

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: P.M.

ODR #13990/12-13 AS

Date of Birth:
[redacted]

Date of Hearing:
August 2, 2013

CLOSED HEARING

Parties to the Hearing:
Parents

Representative:
Pro Se

Centennial School District
433 Centennial Road
Warminster, PA 18974

Anne Hendricks, Esquire
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

Date Record Closed:

August 7, 2013

Date of Decision:

August 19, 2013

Hearing Officer:

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

Background

Student¹ is an early teen-aged student who just finished 7th grade in one of the District's middle schools. Student is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the classifications of Emotional Disturbance and Specific Learning Disability [Math], and consequently is a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504], as well as the federal and state regulations implementing those statutes.

The District has determined that Student requires placement in an out-of-district Approved Private School [APS] to receive a free appropriate public education [FAPE]. The Parent² maintains that the Student should remain in the District's school and that an APS is not an appropriate placement.

For the reasons below, I find for the Parent.

Issue

What is the appropriate placement for Student at this time?

Findings of Fact

1. In 6th grade Student was quiet, shy and withdrawn; the school staff and the Parent were concerned about Student. School staff saw Student as depressed. [NT 19, 32, 116, 125, 157-158, 217]
2. In September 2011 Student was referred to the Student Assistance Process [SAP] with the Parent's permission and the SAP team conducted an intervention. The Parent did not follow up on the SAP team recommendations. [NT 144-148; S-3]
3. The guidance counselor was in touch with the SAP liaison who emphasized how important the SAP team considered psychiatric and counseling services to be for Student. The guidance counselor spoke with the Parent on several occasions about following through with the SAP recommendations but the Parent was hesitant to do so because she thought that the team considered Student "crazy" whereas she saw the behaviors as typical for a child Student's age. [NT 148-149]
4. The evaluation that resulted in the finding of eligibility for special education was triggered when Student's mother went to the school to inquire about getting Student some extra help for math. A Permission to evaluate was issued on October 10, 2011 but the Parent did not sign it until December 27, 2011. [NT 19; S-4, S-5]

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² The term "Parent" is used throughout because Student's mother took primary responsibility for communicating with the District and testified at the hearing.

5. Once the Parent gave permission for an initial evaluation, Student was found eligible for special education for the first time in March 2012, in 6th grade, and was classified as having an emotional disturbance as well as a specific learning disability in mathematics. The classification of emotional disturbance was based upon a history of concerning behaviors in the school and upon a series of inventories and behavioral/social/emotional rating scales, some of which were completed by Student. [NT 104-108; S-6]
6. The Parent's Behavior Assessment Scales for Children [BASC] responses yielded all Average Range scores except two that were At-Risk [attention problems and resiliency]. However, in contrast, the guidance counselor and the Parent had spoken on many occasions before and after the evaluation about Student's behavior in the home setting that was of concern to the Parent. At times the Parent was very distraught about Student's defiant and eloping behaviors at home. [NT 141-143, 150-152; S-6, S-32]
7. The teachers' BASC responses yielded mostly Clinically Significant scores, and Student's self-report responses yielded mostly Clinically Significant scores. The Children's Depression Inventory teacher ratings yielded all areas rated as Very Elevated, and Student's self-report on this measure yielded one Elevated area with all the remaining areas being Very Elevated. Student's Sentence Completion personal responses reflected sadness/depressive feelings, low self-esteem, and feelings of isolation. [S-6]
8. The limited Functional Behavior Assessment [FBA] done as part of the evaluation noted that the Perceived Function of Student's inappropriate behaviors were: "[Student] has poor social skills. Negative peer interactions appear to be [Student's] way of socializing"; "[Student] is not comfortable with people and is not being successful in school. [Student] has no friends because of [Student's] lack of social skills"; and "Emotional interference". [S-8]
9. A psychiatric evaluation was not included as part of the evaluation. [S-6]
10. The IEP team met on March 26, 2012 and an IEP was developed pursuant to the District's evaluation. The IEP provided for supplemental emotional support and supplemental learning support for math. [NT 38-39; S-7, S-8]
11. Student's Full Scale IQ was assessed as 105, at the 63rd Percentile, with the following Index scores: Verbal Comprehension 119, 90th Percentile, Perceptual Reasoning 96, 39th Percentile, Working Memory 104, 61st Percentile, and Processing Speed 91, 27th Percentile.³ [S-6]

³ IQ and Index scores are plotted along the "bell-shaped curve" and indicate a person's performance relative to same age peers, with 100 being exactly average at the 50th Percentile, scores between 90 and 109 being considered Average Range, and scores between 110 and 119 being considered High Average Range. Percentiles are different: they range from below the 1st percentile up to the 99th percentile and while also showing how a person performs relative to a peer group, they convey the information differently. In Student's case, for example, a Full Scale IQ of 105 at the 63rd percentile means that out of 100 students, Student scored better than 62 others.

