

*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

**Child's Name: A.N.**

**Date of Birth: [redacted]**

**Dates of Hearing: September 15, 30; October 20, 21  
November 5, 9, 30, and December 3, 2010**

**CLOSED HEARING**

**ODR No. 01422-1011 JS**

**Parties to the Hearing:**

**Parents**

Parent[s]

**School District**

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**Date Record Closed:**

**Date of Decision:**

**Hearing Officer:**

**Representative**

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**December 31, 2010**

**January 15, 2011**

**Rosemary E. Mullaly, Esquire**

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is an early teen-aged (DOB [redacted]) resident of the Wissahickon School District (“the District”). Student has been identified as a “child with a disability.” The hearing in this matter was initiated by the Parents through their attorney on August 3, 2010 via correspondence submitted to both the Office for Dispute Resolution and the District. The parties engaged in an unsuccessful resolution meeting which occurred within the regulatory timeframe on September 8, 2010. This hearing took place in eight sessions on September 15, 30; October 20, 21; November 5, 9, 30, and December 3, 2010.

To the extent that evidence was placed in the record that constituted unsupported hearsay and was objected to by opposing counsel, it was not used to support a finding of fact.

The Parents assert that the District failed to offer the Student a free appropriate public education and therefore they are entitled to reimbursement for the fees and costs associated with transportation and tuition for the 2010-2011 school year including the cost of extended school year services (“ESY”) at the private school where they unilaterally placed the Student. The District asserts that it offered a free appropriate public education in the school the Student would attend if not disabled, and that the unilateral placement was not proper under the Act and therefore the parents are not entitled to reimbursement of fees and costs associated with the Student’s private school education for the 2010 -2011 school year.

## **ISSUE**

Whether the Parents are entitled to reimbursement of fees and costs associated with transportation and tuition for the 2010-2011 school year including the cost of ESY at the private school placement where they unilaterally placed the Student?

## **Administrative Record**

The administrative record in this matter is comprised of the following:

1. Transcripts of the Proceeding compiled on September 15, 30; October 20, 21; November 5, 9, 30, and December 3, 2010.
2. Documentary Evidence Proffered by the District identified as S-1 through S-22, and P-23.
3. Documentary Evidence Proffered by the Parents identified as P-1 through P-10, P-14 through P-22, P-24 through P-32, and P-23a.
4. Hearing Officer Exhibit 1, entitled “Procedures to Appeal the Decision of the Hearing Officer.”
5. Hearing Office Exhibit 2, November 10, 2010 Standing Order, Hearing Officer Rosemary E. Mullaly directly parties to refrain completely from discussing the subject of their testimony with anyone during a break in their testimony.
6. Hearing Officer Exhibit 3, November 24, 2010 Letter Motion from Caryl A. Oberman.

## FINDINGS OF FACT

1. The Student date of birth is [redacted] and is currently [redacted] years old. (S-2, at 1).
2. The Student was born prematurely at 26 weeks and had related health complications. (P-1, at 1 and 4; P-3, at 2; N.T. 29-32).
3. The Student was diagnosed with PDD-NOS at 26 months. (P-1, at 6-7).
4. District documents pertaining to the Student from 2002-2005 reference high distractibility to auditory and visual stimuli and recommend a minimally stimulating environment. No documentation recommends a placement outside of an autistic support class in a public school. (P-3, at 5,6; P-4, at 5,26; P-5, at 1,22,26; P-6, at 3-26; P-5, at 5; P-7, at 1,9; P-8 at 1,35; P-9 at 1,3,25; S-22).
5. The Student attended a private religious school for four years. Student's parents believe Student had an extreme sensitivity to noise at the time Student was attending the private religious school. (N.T. 113-114).
6. The Student's classroom at the private religious school typically included between eight to ten people. There were disabled and non-disabled students in the classroom. Students would come and go in the classroom throughout the school day. The Student's work area was set up in a corner to limit distractions, but the Student used areas throughout the classroom when Student worked with the teacher. Other students were present in the classroom when the Student used different parts of the room. (N.T. 406-11).
7. The Student made progress at the private religious school even though no noise blocking devices were used in the classroom. (N.T. 417, 1834; P-15).
8. For the 2009-2010 school year, the Parents enrolled the Student in another private school. (N.T. 56).
9. The private school is located in a two story church building. For the 2009-2010 school year it had 16 students; for the 2010-2011 school year it had 12 students. (N.T. 245-46).
10. Since enrolling in the private school in September 2009, the Student has been in three different classrooms, with different teachers, and different behavior support staff. (N.T. 251-252-253, 255-257, 260, 263-67)
11. In December, 2009, the Parents requested an evaluation of the Student written consent for which was received by the District on February 1, 2010, and the evaluation on which was completed on March 31, 2010. (S-2, S-3; S-6 at 20, S-10; N.T. 75).
12. The private school used the state IEP form to describe the Student's program and placement. The private school's IEP says nothing about the Student having an extreme sensitivity to noise. Even though the Student's present levels of functioning change between the time it was drafted and the time the District was developing educational programming for the Student, the IEP was never updated to include Student's current functioning. (P-16/S-15; N.T. 121-123, 125, 295).
13. The appropriateness and contents of the evaluation was not placed in issue in this matter. (P-28/S-1).
14. During consultation between District staff and the private school staff related to the evaluation of the Student, no member of the private school staff stated to District staff that the Student had an extreme sensitivity to noise. (N.T. 1512).
15. Based upon her review of information and documents and her observations and assessment, the District's occupational therapist who evaluated the Student does not believe that Student has an extreme sensitivity to noise. (N.T. 1514).

