

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. 15868-1415AS

Child's Name: M. L.

Date of Birth: [redacted]

Dates of Hearing: 4/15/15, 5/5/15, 5/7/15

CLOSED HEARING

Parties to the Hearing:

Parents

Parent[s]

School District

Exeter Township

200 Elm Street

Reading, PA 19606

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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May 22, 2015

June 5, 2015

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INTRODUCTION AND PROCEDURAL HISTORY

Student in this case is an IDEA eligible resident of the District who has been enrolled in Parent selected but District funded private schools from early in first grade through the end of the 2013/2014 school year.

For the current school year, which began after the last of a series of settlement agreements between the parties expired, Parents enrolled Student in a private school different from the school Student had attended during the 2013/2014 school year. The District declined to pay Student's tuition for that school and proposed an approved private school (APS) placement.¹

The first APS the District identified did not accept Student. Parents rejected the second APS the District offered, contending that it cannot appropriately meet Student's needs, and that Student was making meaningful progress in the private school at the time the District proposed the second APS, and has continued to make appropriate progress there. With the private school impasse unresolvable by the parties, Parents submitted a due process complaint seeking payment of Student's private school tuition and transportation costs, as well as the costs of additional services provided by the private school, and reimbursement for an independent educational evaluation (IEE).

Based on the record produced over the course of a three session hearing in April and May 2015, Parents have established that the District's proposed private school is not appropriate for Student, that the private school Parents selected is appropriate and that there is no equitable reason to deny or reduce payment of tuition at the private school for all services provided to

¹ Since the overarching issue in this case involves comparing two private schools rather than a public school placement and a unilateral private school placement, for ease of reference, the District's proposed private school placement will be referred to in this decision as the APS and Parent's selection as the private school.

Student. Parents also presented sufficient evidence to support their claim that the District should fund the IEE Parents obtained in the summer of 2014.

ISSUES

1. Is the School District required to reimburse Student’s Parents/pay Student’s costs for tuition, including ESY for the summer of 2015, costs of additional services for the private school that Parent selected for the 2014/2015 school year, and transportation costs in that:
 - a. The School District failed to offer an appropriate placement for Student for the 2014/2015 school year;
 - b. Student’s program/placement at the Parent–selected private school is appropriate;
 - c. There are no equitable reasons to deny or reduce reimbursement?
2. Is the School District required to reimburse Student’s Parents/directly pay for an independent educational evaluation of Student that they obtained in the summer of 2014?

FINDINGS OF FACT

Background/District Placement Proposals Through December 2014

1. Student, an early teen-aged child, born [redacted] is a resident of the School District, is eligible for special education services, and is currently attending a Parent-selected private school. (Stipulation, N.T. p. 12)
2. Student has been identified as IDEA eligible in the Autism, Other Health Impairment (OHI) and Speech/Language Impairment (S/LI) disability categories in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1), (9), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 12, 13)
3. A private school is the appropriate placement for Student for the 2014/2015 school year. (Stipulation, N.T. p. 12)
4. Through a series of settlement agreements between the parties, Student attended small private schools from 1st grade through the end of the 2013/2014 school year (7th grade), when the most recent agreement expired. (HO-1 pp. 233—236, 417, 418²; S-1, S-2, S-6)

² The facts relating to the settlement agreements also applied to Student’s sibling, for whom a due process hearing was completed the day before the due process hearing in this case began. By agreement of the parties, testimony

