

*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: ZN  
ODR #00390/09-10 KE

Date of Birth:  
XX-XX-XXXX

Dates of Hearing:  
December 21, 2009  
January 25, 2010  
February 19, 2010

CLOSED HEARING

Parties to the Hearing:  
Mr. and Mrs.

Representative:  
Franca Palumbo, Esquire  
Thalheimer and Palumbo  
1831 Chestnut Street Suite 300  
Philadelphia, Pennsylvania 19130

Wallingford-Swarthmore School District  
101 Plush Mill Road  
Wallingford, Pennsylvania 19086

Timothy Gilsbach, Esquire  
Fox, Rothschild, L.L.P.  
10 Sentry Parkway, Suite 200  
P.O. Box 3001  
Blue Bell, PA 19422-3001

Date Record Closed:

March 7, 2010

Date of Decision:

March 14, 2010

Hearing Officer:

Linda M. Valentini, Psy.D., CHO

## Background

Student<sup>1</sup> is a mid-teen aged student who is eligible for special education services and resides in the Wallingford-Swarthmore School District [District]. Student was placed in a private school [Private School] funded by the District for the 2008-2009 school year. The District then proposed a program and placement in its high school for the current 2009-2010 school year. Believing this offer was inappropriate for their child the mother and father [Parents] requested this hearing seeking tuition reimbursement for the current academic year. The Parents also sought reimbursement for an ESY program for the summer of 2009. The Parents prevailed on both issues.

## Issues

1. Did the District offer Student an appropriate program and placement for the 2009-2010 school year?
2. Must the District reimburse the Parents for the summer ESY program they procured for their child?

## Stipulations

The District stipulated on the record<sup>2</sup> on January 25, 2010 that;

1. The District did not offer or provide Student an ESY program for the summer of 2009.
2. The Parents kept the Student at the Private School for a summer program of ESY for the summer of 2009.
3. The Parents paid for that program for Student out of pocket and are seeking reimbursement for that amount.

## Findings of Fact

1. Born two and a half to three months prematurely, Student experienced asphyxia, oxygen deprivation and leukomalacia (white brain matter loss). Student was adopted at five months of age from a foster home in [Redacted country]. [NT 37, 459; P-7]

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<sup>1</sup> The name, age, gender and current school of the Student is not used in this decision in order to preserve the Student's privacy.

<sup>2</sup> [NT 336-339]

2. Student is currently a mid-teen aged eligible student residing in the District since Kindergarten. Student has generalized anxiety disorder, social phobia, attention deficit/hyperactivity disorder combined type, a learning disability in mathematics and written expression, a motor disorder, trichotillomania, and sensory issues. [NT 36, 39-40, 522-523, 550; P-32, P-36, P-37]
3. There was a period of time when Student was treated for depression. Student's therapist currently is monitoring Student for the possibility of a mood disorder as Student has a history of depression and Student's heightened anxiety puts Student at risk for recurrence of depression. Student was psychiatrically hospitalized because of [Redacted] for ten days in March 2006. [NT 42-44, 524, 550; P-11]
4. Student's generalized anxiety disorder is quite severe and renders Student anxious to the point of interfering with functioning in many different settings. [NT 522, 524]
5. Student's anxiety disorder colors how Student sees everything that is happening around Student, and creates a sense of fear and a sense of doubt and concern that affects how Student perceives what is happening. Student's anxiety disorder interferes with learning in that Student "isn't really there", Student is withdrawn and in Student's own head". Student is so fearful that Student is "just not available" and is "in a sort of self-protection mode". [NT 526-527]
6. Student's anxiety disorder affects Student's ability to form social relationships, because it affects Student's perceptions about the safety of people and the safety of the environment in a visceral way that is not logical but is how Student feels and reacts. [NT 527]
7. Even in the company of Student's treating therapist, Student recently had difficulty tolerating the noise and number of persons in a local Starbucks and a cookie store. When Student becomes anxious, Student experiences a physiological response that interferes with Student's thinking. [NT 556-560]
8. Student's treating therapist assigned Student a DSM-IV<sup>3</sup> Global Assessment of Functioning of 45 on a scale of 0 to 100 in November/December 2009, indicating that Student's constellation of problems places Student in the severe range of mental health issues. [NT 551-552, 572-573; P-44]
9. Student's anxiety affects how Student appears. Student keeps Student's head down, and posture is different, and would make people "wonder what's wrong" with Student. [NT 527]
10. Student's attention deficit/hyperactivity disorder, at the more severe end of the spectrum, results in difficulty sustaining mental effort and paying attention, distractibility, and restlessness to a point that is impairing in multiple settings.

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<sup>3</sup> American Psychiatric Association's Diagnostic and Statistical Manual -Fourth Edition.