12. At the time of the March 2012 IEP Student's grades for the 1st, 2nd and 3rd marking periods were: English 53/50/100%, Social Studies 89/91/73%, Math 40/52/14%, Reading 64/45/95% and Science 87/95/92%. [S-8]
13. Despite receiving 3rd marking period grades of 100% in English, 95% in Reading and 92% in Science, the IEP provides for Student to receive English, Reading, and Science in the emotional support classroom, math in the learning support classroom and social studies in the regular education classroom. [S-8]
14. The IEP notes that Student has "unusually poor expressive and receptive communication skills", "poor social skills" and "needs to be an advocate for [Student's] self". Nevertheless, a speech/language evaluation was not done. [S-6]
15. Despite the results of the BASC, the Children's Depression Inventory and the FBA, the IEP does not call for any related services such as counseling, and the IEP does not provide for any social skills instruction or self-advocacy training. [S-8]
16. On the March 26, 2012 IEP the question "Does the student exhibit behaviors that inhibit his/her learning or that of others?" is checked "yes". [S-8]
17. Some of the behaviors/characteristics listed in the IEP include significant difficulty maintaining attention, restlessness, over-activity, limited eye contact, being disruptive, intrusive or threatening to other students, cheating, deception or stealing, and negative self-image. [S-8]
18. Despite the range of behaviors and needs put forth in the evaluation and the IEP, inexplicably the only behavior of concern listed on the Behavior Intervention Plan is "making eye contact". The antecedents to poor eye contact are "when Student is speaking to an adult" and the perceived function of the behavior is listed as "when upset about a situation". The Behavior Intervention Plan is devoid of any type of Positive Behavior Support Plan strategies. [S-8]
19. Although no behavioral interventions are listed in the March 2012 IEP, the District did begin to use a point system with Student. This point system appears to have been used for all children requiring behavior support, and there is no evidence that it was individualized for Student. The categories tracked were Student Materials, Behavior, Effort and Homework Completed. There was no connection between the behaviors listed in the IEP, the Behavior Intervention Plan in the IEP and the behaviors tracked on the point sheet. [NT 49-51; S-30]
20. Although she met with Student frequently in 6th and 7th grades, the guidance counselor did not have regularly scheduled appointments with Student. Sessions with the guidance counselor were not written into Student's IEPs as a supportive service. [NT 117-119, 123]

21. At various times the guidance counselor ran groups for the students, for example a friendship group addressing general social skills, an anger management group, and a self-esteem group; groups were formed each year depending on the needs of the student population at the time. Groups were publicized on bulletin boards around the school. [NT 117-120]
22. The guidance counselor brought up the idea of participating in the friendship group with Student in 6th grade and Student was not interested. She did not bring up group participation with Student after that and did not bring it up with Student's mother either. Group sessions with the guidance counselor were not written into Student's IEPs as a supportive service. [NT 122]
23. Although the guidance counselor has run groups in the emotional support classroom itself, she did not run groups in that setting during the 2012-2013 school year. [NT 120]
24. Another person runs groups in the school for children in the emotional support programs but the guidance counselor was not aware of exactly what these groups are; a group with the other person was not offered to Student. A group of this sort was not written into Student's IEP. [NT 120-121]
25. Although the school has a social worker who sometimes sees students individually, Student was not scheduled to see the social worker on a regular basis although the social worker was invited to sit in on a meeting to discuss Student. Sessions with the social worker were not written into Student's IEPs. [NT 139-140]
26. Student was very upset about the emotional support placement from the beginning and blamed the Parent for asking about the extra math help. Student told the Parent that friends were making fun of Student for being in the emotional support class, and told her that the other students in that class were "crazy, kicked each other and called out". [NT 20]
27. Student was repeatedly defiant with the emotional support teacher, a male who is a sports coach generally liked by students in the school; Student did little work in the emotional support classroom. [NT 20]
28. Student likewise did minimal work in the learning support math class and was defiant towards the learning support teacher. [NT 159-160]
29. At times Student also seemed sad; the learning support math teacher tried to encourage Student because she recognized Student had good potential but Student seemed uncomfortable with positive attention and would not respond. [NT 160-163]
30. Surprisingly, in light of Student's reported behaviors, Student always came to the learning support class with library books, and they were always the nonfiction type; Student was always learning something from the books. [NT 164]