5. A few months after joining the District at the beginning of the 2013/2014 school year, the Director of Pupil Services and Special Education began reviewing all settlement agreements for out of District placements. Through that process, she became aware of Student, the settlement agreements and that the latest agreement would expire in August 2014. (HO-1 pp. 326, 327, 380, 381)
6. The most recent agreement between the parties, an Addendum to the 2008 Settlement Agreement and Release, was signed by Parents in September 2010 and by the District in November 2010. It provided that the District would fund Student's placement at "[a private] Christian School and Connections Academy." (N.T. pp. 458, 459; HO-1 pp. 244, 245, 393, 420; S-2 pp. 1, 3)
7. "Connections Academy" refers to a Pennsylvania public cyber charter school, [redacted]. When the Addendum to the main settlement agreement was executed in 2010, and for part of the period during which it remained in effect, Student received some academic instruction from the charter school, facilitated by private school staff. During that same period, Student also took classes at the private school that were not offered by the charter school and participated in extracurricular activities. Student last attended the charter school during the 2011/2012 school year. Tuition costs for the charter school, as well as for the private schools, were paid from the settlement trust fund. (HO-1 pp. 176, 177, 241, 243, 246; S-2, S-3)
8. Parents contacted the District, via counsel, in June 2014 proposing to enter into a new agreement for the following two school years (2014/2015 and 2015/2016). Parents' counsel at the time informed District counsel that a private reevaluation of Student was underway and promised to provide the report when completed. (HO-1 pp. 327, 419, 420)
9. Upon reviewing the settlement agreements after counsel contacted her, the Director concluded that because the most recent agreement provided that Student would receive some instruction from a charter school while also enrolled in the private school, the agreement had the effect of transferring LEA status for Student from the District to the charter school, thereby divesting the District of responsibility for providing educational services to Student until and unless Student formally reenrolled in the District. (HO-1 pp. 328, 241, 244; S-6)
10. Although the District reiterated its non-enrollment position in a letter dated August 4, 2014, and further stated that Parents had not requested a FAPE for Student from the District, it also included a permission to reevaluate Student (PTRE) with the August 4 letter. The District requested Parents' consent to assess Student's ability and achievement, as well as Student's behavioral, emotional, and sensory functioning and

from the other case that established facts about the settlement agreements and events from June—August 2014 relevant to the issues in both cases were admitted into the record of this case as HO-1 to avoid duplicative testimony. Testimony from the prior record will be cited as HO-1, followed by the original page numbers from the transcript of that case. To the extent that testimony taken in this record bears upon a finding of fact supported by testimony in HO-1, the testimony from this record is cited as N.T. followed by the page number(s), as usual.

needs. The reevaluation consent request also identified a records review, classroom observation, teacher and parent input, physical therapy (PT), occupational therapy (OT) and speech/language screenings/assessments. (S-8)

11. Parents never completed a new student enrollment form and received no response to their inquiry concerning steps they needed to take to clarify and assure Student's enrollment status in the District. (HO-1 pp. 421—423; P-62 pp. 5, 6)
12. Parents had arranged for a private psycho-educational evaluation of Student, which was in progress at the time the PTRE was issued. They did not sign and return the District's August 2014 PTRE, but took steps to determine when the evaluation report would be available. Parents provided the private psycho-educational evaluation report, dated August 13, 2014, to the District on August 22, 2014. (N.T. pp. 441, 442; S-10)
13. After a District school psychologist reviewed Parents' private evaluation report, the District informed Parents by letter dated August 27, that it had sufficient information to develop an IEP for Student.³ (N.T. p. 524; P-62)
14. The District sent Parents an invitation to an IEP meeting on September 9 for the purpose of reviewing the private evaluation report and developing an IEP for Student for the 2014/2015 school year. (S-15)
15. At the September IEP meeting, the District proposed an IEP that it described as "based solely" upon the information Parents had provided, primarily the private evaluation report. The IEP stated that Student needed a full-time autistic support special education placement, and that the District was willing to consider an out of District placement, if appropriate, but if not, that Student "will receive [his/her] education at [the District's] Junior High School." (S-16 pp. 1, 26—28)
16. On September 16, the District sent the final IEP to Parents, accompanied by a NOREP proposing a full-time autistic support placement at an unspecified location or facility. (N.T. pp. 444, 445; S-18)
17. The NOREP listed two private school placements that were considered, including the school where Student is currently enrolled. The NOREP also listed the District middle school, without special education supports, as a placement that was considered. All potential alternative placements were rejected as lacking sufficient services to meet Student's needs. Parents disapproved the NOREP on September 26 and returned it to the District. (S-18 pp. 2, 3)

³ The school psychologist who reviewed the private evaluation report and later conducted the District reevaluation of Student is not directly employed by the District, but is contracted to the District by her employer, the local Intermediate Unit, on a part-time basis. (N.T. p. 523)