16. Some degree of sensitivity to sound is a common characteristic of students with autism. The District autistic support classroom has various items to address sensitivity to sound. (N.T. 1515-1516, 1590).
17. The Parents submitted a letter in opposition to the District's evaluation on May 21, 2010 which did not reference the Student having an extreme sensitivity to noise or visual stimuli. S-6, at 20.
18. Due to scheduling conflicts related to parent availability and need to reschedule due to desire for counsel to attend the IEP meeting, the IEP meeting did not take place until May 21, 2010. (S-7; S-8; S-9).
19. On May 21, 2010, the Parents along with their counsel, District representatives and their counsel, and staff from the private school attended an IEP. (S-15, at 9).
20. At the May 21, 2010 IEP meeting, the parents notified the District of the issue of the sensitivity to loud sounds and suggested strategies to mitigate the sound. (S-15, at 2195-96).
21. The Transition Plan developed by the District in the IEP describes a result-oriented process addressing the three post-secondary areas of the IEP. (S-15;N.T. 2201)
22. The private school representatives who participate in the IEP development believe that the District IEP goals were fine and similar to the ones they were implementing. (N.T. 212).
23. The private school staff had concerns about the specially designed instruction, the use of visuals as a reinforcer in the behavior plan, and the proposed placement. (N.T.243).
24. The parents filed a complaint notice on August 3, 2010 outlining inadequacies to both the proposed placement and the IEP goals. The Parents objections related to inadequacies of the goals contained in the District's IEP were contradicted by evidence of record. (P-24/S-15 at 29, 30-31, 31-32, 33, 34, 40, 41-42, 44-45).
25. One of the teachers employed by the private school who testified at the hearing, R.H. worked privately for the Parents for over three years; she is friends with the parents and they pay her directly for her services. She has had no teaching responsibility for the Student since Student started attending the private school and she has not participated in the Students IEP meeting. She testified that she is not 100% in the loop regarding the Student's program at the private school. (N.T. 367, 368-69).
26. At the private school, the Student participates in music class which includes requesting songs, singing, dancing, and clapping hands. The music class had 10 students in it for the 2009-2010 school year. During the music class, students are required to listen to and follow the instructor's directions while the singing, dancing and clapping are taking place. (N.T. 399-400)
27. The private school did not use sound proof dividers in any of the classrooms. (N.T.252-53)
28. In two of the three classrooms the Student received instruction in during the 2009-2010 school year, the Student followed a visual schedule that was in the control of the teacher. The student had access to Student's schedule. (N.T. 653)
29. In each of the classrooms that the Student has been placed, multiple conversations occur between the students and staff and concurrent instruction regularly occurs. Communication within class between staff and student was usually oral (N.T.252, 375,594; 626-27).
30. In each classroom that the Student received education while at the private school, concurrent individual instruction was being provided to multiple children and communication between staff members was a common occurrence. The students in the classroom could tolerate this discussion. The staff just needed to make sure students did not face each other and there was 5-7 feet in between. (N.T. 251-252, 253; 263-267, 375, 628).
31. Student currently receives piano lessons twice a week and is able to attend for 25 minutes per session wherein Student is engaged in playing a piano. (N.T. 376-379).
32. A visual Sticker board used in each of the private school classrooms the Student has been assigned during the 2009-10 SY and 2010-2011 school year. The board sits out and is visual to

the Student and Student did not script when visual was in possession of adults. It is important for the Student to see the sticker board so Student could see how many Student had used and it was effective throughout the year. (N.T. 398, 450, 480, 481,576, 578-79, 611, 623)