- This disorder makes it difficult for Student to receive and store information in memory and the anxiety disorder adds to this difficulty because Student cannot concentrate when anxious. [NT 522, 524-526]
11. Student's learning disability manifests primarily in difficulty with processing speed and fluency, and makes it difficult for Student to produce output at the typical speed of a classroom. [NT 523, 527]
  12. Student's motor disorder which interferes with coordination and motor planning was diagnosed as cerebral palsy at a younger age, and now is diagnosed as developmental coordination disorder or dyspraxia. [NT 523]
  13. Student's handwriting (graphomotor) skills, fine motor speed and general dexterity are significantly below age expectations. [NT 468-469; P-7, P-9, P-32]
  14. Although neither the learning disorder nor the motor disorder is extremely severe, they are pervasive and impact all aspects of Student's functioning. [NT 525]
  15. Student's trichotillomania is a [Redacted behavior]; in Student's case the disorder is at the severe end of the spectrum. [NT 523, 525]
  16. Although sensory issues, in the moderate to severe range, affect Student's functioning, Student's developmental pediatrician testified that whether or not to make a diagnosis of sensory integration disorder is controversial. Nevertheless, the sensory difficulties add to Student's distractibility, and Student cannot screen out what the typical person can screen out in order to concentrate. [NT 523, 525, 527]
  17. Student has low frustration tolerance, mood dysregulation, reduced self esteem, reduced self-reliance and social difficulties. [P-7, P-9]
  18. Student's weaknesses in executive functions and emotional functioning impede social skills, study skills, and general ability to function independently in the school environment. [P-7, P-9]
  19. Student has been a complicated patient for the developmental pediatrician to treat because medications for one condition exacerbate other conditions or medications had various side effects that prevented prescribing more generous dosages. Medication alone does not adequately address Student's functioning in the school setting. [NT 524, 529]
  20. Student's learning support teacher in the District for sixth and seventh grades found it hard to keep Student on task. In this regard, in comparison with other students, Student was "probably one of the most severe" that she has taught in her ten years of teaching special education students. Student always needed something to play with, if not Student's hair then something else. The teacher

- supplied Student with small squeeze items. Student was off task about 80% or more of any given instructional period in the inclusion class with 14 or more pupils. In the smaller special education class with nine or more pupils, Student was off task a little less than that. [NT 291-292, 300-301]
21. Student's learning support teacher testified that Student "was a very nervous person, it was evident when you looked at [Student] that [Student] was a very nervous person. [Student] would constantly pull on [Student's] hair. Student could go from being very happy to very upset in a short span of time." Student's anxiety created significant difficulties with performing in school. [NT 290, 306]
  22. Student's learning support teacher observed Student had meltdowns very frequently which depending on the severity could be getting very quiet and not talking to crying hysterically, and the meltdowns changed from day to day depending on what was stressing Student or not. [NT 291]
  23. At the middle school Student was depressed, had no friends, and spent much time in the guidance counselor's office. [NT 43-50, 55-57, 290-292, 298, 299]
  24. In the District, Student ate lunch in a separate classroom with the learning support teacher or the school counselor, and would not attend trips outside the building without one of the Parents, or the very close proximity of the learning support teacher or the school counselor. [NT 290-292, 297-300]
  25. The learning support teacher who saw Student in the morning, at the end of the day and frequently during the day testified that Student was never or rarely happy in school because the environment was stressful for Student. [NT 298-299]
  26. Student carries self around like someone who is not confident; walks in an uncoordinated fashion; is restless, moves around, is fidgety and antsy; is clumsy; drools; is agitated in a noisy environment; sometimes engages in trichotillomania; and has a hand tremor when doing something effortful. [NT 530-531]
  27. Student was persistently bullied in the District's middle school, in the hallways, in the lunchroom, in the bathroom, in the playground and on the bus, and the bullying had a major impact on Student. Student's sixth and seventh grade learning support teacher, a current District employee who knew Student "very well", testified<sup>4</sup> that "at its worst it would have happened at least several times a week" and that the bullying took place during both years she was Student's teacher. [NT 286-287, 292-293, 295-296, 440, 528-529]
  28. The learning support teacher testified that "there were children who made fun of [Student] because, you know, [Student] had visible disabilities and they would make fun of [Student] for that as well. And because [Student] did cry sometimes

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<sup>4</sup> This teacher was called to testify on two separate occasions.

- in school and [Student] was very anxious, you know, comments about that would be made too from what the other children told me”. [NT 445]
29. Student’s learning support teacher observed Student being anxious about the bullying “every day, multiple times a day”. [NT 444]
  30. The learning support teacher directly observed Student being physically bullied. Specifically she recollected an incident in the hallway during class changes when a peer “hit [Student’s] books out of [Student’s] hand”. The teacher reported this to the dean and the school counselor. [NT 437]
  31. The learning support teacher also observed Student being verbally bullied, “being called a [Redacted language]”. The teacher reported these incidents to the dean and the school counselor. [NT 438]
  32. The learning support teacher recalled being told of an incident when [incident redacted; the incident was reported by Student and confirmed by another student. [NT 443]
  33. Student, as well as teachers in the lunchroom, reported to the learning support teacher that Student was being bullied in the lunchroom, mostly name-calling and not being allowed to sit in certain spots. [NT 439]
  34. Teachers who witnessed Student being bullied in the hallways always told the learning support teacher about it. The witness testified that “There were so many instances that they all sort of go together.” [NT 440]
  35. The learning support teacher recalled being told by Student about an incident on the bus when other pupils did not want Student to sit in certain places, and she knew that Student was pushed out of a seat at least once. [NT 440-441]
  36. The learning support teacher would walk Student to the bus and be sure Student was seated in a certain place near the front [near the driver so there would be less chance of Student being bullied] because Student was afraid to get on the bus and would be calmer in the afternoon if Student knew teacher was going to walk Student to the bus. [NT 441-442]
  37. Bullying included an incident on 11-30-06 when a group of three or four students at the bus stop called Student [Redacted language.] When other students tried to intervene on Student’s behalf, the group cursed back at them. Student became upset and cried, causing a nosebleed. [HO-1]
  38. On 12-8-06 Student was found by a staff member on the cafeteria floor surrounded by several students as everyone was leaving the cafeteria. Student said Student was tripped by a peer who disliked Student, and a peer put ketchup between Student’s fingers and on Student’s hands during lunch. Student