18. By letter dated September 25, 2014, the District notified Parents that it sent a referral to the APS it ultimately recommended. Parent and Student visited the school in late November. (N.T. p. 445; S-27)
19. Previously, the District had contacted another APS, which indicated that it could provide a placement for Student. After discussion of that APS at the September 9 IEP meeting, Parent visited with Student. During the visit, the staff concluded that it did not have a placement that could meet Student's needs and notified the District that it would not offer admission. (N.T. p. 327; P-9 pp. 25—27)

Private Psychoeducational Evaluation

20. In late June 2014, a doctorate level school psychologist who had evaluated Student twice before, assessed Student's cognitive ability and achievement. The two assessment sessions also included a Student interview, several measures of executive functioning and a Parent-completed Assessment of Functional Living Skills. The full evaluation included observations during the testing sessions, an observation during Student's academic summer camp program and interviews with camp staff. (N.T. pp. 26; S-10 pp. 4, 5, 15—17)
21. Student was described as very articulate, with good receptive and expressive language skills, and good visual reasoning skills. Other identified strengths were good fine motor control of the writing process; good technical reading skills, with strong literal reading comprehension; good writing skills, with the ability to organize and produce a good written essay (N.T. pp. 26, 27; S-10 pp. 5, 6)
22. In general, Student struggles with executive functioning difficulties associated with a high functioning autism spectrum disorder. Student does not do well with inferential reading comprehension, and especially with taking the perspective of others. Student is impulsive, can be abrasive at times and sometimes has difficulty with sustaining attention, focusing efforts, initiating tasks and complying with non-preferred, on-demand tasks. (N.T. pp. 27—29; S-10 pp. 6, 7)
23. Student also has difficulty with social pragmatics, in terms of both developing appropriate social skills and understanding when to use them, which is a part of executive functioning. Student continues to need external cues to remember to appropriately use developing social skills. (N.T. pp. 30—32)
24. Based on the observation, Student's impulsivity and inflexibility were greatly reduced since the prior evaluation in 2010, but continued to affect Student's peer and adult interactions. At the time of the 2014 evaluation, Student had a greater willingness to change those behaviors in response to peer feedback. Student benefitted from the opportunity to interact with peers who do not have the same social impairments (N.T. pp. 33—37; S-10 pp. 7, 8)

25. Overall, Student's cognitive ability is in the average range, with some skills in the above average to superior range, and some weaknesses. Student's most significant challenge is in math, arising more from lack of motivation, and executive functioning performance-related issues (lack of attention to detail, impulsive responses) than from learning difficulties. Although academically capable, and able to read, speak and write well, the executive functioning difficulties continue to impact Student's learning and performance. (N.T. pp. 38—42; S-10 pp. 9, 11)
26. The independent evaluator noted significant improvement in Student's severe behaviors in the years between his 2010 and 2014 evaluations, which he attributed to greater exposure to typically functioning peers in that period. (N.T. p. 71)
27. Student needs a small, highly structured classroom setting with academically comparable peers who are better functioning, socially, to provide modeling of neuro-typical social behaviors. With the right learning environment, Student can be successful in a college prep academic curriculum. (N.T. pp. 50—54; S-10 pp. 10)
28. Although noting the importance of behavior management, the independent evaluator warned that behavior plans that focus on external control strategies, such as ABA (Applied Behavior Analysis) techniques are likely to be less effective as Student matures. He recommends shifting to cognitive behavior approaches, taught and mediated by a mental health provider, to encourage Student to modify perceptions, thoughts and feelings in order to support Student's desire for self-determination. (S-10 pp. 10, 13)
29. The independent evaluation report also recommends an educational program that provides direct instruction in using appropriate social skills and executive functioning strategies, such as through a social thinking curriculum. The report further recommends that Student be seated "near peers who are very capable in the areas of self-monitoring, focusing and sustaining attention and effort, and in following classroom routines and engaging in socially appropriate behaviors" for cueing in how to engage in classroom routines. (S-10 pp. 11, 13)

