

*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.*

## Special Education Hearing Officer

### DECISION

ODR No. 00590-0910AS

Child's Name: K.S.

Date of Birth: [redacted]

Dates of Hearing: 3/12/10, 4/1/10, 4/26/10, 4/29/10  
6/30/10, 7/22/10

### CLOSED HEARING

#### Parties to the Hearing:

Parents  
Parent[s]

School District  
Central York  
775 Marion Road  
York, PA 17406

Date Record Closed:

Date of Decision:

Hearing Officer:

#### Representative:

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September 10, 2010

September 25, 2010

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student, a resident of the Central York School District, attended the District high school until the end of the 2007/2008 school year. The District evaluated Student in the middle of 4<sup>th</sup> grade (2000/2001 school year), concluded that Student met the IDEA criteria for specific learning disability, and began providing special education services.

Beginning with the 2008/2009 school year, Parent enrolled Student in a small private school, hoping for improved academic progress. After repeating 11<sup>th</sup> grade, Student graduated from the private school at the end of the 2009/2010 school year.

Parent first filed a complaint in November 2009, which was assigned to a different hearing officer and dismissed in response to the District's sufficiency challenge. The District's sufficiency challenge to Parent's second complaint, filed in December 2009, was also granted, but Parent was given the opportunity to amend the complaint. Parent sought tuition reimbursement for two school years, as well as compensatory education from 7<sup>th</sup> grade through the end of the 2007/2008 school year. A preliminary ruling on the District's affirmative defense that claims that arose before January 2008 were time-barred limited the scope of the compensatory education claim to the second half of the 2007/2008 school year, but Parent was permitted to present evidence concerning the entire school year for purposes of determining the appropriateness of the District's program/placement for that year.

The due process hearing was held in six sessions between March and July 2010. Upon a thorough review of the basis for Parent's claims, the purported deficiencies in the District's IEPs as described by Parents' witnesses, evidence comparing the educational services offered by the District and the private school selected by Parent, and Student's progress in each setting in light of the applicable legal standards, the conclusion is inescapable that Parent's claims must be denied.

## **ISSUES**

1. Did the School District provide Student with an appropriate special education program and placement during the 2007/2008 school year?
2. Is Student entitled to compensatory education and if so, for what period and in what form?
2. Did the School District offer Student an appropriate special education program and placement for the 2008/2009 school year?
3. Did the private school in which Parent unilaterally placed Student for the 2008 and 2009 school years provide an appropriate education that addressed the deficiencies Parent alleged in the School District's program?

## **FINDINGS OF FACT**

1. Student is a late teen-aged child, born [redacted]. Student is a resident of the School District, and at all times relevant to the dispute between the parties, was eligible for special education services.<sup>1</sup> (Stipulation, N.T. p. 16 )
2. Student's eligibility category was identified by the District as specific learning disability in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 16)
3. Student was first identified as IDEA eligible in November 2000 after an evaluation that included standardized cognitive ability and achievement tests, as well as assessments of communication, motor and perceptual abilities. (P-4, p. 1, S-110, pp. 2-4)
4. Student's full scale IQ (FSIQ) score of 83 on the WISC-III (Wechsler Intelligence Scale for Children-Third Edition) placed Student in the low average range of intellectual functioning. Index scores were: Verbal Comprehension, 85 (16<sup>th</sup> % ile); Perceptual Organization, 86 (18<sup>th</sup> % ile); Freedom from Distractibility, 75 (5<sup>th</sup> % ile); Perceptual Speed, 86 (18<sup>th</sup> % ile) (S-110, pp. 2—4)
5. The District did not repeat or conduct any additional standardized cognitive and achievement tests when periodic reevaluations were due or at any other time. (N.T. pp. 419, 420, 427, 428; P-4, S-96, p. 4, S-85, p. 1)
6. In September 2008 Parent obtained a review of educational records by a private school psychologist, who offered the opinion that Student's "minimal" academic progress since

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<sup>1</sup> In June 2010, prior to completion of the hearing record, Student graduated from the private secondary school program for which Parent is seeking two years of tuition reimbursement. (N.T. p. 502)

the original District evaluation warranted an updated evaluation to provide better information to Student's IEP team for developing more specific strategies and accommodations to address Student's learning needs. (N.T. pp. 90—92; P-4, p. 2)