- sustained a “large bump/bruise” on the knee as observed by the school nurse.  
[HO-1]
39. When Student attended school in the District Student was anxious, depressed and at one point, suicidal. [NT 42-50, 55-57, 290-292, 298-299; P-11]
  40. When Student rides past the middle school, Student tells the Parents that the years Student spent in the District were the “worst years of [Student’s] life”. [NT 123]
  41. Student received a private evaluation in October 2008. At that time Student displayed articulation difficulties, engaged in a lot of fidgeting and restless behaviors, [Redacted behaviors]. [NT 458, 462-463; P-7]
  42. On February 24, 2009, the District sent the Parents a Permission to Evaluate form. On March 1, 2009 the Parents promptly responded, signed the PTE and a release for the District to obtain information from Private School and hand delivered them to the District. [P-25, P-26]
  43. The Parents also provided the District’s psychologist with an independent Neuropsychological Evaluation, an independent Speech and Language Evaluation and an independent Occupational Therapy Evaluation. [NT 159, 162; P-22, P-23, P-32]
  44. A District high school psychologist performed an evaluation of Student in March 2009. She did not perform any additional testing on Student. She did not meet Student individually. [NT 163-164, 260; P-32]
  45. The District’s Reevaluation Report included, in addition to the private Neuropsychological Evaluation, a review of a report from Student’s treating therapist at the time, two independent CHOP evaluations, a Speech Language Evaluation and an OT Evaluation that the Parents had provided, and records from Private School. [P-32]
  46. The District psychologist agreed with the findings and recommendations of the private neuropsychological evaluator, and adopted the data, findings and recommendations in the private October 2008 evaluation report. The District psychologist determined that Student needed smaller classrooms, and direct instruction in organization, social skills and pragmatic language. The District psychologist however did not recommend that Student remain in Private School. [NT 164, 166, 168, 258; P-7, P-32]
  47. The District ER was dated April 1, 2009. After receiving the ER, the Parents and their counsel wrote to the District psychologist with comments and requests for revisions to be made to the report, including the comment that the diagnosis of anxiety was left out of the report and that the report misquoted a finding of the private evaluator regarding a diagnosis of autism. A revised report was provided

- to the Parents on April 23, 2009, and the Parents and the District psychologist met to review the report on May 11, 2009. [NT 76, 156; P-28, P-29, P-30, P-32]
48. As of June 2009, documented by email, the District special education director and other pertinent staff were aware that it was necessary to complete an IEP for Student, and that the District was already late in this regard. No IEP meeting to plan for Student's 2009-2010 year was convened in May, June, July, or August 2009. [NT 173-174; P-49]
49. On September 1, 2009 while they were on vacation the Parents were contacted by the District about convening an IEP meeting, and the meeting was scheduled for September 9, 2009, Student's first day of term at Private School. The first school day for high school students in the District was September 8, 2009. [NT 79-80, 113; P-36, P-37]
50. When the IEP meeting was held on September 9, 2009, the Parents were told that the IEP presented was a draft and that the final revised IEP would be sent to them in the mail. A final IEP was not sent to the Parents until October 15, 2009. [NT 113, 175; P-37]
51. At the IEP meeting on September 9, 2009, the Parents participated and raised concerns and questions about the proposed program. Concerns raised by the Parents included Student's transitioning in the hallways, classroom sizes, who would be teaching the special education math class, what instruction would take place in the Learning Support classroom, the lack of a baseline in Student's math goal, communication needs, inconsistencies on the IEP with respect to ESY, what social skills instruction would be provided and that the diagnosis of an Anxiety Disorder had been left out of the draft IEP. [NT 82-106, 191, 208, 221, 254-255]
52. At the September 9, 2009 IEP meeting, the Parents were told that the Career College Prep [CCP] classes in which Student would be placed for all academic subjects other than math would have 8 to 14 students. [NT 82, 104]
53. The Career College Prep [CCP] classes, according to the District's curriculum and course guide, are described as having 10 to 15 pupils. [NT 340]
54. At the IEP meeting on September 9, 2009, the Parents were told that the special education math class in which Student would be placed in the District's proposed program would have 8 to 12 students. [NT 82, 193]
55. The private evaluator observed classes at the District high school in which Student would be placed. There were eighteen pupils in the special education math class and seventeen pupils in the CCP science class.<sup>5</sup> [NT 195, 221, 491; P-9]

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<sup>5</sup> Presumably Student's enrollment would increase the class size by one.



56. The District psychologist testified that she does not recommend that Student be placed in a class as large as seventeen. [NT 281]
57. In the high school there is block scheduling and the academic classes are 80 minutes in length. [NT 376-377]
58. Under the proposed IEP, Student was to be placed in regular education Career College Prep [CCP] classes, and also in an 80-minute learning support class for part of each day, where instruction in organization skills, help managing time, organizing classroom work, and keeping up-to-date on the agenda book would be provided. [NT 88, 208-209, 494; P-37]
59. The lesson being delivered in the proposed Learning Support classroom when the private evaluator observed was on 'synonyms'. [NT 495]
60. In the proposed program, Student would be taken out of the Learning Support classroom either for the first half of the class or for the second half of the class four days a week for at least 30 minutes at a time to receive speech/language therapy, occupational therapy and individual counseling. [NT 208-213, 219; P-37]
61. Social skills training was to be provided to Student through a once per week 30-minute Lunch Bunch, although this area was also to be addressed in speech/language therapy and the learning support room. [NT 240-241; P-37]
62. The final IEP offers Student math for only one semester. Student requires specially designed instruction in math for the entire year. [NT 167-169, 179, 183, 205, 358, 412, 493; P-7, P-9, P-37]
63. When Student was in the middle school, Student struggled with math which was very difficult for Student, who on a daily basis told the math teacher, the special education teacher and the counselor about hating math. [NT 302]
64. The neuropsychologist who evaluated Student on two occasions, Student's math teacher at Private School, and the District psychologist all testified that Student requires math instruction throughout the year. [NT 205, 412, 493; P-7, P-9]
65. The District psychologist's Reevaluation Report concluded that Student has a tendency to regress in math. [P-32]
66. The final IEP offered to Student in mid-October 2009 does not contain goals for math reasoning, speech/language therapy, occupational therapy, social skills training or transition. [NT 232, 348-350; P-37]
67. The District's final proposed IEP contains no baselines in the math or writing goals. [NT 228; P-37]