33. The Student Attended camp 15 kids in Student's group; 3 staff; Student routinely was able to participate in camp activities (N.T. 419, 421, 423).
34. During Student's tenure at the private school, the Student participated in activities that exposed Student to unexpected loud noises. (N.T. 527-28, 529-530) yet was able to engage in activities there (N.T. 530,742).
35. The private school did not use sound reducing head phones. (N.T. 671).
36. Noise level of classroom 3 students is like a typical noise level of a child while in instruction – very rarely is there an outbursts. (N.T. 737).
37. Multiple visuals were on the wall in Classroom 3 and it looked the same as is depicted in P-34 in March 2010. There were no sound reducing devices walls not soundproof (N.T. 802-11, 17501752-53, 1762).
38. P-34 accurately depict Classroom 3. (N.T. 1750).
39. Radio plays in the background in the morning while the student works on skills in Classroom 3. (N.T. 1761, 1792-93).

The student attended all community based instruction 1769-70

40. Children with autistic are frequently distractible, sensitive to environmental stimuli (N.T. 818)
41. At the private school if a situation where another student was making in noise in the classroom wasn't that severe; the student making the noise would not be removed from the class. Instead the staff would employ strategies in the classroom to try to decrease or eliminate that occurrence. (N.T. 818).
42. If a student at the private school is perseverating about something hanging on the wall, staff would just go over and take it down – removal of the item is an option. (N.T. 819-20).
43. P-33 is the only behavior plan produced by the private school not been modified since 10/27/09 except for the numbers. (P-33; N.T.822)
44. The computer in Classroom Three has speakers. When students are about to plug in headphones noise comes out of speaker. (N.T. 1740).
45. At the time that the District evaluating the Student and was developing an IEP for the 2010-2011 school year, the information that was provided by the private school was limited to P-21/S-15, the 10/29/10 IEP developed by the private school (P-21), document entitled [the Student's] Progress Report 2009-2010 with data contained in each column (S-13); 2 form completed by parents entitled "Parent Interview Expanded Form" and "Living Skills Checklist" (S-14, at 4-10).
46. The date of the IEP meeting was May 21, 2010. The team agreed to postpone issuing the document until the Student's currently levels of functioning from the private school for the fourth quarter of the school year were received. In addition, the District forwarded to the Parents requests for additional information related to transition planning which upon receipt would be included into the Student's IEP. (N.T. 2197-2204; S-12; S-14).
47. The private school staff only disagrees with the District's behavior plan as it relates to visual schedules referred to in S-15. (N.T. 313) .
48. During the 2009-2010 school year, the Student only participated in weekly community based instruction only from the time Student entered Classroom 3 in March until the end of the 2009-2010 school year. At the time that the District was compiling the Student's evaluation report, Student was not participating in community-based instruction. (N.T.689)
49. Inconsistent testimony was presented by the private school staff as to the OT services the Student was receiving during the 2009-2010 school year. The Student's teacher testified that Student went four times a week for services. The Occupational Therapist testified that for the

2009-2010 school year the student received two 45 minute sessions and one 15 minute session per week and the change to 4 times a week for 20 minutes plus 5 minute sensory break each hour did not start until the 2010-2011 school year. (Compare N.T.444 to N.T. 860). The School District noted in its Evaluation Report that at the private school the Student was receiving OT 4 times a week for 20 minutes (S-6, at 2) and offered an increased amount of services of 3 thirty minute sessions of direct OT; 15 minutes a month of consultation by the Occupational Therapist with staff and a daily implemented sensory diet. P-21 at 48 and 50).