District Evaluation

30. At a September 12 IEP meeting for Student's sibling, the District again requested Parents' consent for a reevaluation by the District. The revised PTRE listed the reevaluation components as review of classroom observations by the District school psychologist, review of school records, interview with parent, teachers and student; PT, OT and speech/language screenings/evaluations and a functional behavioral assessment (FBA). Parents consented to the reevaluation by signing the PTRE at the meeting. (N.T. pp. 440, 441, 529; P-12)
31. Since the District school psychologist considered the private evaluation exhaustive, she did not need, and did not propose, any additional psycho-educational assessments for the District's reevaluation. She also incorporated , *verbatim*, into the RR much of Student's

- background, health and educational history, from the independent report (N.T. pp. 524—526, 537, 547, 549; S-62)
32. The District reevaluation report (RR), dated November 10, 2014, also included Parent input, in the form of written answers to specific questions, an observation of Student at the private school on September 21, 2014, information from teacher input forms, an occupational therapy (OT) assessment, a speech/language assessment, a physical therapy (PT) screening and a functional behavior assessment, which also included classroom observations. (S-27)
 33. Teacher comments were generally positive about Student’s engagement in academic tasks, although Student sometimes needed significant support and reassurance. Teachers also noted difficult behaviors, such as attention-seeking through deliberately antagonizing peers. (S-27 pp. 10, 11)
 34. The full speech/language assessment was provided in a November 19 addendum to the RR. Although the speech/language evaluator identified weaknesses in Student’s pragmatic language skills that prompted her to add more assessments, Student scored within the average range on all measures, including articulation, receptive and expressive language skills, as well as pragmatic language. (N.T. pp. 629, 630, 64, 643; S-28)
 35. The speech/language pathologist recommended group instruction for pragmatic language, focusing on detecting the “mood” of others to appropriately shape communication, repair of communication breakdown to communicate more effectively in an educational setting and use of nonliteral language, including sarcasm and figurative language. (N.T. p. 642; S-27)
 36. The OT evaluation was conducted by an employee of an independent provider contracted to the District. She observed Student at the private school for approximately 90 minutes, asked Parents, teachers and Student to complete a sensory profiles and administered several assessments to examine visual processing and fine motor skills. Based upon the results of the sensory profile assessments, the OT recommended school-based OT for teaching sensory-motor skills, and services to monitor Student’s handwriting skills, due to below average scores on a measure of visual-perceptual processing. (N.T. pp. 565, 567, 568, 572, 573; S-27 pp. 13—16, 26)
 37. The District school psychologist’s first draft of the RR included the recommendation that Student’s “IEP team should review the current reevaluation to determine the best placement to meet [Student’s] needs.” (P-35 p. 95)
 38. On November 10, 2014, the school psychologist sent the draft RR to the District Pupil Services/Special Education Director for review, to determine whether any changes needed to be made, noting that she had kept the recommendations section “pretty general.” (P-35 p. 69)

39. The first paragraph of the recommendations section of the RR given to Parents added the language that, based upon the private psycho-educational report, the private school would be unable to meet behavior needs “a critical component of [Student’s] educational process” because it does not have a behavior specialist and that it does not have a speech/language pathologist to meet Student’s language needs.” (S-27 p. 26)

District’s December 2014 IEP Proposal, APS/Private School Characteristics, Observations

40. At a December 9th meeting, the District proposed an IEP with goals in the areas of pragmatic language, sensory processing, behavior and math. Among other services and accommodations, the specially designed instruction (SDI) provided for explicit social skills instruction, sensory strategies and tools for use in the classroom. As related services, the IEP proposed 30 minutes/6 day cycle of OT and speech/language therapy, 30 min./week of BCBA services, counseling services and daily transportation. The IEP also provided that Student is eligible for ESY and included a behavior intervention plan. (P-17 pp. 32—41, 44, 45, 47,52)
41. The IEP proposed a fulltime autistic support placement at an out of District location, identified as the APS. Parents disapproved the placement due to insufficient information concerning the proposed placement to permit full consideration of the District’s offer. (N.T. pp. 353, 354; P-17 pp. 48, 49, S-35 p. 3)
42. Although December 12, 2014 was identified as the IEP implementation date, Parents received a letter from the APS dated December 3 offering admission beginning January 5, 2015. (N.T. pp. 448, 449; S-32)
43. The APS primarily serves students with an autism diagnosis. All students have an IEP and the program for each student is very individualized, with fluid groupings depending upon student needs and progress. The middle school academic curriculum includes math, reading, science, social studies and language arts. Class size is 6—10 students with one teacher and one instructional assistant. (N.T. pp. 675—677, 695, 712; S-38 p. 7)
44. The APS staff includes behavior specialists, overseen by a BCBA, who work directly with students. The APS also provides OT, speech/language therapy, school counseling services. School psychologists on staff provide both educational testing and faculty/crisis team support. (N.T. pp. 680—687)
45. Although the APS Director knows that there are students enrolled in the school who are on grade level for math and reading, he could not say whether there are grade level peers who are academically comparable to Student, noting that the APS can program very well for students who struggle with the social aspects of speech and language. He believes that the APS can meet the academic needs of any student. (N.T. p. 695)