7. In October 2008, a [local] Intermediate Unit (IU) school psychologist administered the WISC-IV (Wechsler Intelligence Scale for Children-Fourth Edition) test of cognitive abilities as part of an educational assessment by the private school. Student's FSIQ score of 76 (5<sup>th</sup> %ile) placed Student within the borderline range of intellectual functioning, with a 95% chance that Student's score falls between 72 and 82. Component index scores were 91 in verbal comprehension (average range-27<sup>th</sup> %ile), 71 in perceptual reasoning (borderline-3<sup>rd</sup> %ile), 80 in working memory (low average range- 9<sup>th</sup> %ile) and 83 in processing speed (low average range- 13<sup>th</sup> %ile). (P-2, p. 2)
8. Parent obtained an independent psychological evaluation in July 2009 from a different LIU school psychologist, who administered the Woodcock-Johnson III Normative Update/ WJ III/NU Tests of Cognitive Abilities. The psychologist obtained a GIA score of 77 (comparable to FSIQ), which is likely to fall within range of 75—79. Other component scores were: Verbal Ability, 87 (82—91); Thinking Ability, 89 (86—91); Cognitive Efficiency, 64 (59—68); Auditory Processing, 98 (93—104); Fluid Reasoning, 93 (90—97); Short-Term Memory, 66 (62—71); Working Memory, 76 (72—80); Broad Attention, 74 (71—78); Executive Processes, 90 (87—93). (N.T. pp. 156, 159; P-1, pp. 11, 12)
9. The IEP team convened after the District's initial evaluation during the 2000/2001 school year recommended that Student receive supplemental learning support services in the resource instructional environment, which Parent approved. Student continued to receive learning support services from 4<sup>th</sup> grade through the end of the 2007/2008 school year. (N.T. p. 418; S-102)
10. Parent's concerns about Student's functioning in school began to develop in 8<sup>th</sup> grade, when teachers reported that Student was failing to complete/ submit assignments, particularly homework and commenting on Student's focus and attention and need for organizational skills. In 11<sup>th</sup> grade (2007/2008 school year), Parent became very concerned about Student's lack of participation in academic courses, and did not believe the District teachers could provide enough assistance to assure that Student's success, particularly in the math/science class. (N.T. pp. 439, 447, 449, 451, 453, 505, 506, 575—577, 580—583, 606; S-142, pp. 16—19, )
11. The IEP for Student's 11<sup>th</sup> grade school year, as developed in May 2007, included goals for writing and self advocacy. Special education services were to be delivered in both regular education classes and in the resource room for a combined total of 7.6 hour/week, with 3 hours provided in the regular education setting and 4.6 hours provided in a segregated setting (15% of the hours spent in school each week). (S-80, p. 14)
12. Specially designed instruction (SDI) included test taking accommodations, such as a separate room, extended time and no deductions for spelling errors; assistance with

editing writing assignments; study guides to prepare for tests; intermittent deadlines on long-term projects; copies of notes upon request; preferential seating; assistance with reading material above the 7/8<sup>th</sup> grade level; contact with case manager and/or Parent when Student's grades dropped below a 2 (C) level in any class or there were more than two (2) missing assignments; reconvene the IEP team if Student was failing a math/science class within four (4) weeks after the school year began. (N.T. pp. 966; S-80, pp. 10, 11)

13. Student took English in the resource room, following a modified 11<sup>th</sup> grade curriculum, but was enrolled in regular education classes for all other courses with the additional support of an instructional aide in the regular classroom. (N.T. pp. 695, 971, 972, 991, 992; S-145)
14. The combined math/science class in which Student was enrolled during 11<sup>th</sup> grade was a regular education course designed for students who had difficulty in those subject areas. The class was taught by both a math teacher and a science teacher at a slower pace. Student's IEP team believed that Student might do better in a class that provided the hands-on experiences characteristic of that class. (N.T. pp. 814, 815, 906, 965)
15. Student began struggling in the math/science class very early in the 2007/2008 school year. Student was offered considerable individualized in-class support, as well as the opportunity to obtain additional support via both regular education strategies available to all students in the class, such as extra time to complete assignments and meeting with the special education case manager. Student's performance improved after the teachers adjusted the extended time policy to permit more time to complete missed work. Generally, Student did not seek additional assistance, but needed considerable individualized attention initiated by the teachers in order to complete work in that class. (N.T. pp. 816, 817, 821, 827, 828, 830, 835—843, 867, 902—904, 906, 966, 973; S-14, S-16, S-22, S-34, S-133)
16. Student did not relate well on a personal level to the math/science class teachers and did not like accepting help from teachers Student believed did not personally care about Student. (N.T. p. 706)
17. Student's IEP team met to revise the IEP on October 9, 2007. The SDI was amended to provide for clarification of directions (Student to repeat to assure understanding), adding prompts to remain on task and more support for organization (maintain separate notebooks for each subject) to be provided during the academic prep period. (N.T. pp. 975 S-76, S-79, p. 2)
18. Student's teachers reported, generally, that Student lacked motivation, as indicated by missed class and homework assignments, lack of engagement in academic classes and, refusal to attend academic prep classes to take advantage of assistance available for all