50. Contrary to the Parents' assertions, the Students has not been determined to be ineligible for ESY for the 2010-2011. (P-24, at 51).
51. Due to the current level of behavioral functioning, the Student is not assigned to a behaviorist for the 2010-2011 school year. (N.T. 324).
52. Behaviorist for Classroom 1 and 2 was present in the room when the district OT performed her evaluation. She never mentioned to her that the ability demonstrated by the Student to refocus within a short period of time when Student heard another student making noise notwithstanding the fact that Student was not engaged in a preferred activity – to the contrary the Student was working with a stranger and was called upon to listen and comply with direction. (N.T. 317).
53. Private school staff noted that the student's behavior noted by the District's OT in the evaluation was typical of the Student's behavior. (N.T. 317).
54. When Student first got to the private school vocal stereotypy all day; it decreased as year went on. (198, 258-59)
55. The Student never attempted to elope from the private school. 372
56. By the time that the District was finished developing the Student's IEP in June 2010, Student's vocal scripting had decreased from a high of 77%/day across 5 days in September 2009 to below 20%/day across 5 days in June 2010. (P-17, at 1)
57. Anxiety is a trigger for the Students vocal stereotypy (S-6 at 4).
58. During District testing, the Student required multiple prompts to attend to the material but Student did not engage in self talk during either testing session. S-6, at 3.
59. During the administration of testing by the District, the Student did appear sensitive to noises in Student's environment. Student became distracted briefly when another student was making loud noises in another room. Student focused on that interference, attempting to guess which child was making the noise, and was able to refocus once the noise subsided. (S-6, at 15).
60. At the time that the district was conducting the evaluation of the Student, it requested input by the Student's then current teacher who noted that the Student "needs several prompts to complete classroom routines when engaging in non-preferred activities. [Student] requires small teacher to student ratio to learn new material and skills in order to stay focused. Student needs to improve conversational & social skills, including extending conversations." Student also notes Student's "self stimulatory behaviors interfere with Student's progress and ability to stay on task and excel in group settings." (S-21)
61. Effective techniques for use with the Student include repeating directions twice and gestural prompts. 451-52.
62. The Student goes to community based instruction 1x per week; Student needs to keep Student focused on staying with the group; goes to gymnastics off site 1x per week. N.T. 454-455
63. Repetitive vocal behavior – common characteristic of students with ASD as is distractibility, sensitivity to environment. 573-74.
64. Student preferred Disney books and the private school used reinforcers not age- appropriate but encouraging use of more appropriate. N.T. 295, 576, 580, 1746-47

65. At the time that the District was evaluating the Student and was developing an IEP for the 2010 -2011 school year, the information that was provided by the parents was limited to the registration documentation found at S-2, information inserted on the form titled "Parent Information" dated December 23, 2009 (S-3 at 3; S-6 at 2), indication of disagreement with the recommendations of the evaluation report dated March 31, 2010, at S-6 at 20, correspondence dated May 20, 2010 (S-10), document entitled [the Student's] Progress Report 2009-2010 with data provided up until March 24, 2010 column

## DISCUSSION AND CONCLUSIONS OF LAW

### **1. Standard of Review, Burden and Credibility Determinations**

The IDEA requires that a court reviewing an administrative agency decision must base its decision on the preponderance of the evidence. *See* 34 C.F.R. 300.516(c)(3); *L.E. v. Board of Education*, 435 F. 3d 384, 389 ( 2006). At an administrative hearing challenging an IEP, the burden of proof is properly placed upon the party seeking relief. *Schaffer ex rel. v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537 (2005). To support its conclusion regarding the assignment of this burden, the U.S. Supreme Court explains,

The plain text of IDEA is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *McCormick* § 337, at 412 ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion"); *C. Mueller & L.Kirkpatrick, Evidence* § 3.1, p. 104 (3d ed. 2003). ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims").

*Schaffer v. Weast*, 546 U.S. at 56; 126 S.Ct. at 534. Through its continued analysis of the burden issue, the High Court found that nothing would suggest a modification to the default rule in matters challenging the appropriateness of an IEP. *Id.*, 546 U.S. at 62; 126 S.Ct at 537. In the instant matter, because they seek the equitable remedy of reimbursement of tuition and costs incurred for the Student's private educational placement for the 2010-2011 school year from the District, if the evidence is in equipoise, the Parents bear the burden of proof.

In reviewing the testimonial evidence of record, "when faced with divergent opinions regarding a student's educational placement, the hearing officer must make express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon School Intermediate Unit*, \_\_\_ F. Supp. 2d. \_\_\_, 2003 WL22988892 (E.D. PA 2003), at 10. The hearing officer must give some reason for discounting the evidence she rejects. *See Plumme v. Apfel*, 186 F.3d 422,429 (3d Cir. 1999).