68. Although Student turned [the triggering age for mandated transition planning] in the middle of the 2009-2010 school year, the final IEP contains no Transition goals. [P-37]
69. The District psychologist's Reevaluation Report recommended that Student receive ESY in the summer of 2009, "due to significantly low math skills and tendency for regression." The District's psychologist testified to Student's need for ESY at the hearing. [NT 172, 187, 189; P-32]
70. The District psychologist agreed with the recommendation of the private evaluator that Student required ESY. [NT 172; P-7, P-9]
71. The District psychologist discussed the recommendation for ESY with the Parents at the May 11, 2009 meeting. [NT 78]
72. No IEP meeting was convened to discuss or offer Student ESY for the summer of 2009. [NT 78-79, 173]
73. The Parents placed Student in the 2009 summer program at Private School and paid for the cost of that summer program. [NT 7-79, P-33, P-34]
74. The draft IEP that was presented to the Parents on September 9, 2009 stated that ESY was required for Student. [P-36]
75. The District's final IEP states that Student's "ESY eligibility is not determined." [P-37]
76. The Parents rejected the final IEP and NOREP on October 21, 2009 and opted to continue the placement in the Private School. [P-38]
77. The middle school had about 850 pupils when Student was there and the high school has about 1250 pupils. [NT 289, 359-360]
78. Private School offers a small campus composed of three buildings; there are 81 pupils in the School. [NT 390]
79. Students in Private School have average to above average cognitive ability. [NT 391]
80. At Private School, Student has been in classes that have ranged from two (2) to seven (7) students. [NT 389-390, 422]
81. Because the classes are small, teachers can constantly monitor Student, redirect and bring Student back on task, and provide the individual attention Student needs so that Student can access the curriculum. [NT 412, 429-430, 500-507]

82. The Phasing program at Private School affords Student with a range of accommodations and modifications from minimal to intensive, and the amount and intensity of modifications can easily change from class to class when a student's needs change. [NT 392-395]
83. The study skills and writing course Student receives at Private School provides individualized direct instruction to address organizational skill deficits and disability in written expression. [NT 425-427]
84. At Private School Student is able to write assignments on a computer and complete them without the need for time extensions. [NT 427]
85. Student's disability in math is addressed in a math class which last year consisted of only two students and this year consists of only four students. [NT 389]
86. Student's Private School math teacher testified that Student is still anxious and quite distractible. Even in a small classroom this year Student is off task about fifty percent (50%) of the time; last year in a small class Student was off task seventy to seventy-five percent (70%-75%) of the time, [NT 398, 401, 417-418, 434]
87. Although Student remains anxious, at Private School Student is still able to learn. [NT 412, 429, 500-507]
88. At Private School Student is provided with a mentor who meets with Student, goes through Student's book bag, works on goals that are established between Student and the mentor and go through Student's assignment book. [NT 391-392, 423-424]
89. Student meets with Student's mentor each day for forty minutes in a small group and in that time is provided help with managing and completing assignments, and is taught strategies to address Student's organizational and study skill deficits. Student's mentor is in constant communication with all Student's teachers to support Student's success at Private School. [NT 391-392, 423, 424]
90. Student's anxiety and attention deficit hyperactivity disorder remain severe. [NT 532, 574-575]
91. Student's treating therapist, well-versed in the importance of the least restrictive environment given her employment as a school district psychologist in another district, believes that Private School addresses Student's anxiety through its small setting, low number of pupils, ability to become familiar with the small student body, and constant availability of a mentor. [NT 567-568]

92. Student has friends at Private School and eats in the lunch room. [NT 62, 405, 431]
93. Student is happy to be at school, participates in the classes and goes on class trips. [NT 62, 404-405, 429]
94. Currently, after one and a half years in Private School, in the setting of a pediatric visit with a familiar doctor Student made eye contact and engaged with the physician, discussed medication effectiveness and side effects, talked about school, talked about friends and had a range of affect. [NT 532, 536, 540, 543]
95. Student's father testified that the difference between Student at the District and Student at Private School was like the difference between "night and day." [NT 62]
96. At Private School Student has never been bullied or teased; rather Student is supported by peers and is taught to self advocate and to accept Student's own differences as well as those of classmates. [NT 405, 431, 433]
97. Physically Student does not look different now than when Student was in middle school, and that appearance was partially what made Student a target. If Student were returned to the District there is no good reason to think that Student would not be bullied again. [NT 532-533, 539]
98. The psychotherapist treats Student for Student's generalized and chronic anxiety disorder through the technique of prolonged exposure. She testified that the treatment is in the beginning stages. Student is significantly anxious, and she believes that Student would not be able to tolerate being in the high school due to its physical size, the number of people and the noise level. Notably the therapist is employed as a school district psychologist in another district. [NT 549, 550, 552-554, 561, 563, 565, 573, 576]
99. The District's public school environment impacted significantly on Student's ability to function in school given Student's anxiety and attention deficit hyperactivity disorder<sup>6</sup> because Student was nervous and fearful about being bullied, and because the school environment was noisy, active, moved quickly and was unpredictable. [NT 43-49, 529]
100. The private neuropsychological evaluator testified that given Student's high level of anxiety, social anxiety, general anxiety as well as difficulties with impulsivity and inattention, she recommends that Student continue at Private School, as she is concerned that not only would Student not be able to access a typical curriculum feeling that degree of anxiety, but it could put Student at risk to