46. Students at the APS participate in Pennsylvania statewide assessment at various grade levels, taking either the PSSA or the PASA (Pennsylvania Alternative System of Assessment.) In the spring of 2013, 18 8th grade students took the PSSA and 7 took the PASA. (HO-2)
47. The District school psychologist visited the APS and concluded that it was an appropriate placement for the current school year for Student to work on social skills and behavior management issues. She cited the team approach of group social skills instruction by an OT and speech/language therapist several times/week, and a BCBA on staff as the reasons the APS can help Student with those issues. (N.T. pp. 554—556)
48. Although she was unable to see classes in session due to the timing of her visit, she and the APS staff came to a consensus that the APS likely won't be a long-term placement because Student is academically higher functioning than the other students at the APS. In response to the question whether Student would be sufficiently academically challenged, the school psychologist was told that students receive academic instruction in groups of five or six, but it is individualized for each student. After receiving that information, she was no longer concerned about academics. (N.T. pp. 554, 555, 558, 561)
49. Based upon her visit to the APS, Parent does not believe it is an appropriate school for Student because staff could not assure her that Student would be among academically and socially similar peers. When Student is in a lower functioning peer group, Student regresses to a lower level of functioning, and maladaptive behaviors increase based upon Student's perception of what is expected in that setting. (N.T. p. 447)
50. During the 2013/2014 school year, and for several prior years, Student had been enrolled in a regular education private school. The school notified Parents in June 2014 that it could no longer meet Student's needs, prompting Parents to look for a private school that would provide a strong academic curriculum in a supportive environment that could address Student's social and behavior needs. With the recommendation of the private evaluator, who observed Student in the summer program, Parents selected the private school for the current year. (N.T. pp .451, 458)
51. At the end of August, the private school admitted Student, provisionally, for a diagnostic placement to determine whether it could meet Student's needs. At the end of January 2015, Student was offered admission for the remainder of the 2014/2015 school year. (N.T. pp. 140, 141, 452)
52. The private school is a small independent school serving approximately 75—80 students in grades 5—12 who are diagnosed with learning disabilities, autism spectrum disorder or ADHD. Academic class sizes are 4—8 students. (N.T. pp. 142, 143)
53. In addition to having diagnoses that create learning differences, students who are enrolled in the private school generally have average to above average intelligence and are interested in a college prep educational program. Approximately 95% of the private