## Persuasiveness and Credibility Determinations

For the following reasons, less weight was given to the testimony of the following witnesses:

Parents The parents' testimony was obviously heartfelt. They presented as loving, caring individuals who are daily concerned with the well being of their child and want for [Student] the best education available. They appeared extremely satisfied with the private school and relieved that they were able to find such a school for their child – one that guaranteed Student would receive extremely small group instruction in an extremely small school. They presented as being very friendly and familiar with the staff – going so far as independently contracting with members of the private school staff to provide transportation of their child to school and to come into their home to provide music lessons on a weekly basis. While the parents do regularly attend meeting at the private school, they were not regularly in a position to observe the Student in the educational setting. Moreover, they apparently have so internalized their belief regarding the extreme nature of their child's sensitivity to sound and visual input that they never actually communicated this belief to the District. Instead they believed that saying the student was highly distractible was tantamount to conveying to the school district that the child could not be educated in a classroom with any child with presenting needs involving inappropriate vocalization or at a school that had a public address system. The Parents' testimony regarding the impact of visual distractions and the extent that it disrupted the Student's ability to access education was contradicted by testimony by members of the private school staff and documentary evidence containing pictorial representations of the classroom wherein the Student currently receives educational programming.

R.H. has also had a long standing on-going personal and employment relationship with the Parents. She does not have personal knowledge of the Student's current educational program at the private school. While she did have experience working with the Student in the prior private school Student attended and continues to work with Student in Student's home, the basis for her testimony regarding Student's current levels of functioning were not given much weight.

J. A. – the teacher who worked with the Student in Classroom 3 at no point during the course of the 2009-2010 school year was certified as a special education teacher or a regular education teacher. In fact, she was considered an assistant teacher at the private school. Her emergency certification in the parochial schools does not mean she had certification to teach extremely involved students at another school. No evidence was presented that she had received any particularized training to address the complex needs that the Student presents. While her lack of certification is not in and of itself determinative of whether the Student's placement in the private school was "proper under the Act," the weight given to her testimony is far less than if she had the necessary credentials to provide instruction to a student with such complex needs.

L. J. – the behaviorist Classroom 1 and 2 – a Board Certified Assistant Behavior Analyst (BCABA) who developed the behavior plan for the Student when Student arrived at the private school



lacked the kind of specific knowledge about the Student that one would have thought was necessary to effectively provide appropriate behavior interventions – specifically she did not know the functions of the Student’s behaviors.

## **2. Legal Discussion**

### **a. Free Appropriate Public Education**

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. *See* 20 U.S.C. §1412. The U.S. Supreme Court determined that this requirement is met by providing personalized instruction and support services that permit the child to benefit educationally from the instruction and following the procedures set forth in the Act. *See Bd. of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

The IDEA requirement and the *Rowley* standard are met when a child's program provides more than a trivial or *de minimis* educational benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *See Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). 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).

In determining whether a district has offered a student a “free appropriate public education,” the IEP is to be judged as of the time it was written, not in hindsight. *Fuhrman v. East Hanover Board of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993). The Third Circuit has expanded this rule to include evidence acquired after a school district’s decision regarding a student’s need for special education but limited it to consideration of the reasonableness of the district’s decision at the time it was made. *Susan N. v. Wilson School Dist.*, 701 F.3d 751, 762 (3d Cir. 1995).

Procedural violations may support a claim for relief only if those violations impeded a child’s right to receive FAPE, or they significantly impeded the parents’ opportunity to participate in the decision-making process concerning provision of FAPE to the child, or caused a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. §300.513(a)(2).

#### *1. Reasonably calculated to yield meaningful educational benefit.*

Regarding identification of children with disabilities, the IDEA and its implementing regulations require that in evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified AND assessment tools and strategies that provide relevant information

that directly assists persons in determining the educational needs of the child are provided. *See* 34 C.F.R. § 300.304 (c) (6)-(7). *See also* 1412(a)(6) and 1414(b)(1)-(3). In that no issue has been asserted by the Parents in their complaint notice that that the District's evaluation was inappropriate, the issue of the appropriateness of the District's IEP has not been placed at issue in this matter. *See generally* P-28/S-1.

Regarding educational programming, the IDEA and its implementing regulations require that an IEP for a child with a disability be responsive to the child's identified educational needs and must include present levels of educational performance, measurable annual goals, a statement of how the child's progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. *See* 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a) and 34 C.F.R. §300.324.