academic classes throughout the school year.<sup>2</sup> (N.T. pp. 817, 977, 986, 993; S-15, S-21, S-22, S-71)

19. Student frequently missed academic prep periods with the special education case manager. Reasons cited by Student for missing academic prep sessions included forgetting to go, a preference for staying in study hall with friends, reluctance to seek help due to peer reactions and feeling that it was impossible to get completely caught up on missed work. (N.T. pp 691, 701, 940, 941)
20. Student's IEP team convened again in June 2008 to propose an IEP for the 2009/2010 school year. The proposed IEP continued the writing and self-advocacy goals and added a goal for math. (N.T. pp.; S-80, pp. 10—12)
21. In addition to preferential seating, alternative test site, study guides, editing assistance and benchmarks for long-term projects as provided in the prior IEP, proposed SDI for 2009/2010 included adapted assessments by regular education teachers, such as simplifying wording, word banks, chunking information to improve focus and reduce confusion, reduced number of choices for multiple choice tests, short answers or bullets instead of essays and assessments read aloud upon request. (S-80, pp. 13, 14)
22. The District also proposed providing Student with small group instruction in a separate setting for English IV, Math III, Science III and Social Studies, using the general education curriculum for those subject areas. (N.T. pp.; S-80, pp. 15, 16)
23. Student completed transition surveys in 10<sup>th</sup> and 11<sup>th</sup> grades indicating that Student was interested in attending college and specifying graphic design as a career interest. (S-12, S-24)
24. The transition section in Student's 11<sup>th</sup> grade IEP listed attending technical/trade school to prepare for a career in sign-making as Student's immediate post-secondary outcome. Activities to prepare for that outcome included courses in graphic design, architectural design, architectural and mechanical drafting. (N.T. pp. ; S-80, p. 8)
25. The transition section of the IEP proposed for the 2008/2009 school year specified college as an immediate post-secondary outcome to prepare for a career in graphic design. Two graphic design courses were included as activities to further the transition plan. Self-advocacy skills were added as both a transition activity and an IEP goal. (N.T. pp. 245, 246; S-75, pp. 5, 9)
26. More recently, Student's interests have turned toward a career in criminal justice, possibly a corrections officer. Student's perception of current needs relating to attending

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<sup>2</sup> Academic prep is a period built into every District high school student's schedule as a structured study hall. Students are required to return to a specific academic classroom teacher on a rotating basis throughout each week. Toward the end of the 2007/2008 school year, Student and Student's teachers agreed that Student spend every academic prep period with the special education case manager to catch up missed work and provide additional instruction in areas of particular difficulty for Student. (N.T. pp. 987—990)