31. Although Student was found to have a learning disability in math, the District was not using a peer reviewed scientifically based math curriculum with Student. The learning support teacher relied on supplementary materials from the general education math curriculum to deliver the specially designed instruction. [NT 177-178]
32. Notwithstanding the above information about inappropriate and uncooperative behavior supplied in testimony by the District witnesses, the point sheets in evidence for 6th grade, from March 27, 2012 to April 30, 2012, showed that most of Student's scores were "10". "10" is the highest level and represents that Student met "All" requirements under the categories on the sheet. "5" represents meeting "Some" requirements and "0" represents meeting none. [S-30]
33. In 7th grade Student began to acquire a group of friends. As Student became more outspoken, extroverted and engaged, Student's behavior became more inappropriate, and it seemed that the children in the group of friends were "feeding off each other". [NT 32-33, 127-128, 229-230]
34. In October 2012 Student incurred a suspension for fighting with another student in the locker room. [S-32]
35. During the first part of [one sports] season [September and October] Student put forth more effort in math in the learning support classroom, both in terms of work completion and behavior; this tapered off toward the end of the season. [NT 171-172]
36. In 7th grade from the beginning of September 2012 to the date of the next IEP meeting in January 2013, the great majority of Student's scores were "10" except for the last week of school before the winter break. [S-30]
37. The March 2012 IEP remained unchanged until the IEP team met on January 9, 2013 to document that it was discussing Student's behaviors and to develop a Positive Behavior Support Plan [PBSP]. Up to the time of the January 2013 IEP meeting the District had not developed a [PBSP] for Student.⁴ [NT 39-40, 49, 55-56; S-10]
38. The District recognized that a thorough FBA was needed. Following the January 9, 2013 IEP meeting the District arranged for an IU employee conduct an FBA pursuant to a signed Permission to Re-evaluate. On February 14, 2013 the Supervisor informed an administrator that "we need to complete the RR including the FBA and review of records as soon as possible". [NT 52-53; S-14, S-15, S-16, S-35]
39. In the January 9, 2013 IEP the Positive Behavior Support Plan simply notes the behavior of concern of "Refusal to follow directives when they are given to [Student] by a staff member", and the perceived function is "to escape from work/punishment". Although the point system is referenced, the PBSP has no listing of the specific behaviors displayed by Student to be tracked, no individualized plan for addressing Student's behaviors of

⁴ The District prepared a Notice of Recommended Educational Placement [NOREP] following the IEP meeting, but the NOREP was not issued to the Parent until February 15, 2013. [S-17]

concern and no individualized system of rewards and consequences tailored to Student's interests. The PBSP simply notes that Student will be "prompted to make good choices" with the consequence of either points given on a daily point sheet or points being lost. The categories on the point sheet, "Student Materials, Behavior, Effort and Homework Completed" remained unchanged. [NT 40, 44-45, 47-51; S-10]

40. Despite increasing concerns about Student's behavior, no related services such as counseling or social skills groups were added to the IEP in the January 2013 revision. [S-10]
41. A February 8, 2013 note from a regular education teacher to the emotional support teacher about Student [and apparently another pupil as well] reflects the frustration and negative reaction Student could engender: "Continues to do nothing. Is failing [subject]. Yes [Student]'s been prompted and treated like a wonderful person and given a million chances and yes I have let [Student] be disrespectful as that apparently is not a problem either... And no I do not want either one of them moved from the class to infect the rest of my classes at this point. And no, the fact that an aide is in the room has not made a huge impact either." [S-35]
42. In January 2013 up through mid-February most of Student's scores were "10" but with more "5"s than earlier. After mid-February it appears that Student slacked off on using the point sheet. [S-30]
43. On February 5, 2013 Student had mixed up some lunch foods and tried to get a peer to eat it. When a staff person intervened, Student threw a spoonful of the mixture at the adult. Student incurred a suspension. [NT 58; S-21, S-30]
44. On February 11, 2013 Student was throwing snowballs outside with other pupils. When asked to stop the others obeyed, but Student continued, argued with the reprimanding adult, carried snow into the gym, and threw it around. Student incurred a suspension. The District was concerned about how Student reacted versus how the peers reacted and that consequences did not seem to matter. [NT 21, 42-43, 59; S-21, S-30]
45. On February 13, 2013 Student repeatedly told a teacher 'no' when asked to do work. Student incurred a suspension. [NT 58; S-21, S-30]
46. On an undocumented date[s], Student walked down the school halls making farting noises, used curse words related to defecation and pretended to defecate on peers; Student refused to stop when directed. Student incurred a suspension for this behavior. [NT 21, 58; S-21]
47. Suspensions were generally for Student's lack of remorseful response when redirected for these incidents. [NT 58]
48. According to the former Middle School Special Education Supervisor [Supervisor], Student was not engaging in what the District would consider "outrageous" behaviors

such as physical violence. Student was displaying behaviors that “were basically a display of disregard for school authority and school rules”. [NT 42]