State special education regulation provides in pertinent part for the scope of autistic support: Services for students with the disability of autism who require services to address needs primarily in the areas of communication, social skills or behaviors consistent with those of autism spectrum disorders. The IEP for these students must address needs as identified by the team which may include, as appropriate, the verbal and nonverbal communication needs of the child; social interaction skills and proficiencies; the child's response to sensory experiences and changes in the environment, daily routine and schedules; and, the need for positive behavior supports or behavioral interventions. 22 PA Code Sec. 14.131(a)(1)(i).

Regarding the proposed educational placement, the Parents assert in their complaint notice that due to the Students extreme sensitivity to noise, Student cannot learn in loud or auditorily distracting environments. They assert that the District's proposed placement in an autistic support program in the school the Student would attend if not disabled for 83% of the day and inclusion with traditionally developing students for 17% of the day for lunch in the cafeteria, assemblies, homeroom and unified arts. They assert that the Student will be unable to learn in the inclusionary setting due to being socially isolated, overwhelmed and anxious. They further assert regarding the autistic support classroom that it is noisy, visually and auditorily distracting and located next to the cafeteria – a high traffic area of the school. Transitions are also stressful for the student and prevent Student from meaningfully benefitting from Student's education. P-28/S-1, at 2.)

Regarding the proposed IEP, the Parents assert in their complaint as follows:

**[NOTE THAT THE SECTION FORMERLY IN THIS SPACE WAS DIRECTLY QUOTED FROM THE COMPLAINT AND WAS ENTIRELY REDACTED BECAUSE THIS PORTION OF THE DECISION WAS CUT AND PASTED FROM A PDF DOCUMENT WHICH COULD NOT BE EDITED TO REDACT THE STUDENT'S NAME.]**

Federal regulation provides in pertinent part regarding Transition Services:

(a) *Transition services* means a coordinated set of activities for a child with a disability that—

(1) Is designed to be within a results oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes—

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(b) *Transition services* for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

34 C.F.R. § 300.43 (Authority: 20 U.S.C. 1401(34)) 34 C.F.R. Section 300.43.

Federal regulation provides in pertinent part regarding least restrictive environment:

(a) *General.* \*\*\*

(2) Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

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

Federal regulation provides in pertinent part regarding individual education programs

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

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

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

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

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

- (A) Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
- (B) Meet each of the child’s other educational needs that result from the child’s disability;
- (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
- (3) A description of—
  - (i) How the child’s progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
  - (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
- (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—
  - (i) To advance appropriately toward attaining the annual goals;
  - (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
  - (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
- (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
- (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
- (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—
  - (A) The child cannot participate in the regular assessment; and
  - (B) The particular alternate assessment selected is appropriate for the child; and
- (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.
- (b) *Transition services.* Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include—
  - (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
  - (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

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

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

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

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

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

(a) *Development of IEP—(1) General.*

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

(i) The strengths of the child;

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

(iii) The results of the initial or most recent evaluation of the child; and

(iv) The academic, developmental, and functional needs of the child.

(2) *Consideration of special factors.*

The IEP Team must—

(i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;

(iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) Consider whether the child needs assistive technology devices and services.

(3) *Requirement with respect to regular education teacher.* A regular education teacher of a child with a disability, as a member of the IEP Team, must, to the extent appropriate, participate in the development of the IEP of the child, including the determination of—

(i) Appropriate positive behavioral interventions and supports and other strategies for the child;

and (ii) Supplementary aids and services, program modifications, and support for school personnel consistent with § 300.320(a)(4).

(4) *Agreement.* (i) In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.

(ii) If changes are made to the child's IEP in accordance with paragraph (a)(4)(i) of this section, the public agency must ensure that the child's IEP Team is informed of those changes.

(5) *Consolidation of IEP Team Meetings.* To the extent possible, the public agency must encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(6) *Amendments.* Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.

(b) *Review and revision of IEPs—(1) General.* Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—

(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under § 300.303;

(C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);

(D) The child's anticipated needs; or

(E) Other matters.

(2) *Consideration of special factors.* In conducting a review of the child's IEP, the IEP Team must consider the special factors described in paragraph (a)(2) of this section.