- a community college and preparing for a career center on planning for what needs to be accomplished to reach the education and employment goal. (N.T. pp. 716—718, 720)
27. Student has lost interest in graphic design as a career option due to the repetitious nature of the work. (N.T. p. 720)
  28. In September 2008, Student enrolled in the Private School, a private school, where Student repeated 11<sup>th</sup> grade. (N.T. pp. 502, 712, 720)
  29. In addition to academic classes, the private school offers, at an additional cost, the Discovery Program, described as educational therapy for students with perceptual weaknesses. The Discovery Program is provided as a pull-out program delivered in a classroom setting in two 80 minute periods twice/week. (N.T. pp. 516, 517)
  30. In January 2009, the private school's Discovery Center director conducted additional tests to determine Student's educational levels and needs, specifically, Student's need for educational therapy delivered through the Discovery Program, using the cognitive assessment conducted by the [redacted] IU school psychologist and standardized achievement tests and informal assessments administered by the director. (N.T. pp. 560; 561 P-3)
  31. The director's report concluded that although Student's performance on standardized achievement tests in Broad Reading, Broad Math and Broad Written Language on the Woodcock-Johnson Tests of Achievement-Third Edition, Form A (W-J III) placed Student several years below grade level, the scores exceeded the FSIQ score of 76, indicating that Student was functioning close to potential. The WJ-III scores were consistent with other standardized achievement tests administered for the same assessment. (P-3, pp. 2—5)
  32. The director's report also concluded that inconsistencies among sub-test scores may be the result of perceptual deficits. Informal assessments identified "some difficulties in spatial relations, and visual discrimination ... a light deficit in visual motor integration, difficulty with auditory memory and auditory speech," arising from deficits in spatial relations, memory and sound discrimination. (N.T. pp. 520, l. 11-15, 549, 550; P-3, p. 8)
  33. Based upon some discrepancies in subtest scores relating to cognitive skills, academic achievement and processing abilities, along with Student's low average intelligence, the director concluded that Student would benefit from the educational therapy offered at the private school, but Parent was unable to accept that recommendation due to Parent's inability to fund the additional costs for that program. (N.T. pp. 523, 534, 548, 560, 563, 568; P-3, p. 8)
  34. The Discovery Program, combined with an educational component, a resource room to provide tutorial services for students with learning disabilities, comprise the Discovery Center at the private school. (N.T. pp. 521, 522, 541)

35. During the 2008/2009 school year, Student was placed in the resource room of the Discovery Center, also a pull-out program, for four 40 minute periods/week. The time may have been reduced to two 40 minute periods/week for the 2009/2010 school year.<sup>3</sup> In accordance with Student's Individual Action Plan (IAP), the resource room teacher worked on areas of greatest need with the input of the classroom teacher, such as particular assignments and organization. (N.T. pp. 522, 532, 551, 566)
36. Specific supports provided to Student during the school day included organization strategies, copies of the teacher's or another student's notes to eliminate the need to copy from a book or the board; extended time for tests; adjustment to the length of tests/breakdown of tests to limit the amount of material tested at once; word banks; study guides; tests read and scribed by examiner; quiet, supervised place for tests; answers checked to determine need for assistance when spaces were left blank or answers were illegible; books on tape for literature. (N.T. pp. 527, 528, 544, 545; S-147, pp. 2—4) C
37. Student also received an extra set of textbooks for home use, and the amount of math homework was adjusted  $\frac{1}{2}$  of the daily assignment. Completion and grades of homework assignments could be monitored by Parent and Student's resource room teacher by a school-wide online system. If Student failed to complete an assignment, the resource room teacher questioned why it wasn't completed and worked on a strategy to complete it in order to earn at least some credit. (N.T. pp. 528—530, 545, 546, 567; S-147, pp. 2—4)
38. Despite the resource room support, one to one instruction in business math by the special education teacher and other modifications such as reduced assignments for math and books on tape for literature, Student struggled with math and English during the 2009/2010 school year. Student's highest grade point average to the time of the hearing was a 2.47 in the third quarter of the 2009/2010 school year. (N.T. pp. 525, 554, 566; S-147, pp. 1, 4, 6)
39. Mid-quarter evaluation teacher reports from the 2008/2009 school year disclosed that Student's attitude, attention, attendance, behavior and effort were generally considered satisfactory. Student still experienced difficulty completing homework and class assignments and with class participation in some classes, as indicated by three of four teacher assessments marked with the "Needs Improvement" in one or more of those areas. There were no "Unsatisfactory" assessments (N.T. p. 531, 559, 564, 565; S-147, pp. 8, 10, 12, 14)
40. Student's scores for the 11<sup>th</sup> grade PSSA, taken before leaving the District in the spring of 2008 and reported in the fall of 2008, were Below Basic for Math, Basic for Reading and Science and Proficient for writing. (N.T. pp.; S-63, S-64, S-65)

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<sup>3</sup> The testimony of the Discovery Center Director, the only witness to testify from the private school, appears to contradict the IAP faxed during the hearing, which indicates that Student received also received 4 of resource room periods each week during the 2009/2010 school year. The document is consistent with Student's testimony stating that there was one period of special education and two study hall periods with the special education teacher daily. (N. T. pp. 532, 566, 947; S-147, p. 1)



41. At the end of the 2007/2008 school year, Student's cumulative grade point average was 2.11. (N.T. pp.; S-41)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **I. Legal Standards**

Prior to evaluating the evidence relating to the issues raised in Parent's complaint and the parties' contentions, it is helpful to review the basic statutory/regulatory structure, as interpreted by court decisions, that provides the framework for determining whether the School District properly fulfilled its obligations to Student.