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<sup>6</sup> Student's developmental pediatrician, who authored a book on ADHD, noted that anxiety and ADHD together are more than the sum of their individual parts. [NT 529-530]

significantly regress in terms of anxiety symptoms and general symptoms. [NT 501]

101. The treating therapist is of the opinion that given the continuing high level of anxiety, Student will not be able to learn in the high school environment. [NT 566]
102. The treating therapist believes that given Student's current level of anxiety and current lack of skill in managing the anxiety, returning Student to the District in a placement in the high school will induce a very high level of stress that can trigger helplessness and hopelessness leading again to depression. [NT 564-566]
103. To return Student to a large public school like the one where Student experienced persistent bullying would put Student at risk for post traumatic stress disorder, in the expert opinion of the treating developmental pediatrician. [NT 529, 533]
104. According to experts who know Student very well, returning Student to the District at this time is likely to cause significant harm. The only professional who testified that Student can safely be returned to the District is the District's psychologist who did not evaluate, interview, or meet Student although she adopted all the findings and recommendations of the private evaluator save the one addressing placement. [ NT 163-164, 166, 168, 259-260, 486- 487, 489, 498-501, 505-507, 526-527, 529, 532-534, 560-566]
105. The District's psychologist acknowledged that Student's treating doctors and therapists know best how Student's emotional needs should be addressed and that she had no reason to dispute the recommendation of the private evaluator that Student not be removed from Private School and placed in the District's proposed program. [NT 261-262]

## Discussion and Conclusions of Law

### Legal Basis

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion, as one element of the burden of proof, for cases brought under the IDEA, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden

of persuasion. However, application of the burden of persuasion analysis does not enter into play unless the evidence is in equipoise, that is, equally balanced so that by definition the party seeking relief has not presented a preponderance of the evidence. In the instant matter, the evidence is not in equipoise as the Parents presented preponderant evidence on both issues.

Credibility: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.<sup>7</sup> Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at \*28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. Credibility will be addressed in the discussion below

FAPE: Having been found eligible for special education, Student is entitled by federal law under IDEIA, and by state law under the Pennsylvania Special Education Regulations, to receive a free appropriate public education (FAPE). FAPE is defined in part as special education and related services: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP). 20 U.S.C. §1401(9); 34 C.F.R. §300.17; 22 PA Code § 14 *et seq.*

At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP as defined in § 300.320. 34 C.F.R. §300.323; adopted by reference in PA Code 14 *et seq.*

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). Districts need not provide the optimal level of service, maximize a child's opportunity, or even offer a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F.3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1998); Lachman, supra.

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<sup>7</sup> Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Tuition Reimbursement: An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress. Parents who believe that a district's proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement. The IDEA's implementing regulations at 34 C.F.R. §300.148 (c), make it clear that tuition reimbursement can be considered under specific conditions:

“If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency<sup>8</sup> enroll the child in a private...school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment...”

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). A court may grant “such relief as it determines is appropriate”. “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” Burlington, 736 F.2d 773, 801 (1<sup>st</sup> Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

Then, in 1997, a dozen years after Burlington, the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. 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

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<sup>8</sup> The United States Supreme Court in Forest Grove School District v. T.A., 129 S. Ct. 2484 (2009) recently concluded that a student need not have received special education services in a public school before being eligible for tuition reimbursement. This case is simply being cited for informational purposes; lack of previous attendance in public school was not a factor in this case.

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)

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier 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.

ESY: Under the federal IDEA regulations, Extended School Year services are to be provided to an eligible student if necessary to assure that the student receives FAPE. 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Those factors are:

(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 (Regression).

(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 (Recoupment).

(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.

(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.

School districts are not required to provide ESY based upon “The desire or need for other programs or services that, while they may provide educational benefit, are not required to ensure the provision of a free appropriate public education.” 22 Pa. Code §14.132 (c)(3).

## Discussion

Did the District offer Student an appropriate program and placement for the 2009-2010 school year?



The constellation of Student's disabling conditions [FF 2, 3], most prominently Student's debilitating anxiety [FF 4-7], the Student's very unfortunate experience of cruel bullying in the District's middle school [FF 27-38], as well as the inappropriate IEP offered five weeks after the school year had started [FF 50], lead to the inescapable conclusion that the Student is one of the relatively small number of children for whom a small private school is the least restrictive environment appropriate to allow meaningful progress in accessing the curriculum.

The professionals who know Student very well provided convincing, persuasive and compelling testimony that satisfied the Parents' burden of proof that the District's high school at this time is not an appropriate placement for Student. Descriptions of the Private School by the staff who appeared at the hearing and by Student's private evaluator and treating doctors served to establish that the Private School offers Student an appropriate placement in the least restrictive environment appropriate at this time. The father's detailed and credible description of Student's day to day functioning in the District and Student's current functioning in Private School was likewise persuasive in these regards. There are no equitable considerations that would remove or reduce the District's obligation to provide tuition reimbursement.