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(c) *Failure to meet transition objectives—(1) Participating agency failure.* If a participating agency, other than the public agency, fails to provide the transition services described in the IEP in accordance with § 300.320(b), the public agency must reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

34 C.F.R. § 300.324

### **FAPE - Appropriate IEP**

First there must be a determination whether the IEP was reasonably calculated to yield meaningful progress. It is significant to this analysis to note that at the time that the district evaluated the student Student had not attended a district program for over (5) years – parents moved Student to the private religious school in 2005-2006 school year and the private school Student currently attends for the 2009 2010 school year. Other than for observations of the student at the private school and individualized testing results compiled by the District staff, it had to rely upon information provided by the private school records and staff and the parents for the student's current functional levels.

Regarding the transition plan contained in the Student's IEP, the parents assert that it does not address the Student's sensory or behavioral issue and does not define the skills to be taught to reach the listed outcomes. Review of this section of the IEP demonstrates that the District collected input from the parent (P-24, at 19-20) has identified three transition goals and identified the course of study Student will pursue in obtaining these goals(P-24, at 22-25) which

are aligned with the within the 22 IEP goals. The present level of functioning in each of these goals is measurable in that a baseline has been established or will be established once the District has the opportunity to observe the Student engaged in the skill in the educational setting. The Student's current sensory and behavior issues are already contained in the District's IEP. (P-24, at 12-13, 15-16). Nothing requires it to be re-typed in the transition section of the document. See 34 C.F.R. Sec. 300.320(d) (Nothing in this section shall be construed to require—

- (1) That additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act; or
- (2) The IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.)

For the balance of the complaint assertions regarding criticism of IEP goals, as found within the document identified as P-24

1. on pages 30-31, the element of time is contained on page 29 in the present levels of functioning;
2. on pages 31-32, the only evidence was proffered at hearing on this issue indicates that the Student currently can identify all coins a dollar by name. The point of the IEP would be to teach Student the prerequisite skills to attain this goal. If Student already had the skills, it would be unclear as to why this goal is in the IEP;
3. on pages 33 and 34, the goal on their face are clear there will be a series of single step directions given and consecutive steps; the baseline for the skills clearly indicates that this relates to the Student's ability to respond to teacher direction;
4. on page 45, the goal relates to washing off after a swim class – a scenario for which no data currently exists in the record
5. on page 48, the specially designed instruction relates to sensory diet is specific that it will be provided daily
6. goals for self help are included at 40, 41-42, 44-45; the student was able to don Student's own socks within 5 minutes with gestural prompts at 50-75% success and Student can already put on Student's shoes. See P-16 at 7.
7. The IEP provides for daily progress monitoring and daily data analysis. P-24, at 49.

Contrary to the Parents' assertions, the students has not been determined to be ineligible for ESY for the 2010-2011 – it is clear on the face of the IEP that the district will determine ESY eligibility by February 26, 2011. By checking the second box on page 51 of P-24, it indicates that as of the date of the IEP, the team had not reviewed the necessary data.

While not specifically articulated in the complaint notice, at hearing the Parents also criticize the District's offer of occupational therapy services suggesting that it is less than what was being provided at the private school. At various times, the Parents presented testimony regarding the amount of services offered during the 2009-2010 school year and the 2010- 2011 school years. Currently the amount that the District is offering exceeds what is being offered at the private school.

Another issue raised by the Parents at hearing that was not articulated in the complaint notice was the lesser amount of community based instruction offered by the District as compared to the private school. During the 2009-2010 school year, the Student only participated in about two and a half months of community based instruction – which was initiated after the District’s evaluation report was issued.

Based upon the information that was reasonably within the knowledge of the District at the time the IEP was written, the offered an appropriate IEP to the Student. Therefore the Parents issues regarding the appropriateness of the IEP document are without merit.

The next issue asserted by the Parents relates to the appropriateness of the District’s proposed placement. Such a determination must be based upon what information was reasonably within the knowledge of the District at the time the IEP was written. The record does not support a conclusion that review of the documents compiled by various public education entities would have communicated to the District that due to Student’s sensitivity to noise the Student could not be educated in a public middle school setting. To the contrary, each recommended placement for the implementation of the IEPs contained in the record was for a public school placement. Notifying the District that the Student is distractible and sensitive to noise does not communicate to staff that a student must be educated in a setting almost completely devoid of noise.