#### **A. Relevant IDEA Requirements**

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

The Individuals with Disabilities Education Act ("IDEA") requires that a state receiving federal education funding provide a "free appropriate public education" ("FAPE") to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP "must be 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)).

*Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009)

The term "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 (3<sup>RD</sup> 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. *Board of Education*

*v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> 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 (3<sup>rd</sup> Cir. 1996; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Under the interpretation of the IDEA statute established by the *Rowley* case and other relevant cases, however, an LEA is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995).

#### B. Due Process Hearings/Burden of Proof

The IDEA statute and regulations 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, in this case, because Parent has challenged the appropriateness of the District’s program for the 2007/2008 school year and its recommendation for the 2008/2009 school year, Parent must establish that the District’s program was not reasonably calculated to assure that Student would receive a meaningful

educational benefit from the services provided during the 2007/2008 school year and offered for the 2008/2009 school year.

Since the Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis 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.

### C. Tuition Reimbursement

#### 1. Three Step Test

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 FAPE or otherwise acted appropriately.

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 School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) 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.

The Court of Appeals has recently provided guidance with respect to assessing the appropriateness of a unilateral private placement, noting that

A parent's decision to unilaterally place a child in a private placement is proper if the placement “is appropriate, *i.e.*, it provides significant learning and confers meaningful benefit...” *DeFlaminis*, 480 F.3d at 276 (internal quotation marks and citation omitted). That said, the “parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA.” *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir.1999). In fact, the Supreme Court has ruled that a private school placement may be proper and confer meaningful benefit despite the private school's failure to provide an IEP or meet state educational standards. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 14-15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993)

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

## **II Nature of the Claims/Contentions of the Parties**

This case presents somewhat unique circumstances, in that it is possible to compare the entire history of the public and private school placements because Student spent nearly two school years in the private school before the complaint was filed, and despite repeating 11<sup>th</sup> grade, graduated in May 2010. Absent that situation, Student’s testimony and the evaluation evidence presented by Parent’s school psychologist and private school witnesses, the decision in this case may have presented closer questions.

Parent’s claims in this case are based on the premise that Student was so unsuccessful in public school that the District could not have provided a special education program that was reasonably likely to result in meaningful educational benefit. Student’s testimony, along with

the testimony and other evidence concerning the services provided to Student in the private school, however, belie that premise and, therefore, defeat the claims.

The evidence presented by the private school's Discovery Center director indicates that Student was provided with educational services very similar to those provided and proposed by the District, including the opportunity to meet with a resource room teacher who provided support for regular classroom assignments and organization issues. *See* FF 11, 12, 15, 17, 21, 22, 34, 35, 36, and the testimony of District teachers, generally. The record overwhelmingly establishes that every advantage of the private school cited by Student had been offered during the 2007/2008 school year and could have been provided by the District. Student acknowledged receiving the supports specified in the 2007/2008 IEP, with the exception of rephrased directions that Student did not recall receiving regularly. (N.T. pp. 696, 697, 700, 702, 709, 710) Student further acknowledged experiencing greater success in the smaller resource room classes, and testified that the services provided by both the resource room teacher and case manager were helpful. (N.T. pp. 934, 936, 937) When asked directly what more the District teachers should or could have done to be more helpful, Student testified that the case manager did everything Student could think of to help with organization and catching up on missed work. (N.T. pp. 943, 944) Indeed, Student explicitly testified to the similarity between the assistance provided by the public and private schools, noting, however, that more individual attention in the private school gave Student greater confidence that it was possible to catch up after falling behind. (N.T. pp. 944-946)

The testimony further established that the true difference between the private and public placements lay in Student's own willingness to accept services from the private school after rejecting them when offered in the public school. *See, e.g.*, F.F. 15, 16, 18, 19. Student also

testified to the underlying reason for that situation, *i.e.*, feeling more comfortable with the private school teachers, who were perceived to be more personally interested in Student. (N.T. pp. 711, 712)

The obvious and acknowledged similarities between the public and private school services present an insurmountable obstacle to concluding that the District failed to provide/offer FAPE to Student. The same services cannot be deemed inappropriate when offered by the public school, yet considered appropriate when provided by the private school.