In order to fully understand the Parents' reasons for believing they had no choice but to continue Student's placement at Private School, it is necessary to first learn about Student's constellation of disabilities. Student's developmental pediatrician contributed substantial credible testimony in this regard. Dr. Marianne Glanzman is qualified both by familiarity with Student and the District, and by training and experience, to provide expert testimony. Dr. Glanzman has treated Student since 2002 and as such has also spoken with the Parents, with one of Student's District teachers, and with Student's former and current therapists. She has two teenaged children of her own who attend school in the District and who have IEPs, and she testified that she is happy with the special education services that her children are receiving in the District. She has been in the high school. [NT 521-522, 525, 537] Dr. Glanzman holds a Doctor of Medicine degree from the University of Pennsylvania Medical School and completed two fellowships, one in child development and developmental disabilities at Johns Hopkins University's Kennedy Krieger Institute and the other in neuropsychopharmacology at the University of Pennsylvania. She has practiced since 1988. She does clinical teaching with residents at Children's Hospital of Philadelphia, and teaches pediatric fellows completing a fellowship in child development. She has written a book, The Clinician's Practical Guide to ADHD, and has authored chapters in several other books. [NT 519-520; P-51]

Dr. Glanzman's testimony formally established the nature and severity of Student's disabilities. [FF 2-4, 15, 16, 19, 26] She provided informed insight into how these disabilities specifically impacted Student in the District school setting. [FF 5, 6, 9- 12, 14] She provided comparative information regarding how Student is functioning given the Private School environment. [FF 26, 94] In total Dr. Glanzman's testimony persuaded this hearing officer that Student is multi-handicapped, that the disabilities are

severe to moderate, that because they are greater than the sum of their parts the disabilities create synergy that negatively impacts Student, that Student is visibly different from typical students and that this visible difference has in part led to bullying in the past. [FF 26] Dr. Glanzman's opinion that Student should not be returned to the District at this time was persuasive, and this hearing officer adopts her belief that Student's impaired functioning impacts Student's school performance in the Private School considerably less than it had in the public school. [FF 103, 104]

Student's current psychotherapist, Dr. May Leren provided credible and persuasive testimony about the severity of Student's anxiety disorder [FF 3, 8]. Dr. Leren holds a doctorate in clinical and school psychology from Bryn Mawr College, is in her fourth year of employment as a certified school psychologist in a neighboring suburban school district, and also works as a therapist and an evaluator at the Bryn Mawr Child Study Institute. [NT 548-549] Dr. Leren detailed the nature and the extent of Student's anxiety in clear and practical language, and established the fact that Student remains highly anxious [FF 7, 90], that treatment is just in the beginning stages and that Student is not capable of attending the District's high school at the present time [FF 98, 101, 102, 104]. Her credibility was enhanced by the fact that she currently is employed as a school psychologist in another school district and well understands the concept of least restrictive environment.

Student's sixth and seventh grade learning support teacher testified very credibly, candidly, and courageously that Student was persistently bullied over the two years she was Student's teacher [FF 27-38]; her testimony supported the father's testimony [FF 23, 39, 40]. After hearing her initial testimony, in his testimony the District's special education director questioned the extent of the bullying, given that in conversations with the middle school principal the principal "was adamant that this is not – was not the case, and that [Student] was not bullied the way [counsel for the Parents] portrayed it". [NT 364-366] The hearing officer therefore ordered that this teacher be called back for more specific questioning [NT 366-368], admonishing the participants that the teacher was not to be told why she was being recalled [NT 378-379]. The teacher then testified in a follow-up session on another hearing day that after reports of incidents of bullying were made to the dean and the counselor "there were meetings with certain students with the dean...so I know meetings like that occurred." [NT 442] It was represented by counsel for the District that incident reports and reports of meetings with the offending students would be in the files of the offending students rather than in Student's file, so it was ordered that names of the bullies be collected from the Student, the Parents, and any other knowledgeable source and that the files of the students named then be reviewed for disciplinary write-ups or meeting notes. These items, with the students' names redacted, were to be forwarded to counsel for the District and in turn to counsel for the Parents and the hearing officer, and they would become exhibit HO-1. [NT 449-452] Even though the teacher testified to personally witnessing and reporting a very specific incident [FF 30], "Oh yeah. I told the dean and Ms. Green, [Student's] counselor" [NT 442] a written record of this incident was not forwarded as part of HO-1. A written report of [Redacted incident] [reported by Student and confirmed by [an]other student[s] [FF 32] was likewise not forwarded. Only three reports were sent to the hearing officer, who then

asked District counsel to supply a list of the individuals who supplied names of the bullies and a list of the individual[s] in the District who actually searched the files.<sup>9</sup> Given that reports of at least two known significant incidents described under oath were not found in the files, this hearing officer concludes that the learning support teacher's and the father's testimony should be given considerably more weight in this regard than the testimony of the director of special education. It is clear that the District was remiss in not recording all reported bullying incidents, and/or that the responsible persons did not search the files as per this hearing officer's order diligently enough.