49. The emotional support assistant tried sitting with Student in the regular education classes but this was unsuccessful. [NT 130]
50. Student would make threatening gestures toward the emotional support assistant but did not make physical contact. [NT 131-132]
51. On February 19, 2013 the District held a Manifestation Determination Meeting because Student had incurred a pattern of suspensions. The meeting resulted in the District’s finding that Student’s behaviors were a manifestation of Student’s disability. The Parent disagreed, believing that the behaviors were not out of the norm for same age children. [NT 56-57, 66; S-21]
52. On February 19th, the same day as the Manifestation Determination meeting was held, the IEP team revised the IEP, and increased Student’s time in the special education emotional support classroom to full time. In addition to the already scheduled English class and tutorial period in the emotional support classroom, Student was placed in the emotional support classroom for reading, science, and social studies. Student continued in the special education learning support classroom for math. Student was the only child who was placed full time in the school’s emotional support class. [NT 20, 40-41, 69-70; S-19]
53. The only classes in which Student joined the regular education peer group were the “expo” classes such as art or music and physical education. Student was with regular education peers for lunch. [NT 68-69]
54. The District reasoned that providing Student’s instruction in the emotional support class throughout the day the teacher could focus on academics and emotional/ behavioral issues to support the behavior plan and work on IEP goals on a “minute-by-minute basis” if needed. The District thought the small group setting would be more conducive to assist Student with processing incidents of misbehavior. [NT 35, 63]
55. The Supervisor testified that Student was put into the emotional support classroom for reading, science and social studies because those were the classes in which Student “had had some behavioral difficulties”. [NT 67]
56. Contrary to the Supervisor’s testimony above, social studies was Student’s best subject and the subject was of great interest to Student. Although Student had been successful in the social studies regular education class and the teacher told the emotional support teacher that Student could remain in the regular education social studies class, the District decided to pull Student away from all regular education classes and use return to social studies as an incentive to improve behavior in the hallways and in other classes. [NT 204-205]

57. Student likes social studies and likes history. Student would always have nonfiction history library books in class. During class if the social studies teacher was giving a lecture, Student was always paying attention. Student was not disruptive. Student would volunteer to read. Student would answer questions. Student would make inferences about some of the material that other students would not even think to make. Student could recall things from sixth grade social studies that Student would relate to the topics the teacher was talking about. In the opinion of the social studies teacher Student “was a fan of history, it's very safe to say”. [NT 205-206]
58. The social studies teacher was successful with Student. The teacher found common interests with Student and Student generally did well with this teacher; the teacher believes that as a teacher it's his job to relate to kids. [NT 208-210]
59. Following the February 19th assignment to full time special education, Student continued to engage in inappropriate behaviors including disrupting the class, running in the halls and in the cafeteria and calling other pupils insulting names. A sampling of other types of incidents: On several occasions Student entered the school building via the teachers' entrance, on April 17th Student passed gas in close proximity to a staff member, on April 18th Student mocked a staff member's laugh, on April 29th Student harassed a peer; on one occasion Student “pantsed” a same-gender friend in the hallway⁵. [NT 43, 81-82, 166-168, 209-210; S-35]
60. It was difficult to find an avenue of intervention that would work for Student as Student did not seem to care about positive or negative consequences. [NT 32-33, 144, 165]
61. On March 27, 2013 the Parent informed the emotional support teacher that she wanted Student out of special education immediately. There is no evidence that the District issued a Procedural Safeguards Notice or a NOREP or that a meeting with the IEP team was convened to address her concerns. [S-35]
62. Although Student represented to the Parent that Student disliked the emotional support teacher, this was not observed by the guidance counselor who had the opportunity for frequent contacts with Student and this teacher. [NT 134-135]
63. The emotional support teacher would bring Student up to the guidance counselor's office to talk about behavior alone or with the principal or assistant principal. At times it seemed that staff was getting through to Student but in the next class period it was like the conversation with staff “never happened”. [NT 130-131]
64. The emotional support teacher called the guidance counselor down to the classroom on one occasion when Student was in the corner of the room, feet up on a desk, singing *The Wheels on the Bus* “at the top of [Student's] lungs”. This was during the time when the emotional support teacher was trying to teach Student social studies on a one-to-one basis. When Student would not stop, staff called Student's mother who spoke with Student on the phone. [NT 132-133]

⁵ Underwear stayed up.