The record is replete with references to multiple scenarios in which the Student engages involving loud noises and visual stimulation that Student is able to tolerate and still access Student’s educational program the private school and it does not support the conclusion that the Student has such an extreme sensitivity to noise and visual stimulation that the only appropriate place to implement the IEP would be in a place like the private school the Student’s Parents had placed Student unilaterally. Furthermore had the parents expanded on what the student’s needs were during the evaluation process *vis a vis* the extreme level of sensitivity to noise that they allege the Student manifests, the District would have been given an opportunity to assess the Student and provide appropriate program and placement to address a verified extreme need. The Parents did not afford the District that opportunity. The IEP had to be developed using the information that was available at the time it was offered – and therefore the District can only be judged on whether –with the information it reasonably had – did it offer a FAPE to the student in the least restrictive appropriate environment based upon the information that was available at the time the decision was made.

## 2. *Tuition Reimbursement*

If the parents of a child with a disability are not satisfied with the particular program proposed by the school, the U.S. Supreme Court held that parents may enroll their child in a private school and seek reimbursement from the public school. *See Burlington School Committee v. Department of Education*, 471 U.S. 359, 105 S. Ct. 1996 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361 (1993). The *Burlington* Court established



a three-part test for approving reimbursement for unilateral private school placements. The parents prevail if they show (a) that the placement proposed by the school did not comply with the IDEA's FAPE requirement, (b) that their private placement was appropriate, and (c) that "equitable considerations" justify an award.

The Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. Sec. 1400 et seq., and the implementing regulations codify both the parental right to tuition reimbursement if a district does not make a timely offer of FAPE as well as the equities which can automatically weigh against the parents in their attempt to obtain tuition reimbursement, specifically

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 elementary or secondary 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 costs of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

See 20 U.S.C. Sec. 1412(a)(10)(C)(ii); 34 C.F.R. Sec. 300.148(c). It further provides that, in the part pertinent to the instant matter

[T]he cost of reimbursement may be reduced or denied if at the most recent IEP meeting that the parents attended prior to removal of the child from public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child including stating their concerns and their intent to enroll their child in a private school at public expense; or ten business days prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described [above]; If prior to the parents' removal of the child from the public school, the public agency informed the parents ... of its intent to evaluate the child (including a statement of the purpose of the evaluations that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or upon judicial finding of unreasonableness with respect to actions taken by the parents.

20 U.S.C. Sec. 1412(a)(10)(C)(iii); 34 C.F.R. Sec. 300.148 (d)(1)-(3).

Regarding the equities of the decision, it is significant to note that the other than references contained in educational records that were at least 5 years old at the time, the District did not find anything in the documentation generated at the time it was called upon to program for the child related to extreme sensitivity to noise. In each situation when the distractibility and stimuli sensitivity was raised in the early records, the placement proposal was always for an autistic support class in a public setting. It was not noted as an issue of concern for which the private school was providing behavioral intervention. It was not listed as a need on the IEP

developed by the private school. The Parents did not note this extreme sensitivity at any point when the District was evaluating the Student. Information provided through observation in the private school setting and evaluation by District staff did not suggest that the Student's presenting needs rose to the level that was described during the hearing in this matter. Specifically, the Student took weekly community based instruction outings wherein the staff could not control the noise level. The Student took piano lessons twice a week. The Student was in class with another student who made noises and yet Student was able to access Student's education. During the end of the 2009-2010 school year, Student received Student's education in a classroom setting that had multiple visual distracters. Each classroom wherein Student received education had a visual sticker reward system that was kept out so Student could gage Student's status for reinforcers. In at least two of Student's classes Student had a visual schedule that proved successful and not distracting if within the control of an adult.

Therefore, the equities of this matter weigh against the Parents due to their failure to notify the District of the Student's extreme sensitivity to noise and visual stimuli such that Student could not be educated in a less restrictive environment than a setting similar to the school where the Parents' unilaterally placed Student.

### **CONCLUSION**

The Parents have not met their burden of proof to demonstrate that the District failed to offer the Student a FAPE for the 2010-2011 school year. Moreover, the equities support a denial of the tuition reimbursement claim. Therefore, the District does not have to reimburse the Parents for the costs that they incurred as the result of the Student's private school placement for the 2010-2011 school year.

### **ORDER**

AND NOW, this 15th day of January, 2011, it is hereby ordered that, for the reasons cited above,

The Parents' request for reimbursement of costs associated with their unilateral placement of the Students at a private school is DENIED because they have not met their burden to demonstrate that the District's proposed program was not appropriate for the Student.

All other relief requested by the Parents not addressed by this order is specifically denied.

*Rosemary E. Mullaly, Esquire*

SPECIAL EDUCATION HEARING OFFICER

Date of decision: January 15, 2011