The District's Offer of FAPE: In order to prevail on a tuition reimbursement claim the Parents must first prove, under the Carter analysis, that the District did not offer Student a free appropriate public education. Given Student's multiple disabilities, the program and placement the District offered to Student was inappropriate in several respects. Initially, the IEP was not completed in a timely manner. The first day for high school students to report for classes in the 2009-2010 school year was September 8, 2009<sup>10</sup>. Five days after the District sent the Parents a Permission to Evaluate form [February 24, 2009] the Parents signed their approval and returned the form [March 1, 2009] [FF 42]. The District's psychologist did no testing of her own and did not interview Student individually [FF 44]; she adopted the findings and recommendations of the private neuropsychologist in all respects save placement [FF 46], and issued her evaluation report in a timely manner. She discussed her findings with the Parents in mid-May [FF 47]. The District was aware of its obligation to offer Student an IEP if it intended to place Student in the high school, and had more than enough time to offer an IEP before the start of the 2009-2010 school year. The District then inexplicably waited the remainder of the spring and all summer [FF 48] before, on September 1<sup>st</sup>, inviting the Parents to an IEP meeting to plan a program that was to be implemented at the start of the school year one week later [FF 49]. The meeting was held on September 9<sup>th</sup>, and a final IEP was not sent to the Parents until mid-October, five weeks into the academic year [FF 50]. In its closing argument the District attempts to place blame on the Parents for not contacting the District to ask when an IEP meeting would be held. Clearly, convening the IEP meeting was the District's responsibility; the Parents do not have to prove why they didn't ask about an IEP meeting, they simply have to prove that the District failed in its obligation to offer an IEP, and that this delay resulted in no program and placement being offered to Student until five weeks into the school year.

Aside from being inexcusably late, the final IEP of October 2009 failed to offer Student an appropriate program. It failed to provide Student sufficient instruction in mathematics to address Student's specific learning disability in this area. The District offered Student daily mathematics instruction in blocks of 80 minutes, however the mathematics instruction was to be given for only one semester [FF 57, 62]. In light of Student's documented disability in this area, Student's aversion to this subject [FF 63] and the very

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<sup>9</sup> Names were provided by G K, Middle School Principal; Mr. [redacted], Student's father; E G, Guidance Counselor; P T, Dean at Middle School; G J, Dean at Middle School; and S K, learning support teacher. Files were reportedly searched by Deans P T and G J; the District's attorney reported by email that the only documents found were the ones that he had previously provided. [HO-2]

<sup>10</sup> Communication by email from District's counsel at hearing officer's request.

strong likelihood of Student's regressing if not provided with consistent mathematics instruction over a prolonged period [FF 65], the plan of delivery of mathematics to this student was inappropriate. Notably the District's psychologist testified that an appropriate program for Student must include math instruction throughout the year. [NT 205] Further essential elements render the IEP inappropriate: the lack of goals for math reasoning, speech/language therapy, occupational therapy, or social skills [FF 66]; the lack of baselines in the math or writing goals [FF 67]; the lack of any information, baselines or goals regarding transition planning [FF 68]; and the change of ESY eligibility for summer 2009 from "eligible" in the original draft to "to be determined" in the final draft – regarding ESY for the summer that had already come and gone [FF 74, 75].

In addition to not offering an appropriate program, the District's proposed placement by its very nature is inappropriate for Student. Although the class size alone is clearly too large for Student [FF 52-55] that factor could possibly be altered through creating an individualized roster. It is the gestalt of a large suburban high school, combined with Student's severe and complex disabilities, that renders the District's proposed placement inappropriate at this time. Student experiences disabling anxiety in large spaces, in the company of numerous persons moving rapidly and unpredictably, within a high noise level [FF 98, 99]. Added to the immutable physical environment of the high school is the fact that the last time Student was in a typical District school Student was mercilessly bullied and remains deeply affected by this experience. Perhaps if the responsible persons in the District had immediately put a swift and emphatic end to the bullying directed at Student in middle school and demanded that Student be valued and respected by the students under their control, Student might have been able to tolerate the public school physical setting if given a very high level of programmatic support. This hearing officer has no doubt whatsoever that the learning support teacher, the father and the developmental pediatrician's testimony regarding the extent of the bullying Student suffered was accurate. The District's inability to produce written records from the files of the offenders in no way indicates to this hearing officer that bullying did not occur at the level described.

Student's disabilities are too severe and Student's anxiety too great for Student to make meaningful educational progress in the District's high school [FF 100, 101]. Experts who know Student very well all testified credibly that to return Student to the District is likely to cause significant harm, including risking regression in all domains, traumatization, depression, post traumatic stress disorder and suicide [FF 100-104]. The District's psychologist, although testifying that Student could be returned to the District, did not dispute the authority of Student's private evaluator, treating clinician or treating pediatrician who strongly held that Student should not be placed in the high school [FF 105]. The District psychologist was gracious and forthright in her testimony, and certainly well-trained, and it was unfortunate that she was placed in the position of being questioned about procedural matters over which she did not have control and of defending a program and placement that were inappropriate.

The Parents' Chosen Private Placement: Since the District did not fulfill its obligation to offer Student an appropriate program and placement, the second prong of the Carter analysis must be reached. The program and placement unilaterally continued by the Parents is appropriate. Private School offers a small educational environment by virtue of the size of its campus and the size of the student body [FF 78], small classes of two to seven students [FF 80], immediate teacher monitoring and feedback [FF 81], and a range of accommodations and modifications from minimal to intensive which can be changed quickly as the need arises [FF 82]. Private School provides two or four pupils to one teacher for mathematics instruction [FF 85], and individualized instruction in written expression, study skills and organization [FF 83, 89]. Private School offers an extensive mentoring program [FF 88, 89]. Although Student remains anxious and attention deficits and hyperactivity remain severe [FF 90], at Private School Student is still able to learn [FF 91].

