw no evidence that Student regressed during summer breaks.

The Parents' request for compensatory education for Student in the area of ESY is denied as they have not met their burden of proof on this issue.

IEE

Pursuant to the IDEA and its implementing regulations, parents may request an Independent Educational Evaluation [IEE] at public expense if they disagree with the District's evaluation. The District must either provide an IEE or prove at a hearing that its evaluation was appropriate. *34 C.F.R. §300.502(b)*. An evaluation is appropriate if it comports with the requirements of the IDEA and its implementing regulations. In pertinent part, the IDEA and its regulations require that the people who review the assessment information and complete the report must be qualified professionals who, with the parent, determine the educational needs of the child. *34 CFR § 300.306*. Section 1414(b)(2) of the IDEA requires that in conducting the evaluation, the local educational agency shall:

- A) use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's [IEP]

B) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

C) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.²⁰

The IDEA at section 1414(b)(3) also puts forth additional requirements to ensure that:

(A) assessments and other evaluation materials used to assess the child under this section

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;

(iii) are used for the purposes for which the assessments or measures are valid and reliable

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of disability; and

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided

Arguably the burden of persuasion falls to the District on the issue of the Independent Educational Evaluation, although the Parents did not assert that they obtained the private evaluation because they disagreed with the District's re-evaluation. The evidence is not in equipoise. This hearing officer finds the District's re-evaluation to be appropriate for the purposes for which it was needed, that is, to assess Student's continued eligibility for special education and to ascertain Student's areas of need such that an appropriate IEP could be written. The re-evaluation addressed cognitive ability, academic achievement, executive functioning, social-emotional functioning and [redacted]. Student's needs are in the areas of reading, written expression, organization, self-regulation and [redacted] and sufficient data was obtained upon which to base an appropriate IEP.

Criticizing the reevaluation and the IEP, the Parents make much of the District's not conducting an FBA on site at the Private School. First, the IDEA only expressly requires an FBA and a BIP [Behavior Intervention Plan] upon removal of an eligible child for 10 school days in a school year. 20 U.S.C. §§ 1415(k)(1)(D) and 1415(k)(1)(F). Otherwise, there is no such obligation under the IDEA except to the extent implicit in the

²⁰ See also 34 CFR § 300.304(b).

requirement that the IEP team “consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address ... behavior [that impedes the child’s learning or that of others].” *Id.* § 300.346(a)(2)(i). Second, the courts have been reluctant to require best practice in the absence of legal standards for FBAs and BIPs. *See, e.g.,* Alex R. v. Forestville Valley Cmty. Sch. Dist., 375 F.3d 603 (7th Cir. 2004); *Robert B. v. West Chester Sch. Dist.*, 44 IDELR ¶ 123 (E.D. Pa. 2005).

Nevertheless, the District planned to complete an FBA during the first 30 days of Student’s attendance at the high school, a reasonable and wise procedure since analyzing Student’s behaviors, their antecedents and their consequences in the small, familiar middle school level setting in the Private School would likely have slight benefit in terms of devising a positive behavior support plan for the larger, unfamiliar, public high school setting. Under the proposed IEP Student would have a solid structure of behavioral, social and emotional support from day one at the high school and the addition of a positive behavior support plan following an FBA after 30 days would likely serve only to supplement, rather than form the core of, Student’s support system. In an analogous situation the federal court in Pennsylvania’s Eastern District noted that an IEP can provide meaningful benefit when the student is transitioning from private to public school and the district waits until the student returns to the district to establish baselines. *See J.G. v. Abington Sch. Dist.*, No. 08-cv-00734, 2008 U.S. Dist. LEXIS 83062 at *14-15 (E.D. Pa. Oct. 15, 2008. Waiting until a student is situated in the new environment before establishing behavioral baseline data is even more appropriate.²¹

The District’s evaluation, upon Student’s actual entrance into the high school, would be extended to include a speech/language assessment and an assistive technology assessment to explore avenues of inquiry/instruction recommended by the private evaluator. Given the uncertainty of whether or not the Parents were going to opt for public education, the District cannot be faulted for conserving valuable resources in these specialty areas unless and until Student actually enrolls in and attends public school.

Although the private evaluator produced a thorough and informative report which she explained with grace and patience during her testimony, and portions of which the District adopted for IEP planning purposes at the Parents’ request, the District is under no obligation to expend public funds for the independent evaluation as the District’s reevaluation was appropriate.

²¹ *See also* Brett S. v. West Chester Area Sch. Dist., No. 04-5598 at *43-46, 2006 U.S. Dist. LEXIS 10249 (E.D. Pa. March 13, 2006); Caitlin W. v. Rose Tree Media Sch. Dist., No. 03-6051, 2009 U.S. Dist. LEXIS 42307 at *20 (E.D. Pa. May 15, 2009)

Order

It is hereby ordered that:

1. The School District offered Student a free appropriate public education in terms of program and placement (FAPE) for the 2008/2009 and the 2010/2011 school years. As the Parents did not accept the District's offer to convene an IEP meeting for the 2009-2010 school year the District was under no obligation to offer an IEP for that year.
2. As the District offered Student FAPE for the period in question it is not required to reimburse the Parents for tuition to Private School.
3. Student is not entitled to compensatory education for extended school year (ESY) services for the 2009/2010 school year.
4. The District is not required to reimburse the Parents for the independent educational evaluation they obtained for Student.
5. The District is not required to take any further action, and it need not hold IEP meetings for future school years unless the Parents provide clear, express and timely notice that they intend to enroll Student in the District.

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

January 20, 2010

Date

Linda M. Valentini, Psy.D., CHO

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