- school graduates go on to post-secondary educational programs, with approximately 25% starting at a two year college. (N.T. pp. 143, 144, 146)
54. The therapeutic component of the private school services includes group counseling services twice weekly for 40 minutes for all students, with the opportunity for each student to see his/her counselor on an individual basis as needed. A psychologist with experience in cognitive behavior therapy supervises the counseling program. (N.T. pp. 145, 146)
 55. The private school provides consultative OT services to all students for classroom supports to help them in the educational environment. (N.T. p. 147)
 56. The private school does not offer speech/language therapy, but does have a part-time (1 x/week) speech/language therapist who provides services at an extra cost. (N.T. p.147)
 57. Social pragmatics are addressed at the private school through working on pragmatic language skills in the weekly group counseling sessions, as well as through staff support and re-direction throughout the day. All staff at the private school are trained in social pragmatics. The counseling staff teaches social skills and behavior strategies that the teachers reinforce and help implement for each student after consultation with the counselors. (N.T. pp. 148, 149)
 58. Student currently has a daily feedback/point sheet to track progress and lapses in appropriate behaviors. Based upon the information disclosed on the feedback sheets and informal observations during daily interactions, Student is making slow progress in improving behaviors and social skills. Had Student not shown progress during the diagnostic placement, Student would not have been offered admission for the second half of the school year. (N.T. pp. 141, 149—153, 156)
 59. Student receives a number of accommodations and supportive services that are built into the private school daily program, as well as the daily feedback sheet and supplemental one on one instruction in math. Academic classes are not grade-leveled. Student is instructed with peers at the same academic level. (N.T. pp. 154, 155; P-25)
 60. In the evaluation report, the independent evaluator identified the private school as one “that could provide the type of educational program that [Student] requires.” Upon review of the curricula of academic courses and the counseling curriculum, and the specific services Student is receiving, he confirmed that the private school courses are academically appropriate for Student and that the services Student receives conform to his recommendations based upon the evaluation results. (N.T. pp. 55, 56; P-24, P-25)
 61. The independent evaluator noted, in particular, that the private school focus on academics with support, that counseling services are provided on an individualized, “as needed” basis, and that working on Student’s areas of behavior and social skills needs in settings with peers meet Student’s needs. (N.T. pp. 56—58)

62. The District school psychologist observed Student in a language arts class at the private school in March 2015. She noted delayed compliance with a teacher directive and that Student called out a few times, but there were no major behavior issues. Staff reported that Student was making progress, although behaviors and social skills remained areas of concern. Student was participating in twice weekly group counseling sessions and individual counseling as needed. Student often checked in with the counselor daily. (N.T. pp. 552—554)
63. For most of the school year, the school psychologist was unaware that the private school made OT services available on a consultative basis, if needed, that Student gets social skills instruction, group counseling and individual counseling as needed (N.T. pp. 557, 558)
64. Parents are very pleased with Student’s progress at the private school, which has exceeded their expectations. Student’s association with an older peer group has been beneficial, since those students are socially more advanced, and Student’s desire to “fit in” has motivated positive changes in Student’s behaviors and increased social skill development. (N.T. pp. 453, 454)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Standards/Burden of Proof

The IDEA statute provides that a school-age child with a disability is entitled to receive a free appropriate public education (FAPE) from his/her school district of residence. 20 U.S.C. §1400, *et seq.*; 34 C.F.R. §300.300; 22 Pa. Code §14. The required services must be provided in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009). “Meaningful 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 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley*; *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An

eligible student is denied FAPE if his program 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 v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

The IDEA statute and regulations also provide procedural safeguards 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. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the 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, because Parents have challenged the District’s proposed placements and services offered to Student, Parents were required to establish that the District’s proposals would not have provided a FAPE to Student.

Although the burden of persuasion remains with the party that files a due process complaint throughout the proceedings, the Supreme Court it did not specify in the *Schaffer* case which party must produce evidence at various points in the proceeding. Consequently, although a school district will prevail if a parent fails to present sufficient evidence to justify a conclusion that the district violated the IDEA by whatever action or failure to act that the parent contends was inappropriate, that does not mean that a school district has no obligation to present evidence at a due process hearing. Allocating the burden of persuasion affects the outcome of a due process hearing only in that rare situation where the evidence is in “equipose,” *i.e.*, completely

in balance, with neither party having produced sufficient evidence to establish its position.

Ridley S.D. v. M.R., 680 F.3d 260 (3rd Cir. 2012).

Tuition Reimbursement Legal Principles

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 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 a FAPE or otherwise acted appropriately. The right of parents to seek reimbursement for private school tuition was later codified in the IDEA regulations at 34 C.F.R. §300.148.

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington* and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). 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. A decision against the parents at any step of that process results in a denial of reimbursement.

There are also clear principles for determining the appropriateness of a parentally selected private placement established by both court decisions and the IDEA regulations. A parent's selection of 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. See also, 34 C.F.R.

§300.148(c).