65. The social studies teacher thought Student's relationship with the emotional support teacher was very good and observed that the emotional support teacher always has a strong relationship with his students. The social studies teacher thinks that Student never really bought into the emotional support program. The Parent reported that Student resented the emotional support classroom and wanted her to get Student removed from there. [NT 212-213, 215-216, 230]
66. Student's re-evaluation was done pursuant to the January 9, 2013 IEP meeting [PTE issued January 24, 2013 and signed as approved by the Parent on January 29, 2013. PTE revised on February 20, 2013 and signed as approved by the Parent on that same date]. [S-15]
67. The re-evaluation report issued on April 1, 2013 contained the FBA done by an IU employee, a Board Certified Behavior Analyst [BCBA]. Notably this ER was completed nearly three months after the IEP meeting at which it had been discussed. [NT 70; S-23]
68. The FBA finding was that Student engaged in inappropriate behaviors to avoid difficult work and to gain peer acceptance. The BCBA provided a comprehensive list of PBSP recommendations. [NT 82; S-23]
69. Despite the FBA's finding that one function of Student's behaviors is to avoid difficult tasks there was no recommendation in the April 2013 for a neuropsychological evaluation to see if there were issues in learning other than math. [S-23]
70. Despite Student's continuing to be classified as emotionally disturbed, the April 2013 re-evaluation again did not include a psychiatric evaluation. Although behavior rating scales were utilized, the scores were not reported.⁶ [NT 70-72; S-23]
71. The District's re-evaluation recommended a more restrictive placement for Student and the District began speaking with the Parent about making application to Approved Private Schools. The Parent initially would not approve sending packets of information to the schools to seek admission but later gave consent. Responses were received from several APSs favorable to accepting Student. [NT 92-93; S-37]
72. Because Student's previous IEP had expired, on April 11, 2013 the District held an interim IEP meeting with Student's mother participating by telephone. As the Parent had not had the full amount of time to consider the re-evaluation report, the IEP did not include the re-evaluation findings in the Present Levels section. The team did add computer time, bonus points and praise to the points rewards system. [NT 73-78; S-25]
73. On May 6, 2013, toward the end of Student's 7th grade school year the IEP team met and updated the April 11th IEP, and considered the re-evaluation report of April 1, 2013. [S-28]

⁶ Unfortunately the author of the report could not be asked about the results since that psychologist is no longer employed by the District.[NT 72]

74. Student's grades were reported in the May 2013 IEP as follows for the first, second and third marking period, and were in contrast to grades received before Student was placed in special education: Social Studies 76/87/71; Math 70/60/52; English 78/75/71; Reading 81/85/65; Science 76/78/71. [S-28]
75. The SDI section of the May 2013 IEP is notable for removal of "use of calculator" and the addition of a one-to-one support person assigned for times when Student travelled in the hallways to prevent inappropriate behavior and during classes to help Student focus. [NT 80-82; S-28]
76. In spite of the BCBA's finding that a weekly or monthly reward system was not working, the SDIs kept the reinforcement schedule at weekly and monthly. The daily point system allowed children to earn weekly and monthly rewards. The system was not always effective for Student because Student would come into class without the sheet. It appeared that Student never really bought into the point system. [NT 180-181, 199, 207; S-28, S-30]
77. Other than adding the one-to-one support person for the hallways and during classes, the SDI's did not reflect the FBA. The IEP team did not revise the old sketchy PBSP or create a new robust PBSP to incorporate the behavior analyst's recommendations. [S-28 and following]
78. At the May IEP meeting the District concluded that Student should be placed in a full time emotional support program in an APS because of the therapeutic component in such a placement. The District issued a NOREP to that effect on May 6, 2013 which the Parent did not approve. [NT 33-34, 36, 73, 84; S-27]
79. The Parent continues to maintain that the behaviors Student was displaying were typical of a child Student's age, and that they were not to the extent of requiring emotional support in general and especially not in an approved private school setting. [NT 36, 84-85]
80. With the school social worker's assistance the Parent located and took Student to see a therapist and also took Student to see a psychiatrist; medication for a possible diagnosis of ADHD is being considered. Student saw the therapist about four times towards the end of the school year. Student is due to return to the psychiatrist before school starts to see if medication is appropriate. [NT 22-23, 84-85, 87-88, 91, 227-228; S-35]
81. The District believes that Student would benefit from the services of an APS such as interaction with a team of people to provide group sessions on social skills, modeling of appropriate behaviors, group counseling and therapy, and assistance in processing situations. The District is concerned that unless Student receives help something bad will happen to Student. [NT 35, 95-98, 101-102, 153-154, 170]

82. The District believes that this kind of support “[is] not something that’s part of necessarily the public school environment”. [NT 36]
83. The District believes that it has provided the maximum amount of support for Student that it can provide. [NT 35, 129, 136]
84. The District believes that Student was not successful in being able to adapt and to display more appropriate behaviors, and to engage and learn without exhibiting some of the behaviors that were disruptive to Student’s learning. [NT 35, 200, 222]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parent asked for the hearing and thus assumed the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

I was particularly struck by the care and concern the District witnesses have for Student, as well as for the underlying positive regard demonstrated by the Parent and the District personnel toward one another despite their sharp disagreement about Student’s placement. I find that every witness in this matter testified honestly and to the best of his/her knowledge and belief. I also want to comment that the grace and patience shown by District counsel in this difficult matter was very much appreciated.