It is, or should be, obvious that the appropriateness of educational services offered by a public school cannot be determined based upon an eligible student's willingness to accept and cooperate with the services and supports that are offered, absent evidence that the Student's reluctance to accept the services has an objectively reasonable basis. Liking one school better than another is not such an objectively reasonable basis. Here, there was no suggestion that any of the District teachers were not well-qualified, were unwilling to provide the help Student so obviously needed, or failed to notice that Student was struggling and recommend changes to Student's program and otherwise increase their efforts to provide academic support. To the contrary, there is ample evidence of the District's efforts to meet Student's needs by adding additional supports to the IEP. (FF 17)

To the extent that Student was happier and more confident, academically, at the private school it was certainly a beneficial change. The benefits described by Student do not, however, make the public school program inappropriate. The dispositive issue is not which placement was better for Student, but whether the public school was inappropriate. If both the private and public schools offered an appropriate educational program, the first prong of the three step *Burlington-Carter* test must be decided in favor of the District, and the inquiry could end.

There was, however, additional evidence that despite Student's feeling that the private school was much better, its efforts were little, if any, more successful in addressing Student's needs. Student still struggled academically. (FF 38, 39) By the time of the hearing, the highest grade point average Student had achieved after nearly two years in the private school was 2.47 for the quarter third quarter of the 2009/2010 school year, only .33 points higher than Student's final average at the end of the 2007/2008 school year. (FF 38, 41)

Moreover, the report of the most recent evaluation of Student, conducted in July 2009, by one of Parent's expert witnesses, indicated that the reasons Parent gave for the evaluation were similar to the kinds of behaviors Student exhibited during Student's last year in the District. (P-1)

Finally, Parent faulted the District for the lack of an appropriate transition plan and its failure to determine Student's learning style in order to develop better instructional strategies. The private school witness, who conducted an evaluation of Student in the winter of 2009 conducted no assessments to determine Student's learning style. The witness did not know of any transition services provided to Student, and Parent produced no other witness to provide such evidence. (N.T. p. 567)

Even crediting Parent's contention that the District failed to provide adequate transition services and the kind of evaluation data that could better identify the way Student learns, thereby providing information for developing instruction more likely to improve Student's learning outcomes, the absence of evidence suggesting that the private school provided **any** transition services or that it compiled data similar to that deemed important and necessary by Parent's

experts also defeats Parent's claim that the private school was an appropriate placement that met Student's unique special education needs.

As noted by the court in *Gagliardo v. Arlington Central School District*, 489 F.3d 105, 115 (2<sup>nd</sup> Cir. 2007), denying tuition reimbursement based upon the appropriateness of the private school is justified where,

[T]he chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not. A unilateral private placement is only appropriate if it provides "education instruction *specifically* designed to meet the *unique* needs of a handicapped child." *Frank G.*, 459 F.3d at 365 (quoting *Rowley*, 458 U.S. at 188-89, 102 S.Ct. 3034) (emphasis added).

Similarly, in *Matrejek v. Brewster Central School District*, 293 Fed. Appx. 20 (2d Cir. 2008), a panel of the Second Circuit Court of Appeals affirmed the district court's determination that the administrative hearing officer correctly concluded that tuition reimbursement should be denied where the private school selected by parents did not provide all of the services deemed necessary by parents' own expert witnesses.

In this case, the public and private schools offered services that were comparable, but Student preferred the private school setting. Although Parent was certainly free to provide, regardless of the lack of objective evidence that Student derived any academic advantage from attending the private rather than the public school. Parent's problem with establishing that the District should be ordered to fund the private placement comes down to the simple fact that if the educational supports provided in the public and private schools were comparable, as the evidence establishes they were, any deficiencies in the District's program were likewise present in the private school, making it an inappropriate placement as well. If the private school services met Student's unique needs and if meaningful progress in the private school is established by grades similar to the grades Student earned in public school, Student likewise made adequate progress



in Student's enrollment in the District, also indicated by passing grades comparable to those Student earned in the District.

There is substantially more evidence in the record establishing that the District provided Student with appropriate services that resulted in meaningful progress in light of Student's cognitive potential, including the private school's evaluation during the 2008/2009 school year. (FF 31) The foregoing discussion, however, is sufficient to determine that Parent's claims for both tuition reimbursement and compensatory education must be denied.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parent's claims against the School District are **DENIED**.

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

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER

September 25, 2010