Settlement Agreement Issues/September 2014 IEP offer

In testimony elicited at the hearing for this Student, as well as at the hearing for Student’s sibling, the District suggested that it was justified in refusing to enter into a new settlement agreement with Parents in 2014 because Parents misused funds provided pursuant to the now expired agreements. That argument was made much more explicitly and vehemently in the District’s closing argument in this case, but the relevance and significance of those allegations are even more obscure, and frankly, even more disturbing in this case. Here, unlike the other case, the District had no intention of offering an in-house special education placement for Student. Since the District recognized that it could not provide an appropriate placement for Student, and indeed, stipulated to Student’s need for a private school placement at the beginning of the hearing in this matter, its refusal to consider Parents’ proposed placement more seriously and carefully from the outset would have been questionable under any circumstances. Here, however, the District’s conduct went far beyond arguably violating Parents’ right to participate in determining an appropriate placement for Student—the District had no placement available for Student at all until January 2015.

In September 2014, the District proposed an IEP with goals, specially designed instruction (SDI) and related services, as well as a special education placement, in terms of specifying a type and level of services, but identified no actual place for Student to physically go for implementation of the IEP. More disturbing, the District stated in the IEP that if a private placement could not be identified, Student would attend a regular education school in the District, but no special education supports and services were identified for that location. Moreover, the District stated in the NOREP that a regular education placement without special education supports was inappropriate. Consequently, the evidence produced by the District established that in September 2014, it had no appropriate means of implementing the program and placement it proposed for Student. Even if it were possible to reasonably conclude that the District's proposed IEP and placement recommendation were appropriate as written, the District had no identified means of implementing the IEP and delivering any of the proposed services at the time the IEP was offered, or at any time from then until the District proposed a second IEP in December 2014.

Although the District initially identified an APS in the fall of 2014, it did not offer admission once the APS staff learned that Student was on grade level, academically, with behavior needs far less extensive than the school population because the APS realized that it could not appropriately meet Student's needs.

Consequently, the September IEP, which did not include a location for implementing the full time autistic support placement that the District purportedly offered, was nothing but an empty gesture designed to provide some semblance of cover for the District's egregious failure to fulfill its IDEA obligation to Student.

The most disturbing aspect of that violation, however, is the link the District made to Parents' conduct with respect to the prior settlement agreement, leaving the distinct impression that the District would not consider providing an appropriate placement for Student if it was requested by Parents.

As noted in a footnote in the recently issued decision for Student's sibling, the expired settlement agreement between these parties should have played no role in decisions concerning Student's special education services. This case is not about the substance of the prior settlements. The only relevance of the agreements was to explain the background of the present dispute, and as a factor in determining whether Parents were unreasonable from the outset in suggesting that the District fund a private school placement for Student.

The District is, of course, under no obligation to enter into a settlement agreement with these or any other parents of an IDEA eligible child. The District's only obligation is to provide a FAPE to resident students who are eligible for special education services. Nothing in the IDEA remotely suggests that the District's obligations to Student is in any way contingent upon, diminished, or in any way altered by the judgments or opinions of District staff with respect to whether they agreed with Parents' use of funds made available through prior settlement agreements.

Any suggestion that the District's IEP and placement offers, or its actions with respect to the timing or any other circumstances relating to developing an IEP for Student should be viewed in light of, and perhaps excused, because of Parents' past actions relating to the expired settlement agreement, which appears to be the intent of the argument, is entirely unjustifiable.

Appropriateness of the APS

The District's insistence that the APS is appropriate for Student can only be accepted by agreeing with the underlying premise that Student's special education needs can only be met in a full time autistic support placement. Although the District purported to rely on the private evaluation report that Parents provided, nothing in the report suggests that a full-time autistic support placement is appropriate for Student. To the contrary, the private evaluator made it clear both in the August 2014 report, and in testimony at the hearing, that he believes that Student should spend as much time as possible being educated with peers who are less, not equally, or more, socially impaired. Proposing a full-time autistic support placement completely ignored that recommendation.

Instead, the District school psychologist, perhaps at the insistence of the Pupil Services/Special Education Director, "cherry-picked" language from the evaluation report, took it completely out of context, and used it to justify a placement that has a behavior specialist available. That use of a need purportedly identified in the private evaluation report ignored the evaluator's warning in the same section, and throughout the report, that restrictive behavior techniques are likely to be counter-productive for Student at this point.