Special Education: FAPE: Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention

benefit and student or student progress; and provided in conformity with an Individualized Educational Program (IEP).

School districts and other LEAs provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” at the time it was created to enable the student to receive “meaningful educational benefit”, a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist.*, WL 2682741 (E.D. PA. July 8, 2011) *aff'd*, 2013 U.S. App. LEXIS 11091 (3d Cir. 2013).

An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the student only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk*. “Meaningful benefit” means that an eligible student’s program affords him or her the opportunity for “significant learning.” *Ridgewood Bd. Of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999). In *Ridgewood* the Third Circuit rejected the notion that there could be a “single standard” for determining what constitutes an appropriate program under IDEA.

Emotional Disturbance: The applicable implementing regulations of the IDEA define Emotional Disturbance as follows: (i) *Emotional disturbance* means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors; (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) Inappropriate types of behavior or feelings under normal circumstances; (D) A general pervasive mood of unhappiness or depression; (E) A tendency to develop physical symptoms or fears associated with personal or school problems.(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section. 34 C.F.R. § 300.8(a)(4).

Parental Participation: The IDEA properly places prominent value on the role of Parent in the education of their children, including decisions about placement. “Each public agency must ensure that the Parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.” 34 CFR §300.327, 34 CFR §300.501(c)

Least Restrictive Environment: The IDEA requires that disabled students be placed in the least restrictive environment that will provide meaningful educational benefit. Congress has expressed a clear intent and preference that disabled children be placed in regular education classes, and that removal of a student from regular education classrooms is permissible “only

when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C.A. § 1412(a)(5)(A); 34 CFR §300.550. Pennsylvania State regulations adopted by reference from the IDEA state verbatim what an IEP shall contain. 22 Pa. Code § 14.131(b) and 22 Pa. Code § 14.102 (a)(2) adopt all federal regulatory requirements, including the requirement that a student be educated in the least restrictive environment.

A plethora of case law supports IDEA’s mandate that education must occur in the least restrictive environment appropriate for the individual child. An early landmark Third Circuit case on inclusion, *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993) 19 IDELR 908] counsels that the failure to consider the full range of supplementary aids and services to enable a student to be educated in regular class to the maximum extent appropriate is sufficient to establish liability for violating the mainstreaming requirement of the IDEA. “If the school has given no serious consideration to including the child in a regular class with supplementary aids and services and modifying the regular curriculum to accommodate the child, then it has most likely violated the Act’s mainstreaming directive.” The expectation of least restrictive environment is so rigorous that the courts have held, for example, that an LEA is prohibited from placing a child with disabilities outside of a regular education classroom if educating the child in the regular classroom with supplementary aids and support services can be achieved satisfactorily. If the LEA fails to offer the student a program and placement which occurs in the least restrictive environment, it has failed to offer FAPE. The two concepts (LRE and FAPE) are inextricably intertwined. Children who are not provided with educational services in the LRE appropriate to their needs are not provided FAPE. *Millersburg Area School District v. Lynda T.*, 707 A.2d 572 (1998).

Contemplating the IDEA’s Least Restrictive Environment requirement, our Third Circuit has construed the language of the IDEA to prohibit local educational agencies from placing a child with disabilities outside of a regular classroom, if educating the child in the regular education classroom, with supplementary aids and support services, can be achieved “satisfactorily.” *Oberti v. Board of Ed. of Clementon Sch. Dist.*, 995 F.2d 1204, 1207 (3d Cir. 1993). A federal district court in the western part of Pennsylvania has instructed that consideration of educating the child in the regular classroom with supplementary aids and services must be more than a perfunctory glance toward the option of full inclusion, as the word “serious” implies. See *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 WL 22988892 (W.D. Pa. 2003).

Authority of the Hearing Officer: The IDEA authorizes hearing officers and courts to award “such relief as the Court determines is appropriate” 20 U.S.C. § 1415(h)(2)(B). It is the explicit obligation of the hearing officer to base hearing decisions on the substantial evidence of record and upon a determination whether the child in question received FAPE. 20 U.S.C. §1415(f)(3)(E). Moreover, just as courts hearing civil actions brought to challenge a decision of a hearing officer are directed by the IDEA statute to “grant such relief as the court determines is appropriate,” the hearing officer must, at times, fashion an appropriate equitable remedy where FAPE has been denied. See, 20 U.S.C. §1415(i)(2)(C); *Simchick v Fairfax County School Board*, 553 F.3d 315 (4th Cir. 2009).