At Private School Student is slowly developing some friendships [FF 92], Student seems to have gained a modicum of self-esteem [FF 94], and Student likes school [FF 95]. Student has not been bullied once in a year and a half [FF 96], and perhaps if only for this reason Student has, as Student's father put it, experienced a change that is "like night and day" [FF 95].

This hearing officer, in consideration of Student's multiple physical, learning, neurological, and emotional disabilities, and in consideration of Student's past experiences of severe bullying at a District school, must agree with the Parents and their experts that returning Student to an inappropriate program in an inappropriate setting at this time would deny Student the FAPE to which Student is entitled and create an unacceptable risk for regression in all areas.

Equitable Considerations: Since the District did not fulfill its obligation to offer Student an appropriate program and placement, and the program and placement unilaterally chosen by the Parents is appropriate, the third prong of the Carter analysis must be considered. In this matter, the equities favor the Parents. The Parents willingly and promptly provided information, including several privately-obtained evaluations, to the District's evaluator [FF 43, 45]. When the District's ER was discussed with them they openly put forth their areas of disagreement [FF 47]. When an IEP meeting, delayed for three-and-a-half months, was finally held, they were candid regarding their concerns [FF 51]. Their concerns were not allayed; in fact they were rightfully intensified, when the final draft of the IEP was offered, five weeks into the academic year [FF 50]. There is no factor that would serve to reduce or eliminate the District's obligation to reimburse Parents for tuition at Private School.

Must the District reimburse the Parents for the summer ESY program they procured for their child?

ESY eligibility does not rise and fall solely on the criteria stated in the federal and state special education regulations. The Pennsylvania special education regulations incorporate by reference the federal ESY regulation, and state that the seven Pennsylvania factors are

to be considered “in addition” to the requirements of the federal regulation. Consequently, the Pennsylvania factors provide neither exhaustive nor exclusive criteria for determining a need for ESY services. Rather, an IEP team must also consider a more global question: Are ESY services necessary for a given student to receive FAPE? Expanding that term, a district must consider whether ESY services are needed to assure that the student’s program is reasonably calculated to confer meaningful educational benefit. Rowley. “Meaningful benefit” means that an eligible student’s program affords the student the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999).

In determining the need for ESY services, school districts can, and do, consider factors such as significant deficits, slow progress and functioning considerably below grade level in a given area to determine whether ESY services are needed for a student to receive FAPE. In the instant matter, with regard to the issue of reimbursement for ESY during the summer of 2009, the District and the parties determined through the evaluation and IEP process that Student required ESY [FF 69, 70, 71, 74]. However the District did not convene an IEP meeting to discuss ESY for summer 2009 nor did the District make any proposals for ESY for that summer [ST 1; FF 72]. The Parents elected to pay for Student to attend the summer program offered by Private School [ST 2, ST 3; FF 73]. When the final version of the IEP was presented to the Parents the ESY provision had inexplicably been changed [FF 75].

The totality of the testimony provided about Student’s disabilities in this hearing overwhelmingly supports Student’s need for ESY, and this hearing officer so finds. The fact that the parties formalized the intent to provide ESY in their settlement agreement is not necessary to establish Student’s unfettered right to an ESY program; rather the Student’s severe needs so establish that right in light of the factors the state of Pennsylvania instructs Districts to consider. The District will be ordered to reimburse the Parents for Student’s summer 2009 ESY.

The District in its closing argument attempted to cast the ESY issue in the light of a contract dispute over which this hearing officer has no jurisdiction; case law offers no crystal clear direction in this circuit. Although this hearing officer finds that Student is entitled to ESY separate from any agreement to this effect, she is compelled to make the observation that the District’s position, borders on, if not enters, the realm of bad faith. The District made an agreement, reneged on the agreement either willfully or inadvertently, and now wants to deny the Parents the opportunity to obtain redress through one consolidated administrative process, suggesting that they instead need to take their claim to another venue.

If the District is in fact saying that the Parents need to seek enforcement of the signed agreement before a judge in a courtroom rather than before this hearing officer, then the District risks squandering public funds through engaging its own attorney in yet another segment of litigation in which it would likely not prevail. If in the alternative the District is hoping that the Parents will simply give up and forfeit their claim to reimbursement for ESY rather than go to court, it risks sending a message to other families in this District,

and to the families' attorneys, that going to due process is far safer than reaching an agreement. Both outcomes would be unfortunate. This hearing officer was struck by the fact that two of the Parents' professional experts testified forthrightly to having special education-eligible children in this District and to be satisfied with the services their children received. The Student's [Redacted sibling] receives regular education in the District successfully. Clearly the District knows how to provide appropriate programs for some of the children in its care; it is hoped that the District will take appropriate steps to afford this level of quality to all its students in an atmosphere of acceptance and safety.

#### Order

It is hereby ordered that:

1. The District did not offer Student an appropriate program and placement for the 2009-2010 school year.
2. The placement unilaterally continued by the Parents for the 2009-2010 school year is an appropriate educational placement to address Student's multiple disabilities.
3. The equities do not reduce or eliminate the District's obligation to provide tuition reimbursement for the 2009-2010 school year.
4. The Parents are entitled to reimbursement for their unilateral continuation of the placement of Student at the private school for the 2009-2010 school year.
5. The District shall reimburse the Parents for their out-of-pocket expense for the ESY program in which they placed Student during summer 2009.

March 14, 2010  
Date

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