The impression left by the record that District staff and contractors were pressured to shape the evaluation results to enhance the potential for the APS to appear to be appropriate and the private school inappropriate was disturbing.

In addition, the District entirely ignored Parent's concerns that the APS would not be sufficiently academically challenging for Student, because there would be no academic and social peer group for Student. The APS director clearly attempted to downplay or avoid that issue to minimize the impact of Parents' reasonable concerns about the level of academic

challenge Student would be able to obtain at the APS. That, however, became impossible once he revealed that approximately 30% of the students who attend the APS take the PASA, (Pennsylvania Alternate System of Assessment) instead of the PSSA test taken by most Pennsylvania students at certain grade levels. As stated in *In Re: A Student in the Easton Area School District*, Special Education Opinion No. 13256-1213 (SEA Pa. 2013) at p. 11 (FF 51):

...The PASA is presented orally and requires no reading or writing. School districts cannot obtain credit for the PASA for more than 2% of their student population. The state guidelines provide that the PASA is appropriate only for students with significant cognitive impairments who require intensive instruction in order to learn, require extensive adaptation and substantial modifications to the general education curriculum, and whose participation in the general education curriculum differs substantially in form and substance from most other students

(Citations to the evidentiary record following the factual finding are omitted) Additional evidence requested by the hearing officer pursuant to 22 Pa. Code §14.162(g), and supplied later by the private school director revealed that of 25 students in the current 8th grade class at the APS who took a test in the spring of 2015, 18 took the PSSA and 7, or 28%, took the PASA. (HO-2)

Least Restrictive Environment

Part of Parents' argument that the APS proposed by the District is inappropriate and the private school they selected is an appropriate placement relies on the IDEA requirement that eligible students must be educated in the least restrictive environment ("LRE") appropriate for the student, *i.e.*, one in which the student is educated with children who are not disabled to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2)(i). In this case, however, that concept does not apply, since neither of the private schools at issue educate children who are entirely typical learners. Although the APS serves only children with IEPs, and the private school does not require IDEA eligibility, it still admits only students with diagnosed learning disabilities,

ADHD and autistic spectrum disorders, albeit students who have strong cognitive and verbal and self-help skills. Consequently, while the private school enrolls students with different needs, and there are peers with better social skills, the private school still does not provide exposure to nondisabled peers as the LE standards contemplate.

Nevertheless, there is ample evidence in the record that the private school meets Student's needs by addressing behavior, pragmatic language and social skills issues in an academically appropriate setting with an appropriate peer group. Consequently, it is an appropriate placement for Student.

Parents in this case amply met their burden of proof that the APS would not provide an appropriate placement for Student, and that the private school has provided Student with a reasonable opportunity for meaningful progress, and actual progress.

Equities

Parents' conduct in this matter does not support a denial or reduction of tuition reimbursement. Their request to the District to enter into a new settlement agreement in June 2014 is not a basis for concluding that Parents conduct was inequitable, based on the history between the parties. The District did not attempt to plan for Student's special education placement and services until after Parents contacted the District in June 2014. It was reasonable for Parents to expect that the District intended to renew the settlement agreement again, since the District took no steps to notify Parents that they intended to provide services to Student, and, indeed, had nothing available to meet Student's needs.

ESY

Since the District acknowledged Student's ESY eligibility in the December 2014 IEP proposal, Student is entitled to ESY services delivered by the private school, since it is an appropriate placement for Student.

Evaluation Reimbursement

The District relied on the private psychoeducational evaluation for much of its evaluation report, and the school psychologist who evaluated Student on behalf of the District acknowledged that it is thorough and comprehensive. Parents' therefore, are entitled to reimbursement for the IEE.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to take the following actions:

1. Pay/reimburse Parents for all costs of Student's education at the private school in which Student is enrolled for the 2014/2015 school year, including ESY services for the summer of 2015 and charges for additional services.
2. Reimburse Student's Parents for their costs of transporting Student to the private school for each day Student attended/will attend school during the 2014/2015 school year and each day Student attends the 2015 ESY program.
3. Reimburse Student's Parents for their costs of the IEE admitted into evidence as S-10.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

June 5, 2015