Discussion and Conclusions

The heartfelt testimony of the District's witnesses provided compelling evidence that Student is regarded with genuine affection and concern, but is also severely trying the patience and exhausting the strategies of almost all the school staff working with Student. It is clear that Student's behaviors, even though not "outrageous", make Student stand out starkly from the population of the [generally] more compliant same-age children in the school; it is possible that in another school district Student would not stand out so starkly. It is clear that District staff is sincere in its belief that Student would be best served in an APS, not only to address the overt behaviors, but also to address underlying emotional issues driving the behavior. It was also clear that each witness considered the supports provided to Student in 7th grade appropriate, and in the words of the Supervisor, "the maximum support" available in a public school setting.

For her part, the Parent professes to believe that Student's behaviors are typical of a pre-teen [now early teen] aged child and that her child is not emotionally disturbed. However, mother's testimony, as well as that of the guidance counselor, established that the Parent is concerned and deeply troubled by some of Student's behaviors particularly as they are manifested in the home setting. Given that the Parent is untutored in special education law, she would not be expected to understand that her child's behaviors in school combined with the Student's answers across three self-report assessments do in fact support a special education classification of emotional disturbance as defined above. The Parent cannot be faulted for equating "emotionally disturbed" with "crazy" given the unfortunate perceptions that still linger in the general public's understanding of mental health issues. Additionally, what appears to be the underlying basis for her objections to an APS placement is the Parent's concern that the pupils who are sent to approved private schools are much more behaviorally disordered than Student, and she is particularly concerned that in at least some APS programs pupils are placed because of physically aggressive behaviors. Finally, the Parent in this case is not conversant with the IDEA and its mandate for a child to be educated in the LRE, a point she could have legitimately raised in her testimony had she known.

I cannot find that an APS placement is appropriate at this time because the District has yet to provide an appropriate placement within the public school. Although it is true that the District applied many interventions, for this particular child they seemed to be the wrong interventions, and it is this very point that led to the District's failure to prevail in this matter. A careful reading of the testimony and the exhibits, captured in the factual findings above reveal that:

The District took one whole year to provide Student with an appropriate FBA despite inappropriate behaviors occurring prior to the finding of eligibility and throughout the whole first year of Student's special education programming.

At no time did the District create and faithfully implement an appropriate individualized Positive Behavior Support Plan for Student, not even when there was finally a comprehensive FBA as of April 1, 2013.

The point system that seemed to form the entirety of the behavior support plan provided to Student was irrelevant to Student's particular issues, was not completed in such a way

that it comported with the District's witnesses' testimony about Student's behavior, was not set up to provide frequent enough reinforcers [even after the April 2013 FBA suggested a revision in this regard] and did not include a specific list generated from Student of desired reinforcers. Moreover even when it became obvious that Student was not "buying into" the point system the District continued employing it in its inappropriate format.

Student's grades before placement in special education and after placement in special education demonstrate that Student was not making meaningful educational progress under the IEPs provided. [Contrast FF 11 with FF 74] Student's grade were worse after receiving special education than before, even in the specific area [math] of Student's learning disability. Tellingly, Student's grades deteriorated even further when the District decided that a full-time special education placement [all major subjects in the emotional support classroom with one period in learning support] was needed. Although Student did not testify, it can reasonably be inferred that Student was 'voting with Student's feet' [actually, with Student's behavior], doing everything possible to get out of the emotional support special education class.

Student's outstanding strength was ignored. Student is very bright, and has an intellectual passion – social studies/history. Student prefers to read non-fiction, is never without a library book, and is always learning something in the area of interest. Student typically related to the social studies teacher in an appropriate manner, and it seems that the social studies teacher had found the key to relating to Student. Removing Student from the regular education social studies classroom where Student was a valued and insightful participant was simply wrong, and having Student possibly earn a return to the general education social studies classroom as a "reward" for better behavior is contrary to the IDEA's LRE mandate.

Student obviously requires learning support for math; participation in that one class might not have struck so intensely at Student's self-esteem if it were the only special education class. Further, the specially designed instruction in math may have been much more effective if it had been delivered through a scientifically based peer reviewed sequential program for children with a learning disability in math rather than through a variation on the regular education math curriculum.

In spite of a clear statement in the original evaluation that Student had receptive and expressive communication difficulties, the District never performed a speech/language evaluation to see if there was a language disorder.

In spite of the conclusion of the behavior analyst that one of the two functions of Student's inappropriate behaviors was to avoid difficult work, and in consideration that this child has a high verbal IQ but difficulty in most subjects, the District did not proceed to a neuropsychological evaluation to see if there are areas in addition to math that are impaired.

Although Student was classified as emotionally disturbed on the first evaluation, and

behaviors worsened by the time of the second evaluation, neither evaluation included a psychiatric evaluation.

In spite of Student's classification of emotional disturbance and behavioral problems the District did not include in any IEP regularly scheduled individual sessions with the guidance counselor, and/or regularly scheduled individual sessions with the social worker, and/or regularly scheduled individual sessions with the third person providing counseling services, and/or participation in a social skills group or a friendship group.

The evidence is overwhelming that the District failed to apply appropriate supports and services to enable Student to succeed in the regular education setting. Once Student was placed in the more restrictive emotional support setting, and it became obvious that Student's behavior was not improving, instead of reassessing its program for Student the District just added more of what was already not working, and put Student entirely in emotional support. When, not surprisingly, this did not bring about the desired change, the District's response was to attempt a placement in an even more restrictive setting, an APS.

I agree with the Parent that placing Student in an APS at this time is inappropriate, not because Student is too young or because other children in the APS may be more aggressive, but because the District simply failed to provide an appropriate program in the less restrictive setting. Until Student is provided regularly scheduled individual and group counseling, and an individualized PBSP, and other necessary supports, and receives the necessary evaluations, the District has not given the "serious consideration" to placement in the regular education setting that the IDEA demands.

The Parent should not interpret the foregoing as in any way implying that Student does not qualify for the classification of emotional disturbance. Student's responses on structured inventories and projective tests at the time of the re-evaluation, Student's behaviors in the school setting, and Student's behaviors in the home are certainly of considerable concern. There are indications that Student may be depressed, and the irritability Student displays is a common symptom of depression in children. Along with an appropriate school program Student absolutely requires outpatient therapy with collateral family therapy sessions and, if prescribed by a psychiatrist, medication management. The Parent's following through with these two services that are in her control will go a long way to helping to ensure that the District's program works for Student.

Finally, the parties must understand that should an appropriate educational program carried out with fidelity in the public school not result in significant changes, there is nothing in this decision that should be construed as prohibiting the District from seeking an APS placement in the future.

Exercising my authority to fashion an equitable remedy for a past denial of FAPE and to promote Student's success in the public school setting, I hereby issue the following:

Order

It is hereby ordered that:

1. An Approved Private School is not an appropriate placement for Student at this time.
2. Student is to return to the District's middle school. Within ten calendar days of the date of this decision the IEP team must convene and design an appropriate program for Student that includes all the supportive services necessary for Student to make meaningful educational progress in the least restrictive environment. The IEP team must *begin with the presumption* that Student will be educated in general education classes rather than in an emotional support classroom, and must consider *inter alia* regularly scheduled 30 minute sessions with the guidance counselor or social worker or other counselor once per week with provision of additional sessions as needed, participation in an ongoing small counseling group designed for middle school students who are immature and require instruction in social skills, appointing the social studies teacher as Student's mentor, providing the services of a one-to-one aide as needed throughout the day, and establishing regularly scheduled communication with Student's psychiatrist and outpatient therapist.
3. Within 10 calendar days from the date of this decision the IEP team shall meet and create an individualized and detailed Positive Behavior Support Plan. The BCBA shall be present at this meeting. Student should be invited to give specific input in person or through writing regarding desired reinforcers as well as fair consequences. The Parent must be present at the meeting.
4. The BCBA shall consult with the District for 60 minutes per month to modify as necessary and to monitor the implementation of the PBSP. This service shall be written into the IEP.
5. Within 30 calendar days of this Order, the District shall procure and fund a psychiatric evaluation for Student to determine the nature of Student's behavioral/emotional difficulties and to ascertain whether a trial of medication would be appropriate. The psychiatrist must be one who works regularly with school districts and who includes interviews with school personnel as part of the evaluation.
6. Within 60 calendar days of this Order, the District shall fund an independent comprehensive neuropsychological evaluation to ascertain if a heretofore undiagnosed learning disability in reading and/or written language, or another interfering process, is forming the basis of Student's work refusal.
7. Within 60 calendar days of this Order the District must perform a speech/language evaluation to explore whether Student has a receptive and/or expressive communication disorder.

8. As part of the IEP the District must offer parent education and training to assist the family in helping Student manage behavior in school and at home, and to assist the family in being consistent with following through with outpatient therapy and medication management.
9. Nothing in this Order shall be construed as prohibiting the IEP team from considering a future APS placement for Student if the supports outlined above prove to be ineffective in managing Student's behavior such that Student cannot receive meaningful educational benefit from an appropriate special education program in the public schools.

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

August 19, 2013

Date

Linda M. Valentini, Psy.D., CHO

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