

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

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 14223-1314 KE

Child's Name: J.B.

Date of Birth: [redacted]

Dates of Hearing: 12/19/13, 12/20/13, 1/31/14

CLOSED HEARING

Parties to the Hearing:

Parents

Parent[s]

School District

West Jefferson Hills
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Representative:

Parent Attorney

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Date Record Closed:

March 21, 2014

Date of Decision:

April 14, 2014

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student was identified as IDEA eligible in the Learning Disabilities category near the end of 4th grade, the first year of enrollment in the District. Although Student struggled academically in both elementary and middle school, Student was noted by teachers to be respectful and compliant, although sometimes lacking focus in the classroom.

Student's demeanor changed dramatically in 9th grade, when behavior problems and complaints of almost constant illness arose immediately. In the summer between 8th and 9th grades, Student was diagnosed with ADHD, ODD and depression, and began taking medication. A psychiatric hospitalization in October and attendance issues prompted the District to conduct an FBA and develop a behavior plan that was implemented in January 2011. Student's problem behaviors, including cutting class, tardiness, defiance and disrespect continued through 9th grade and escalated in 10th grade until an explosive incident in December 2011 resulted in the District placing Student in a private, alternative school for students with behavior problems. Student's problem behaviors continued to escalate and academic achievement decreased until the parties agreed, via mediation, to homebound instruction in February 2013 through the end of the school year. Student enrolled in a cyber charter school for the current school year.

Parent initiated the due process complaint in August 2013, seeking compensatory education for the 2011/2012 and 2012/2013 school years, primarily for the District's alleged violations of the IDEA Least Restrictive Environment (LRE) requirements as a result of the private school placement. The record compiled over three hearing sessions in late December 2013 and late January 2014 established numerous procedural and substantive IDEA violations, and that Student regressed in behavior and academics in both the District and private school placements, resulting in a substantial award of compensatory education for Student.

ISSUES

1. Did the School District fail to appropriately evaluate student for all potential disabilities?
2. During the course of District evaluations, did the District fail to fully assess all of student's needs?
3. Did the School District fail to assure Parent's meaningful participation in all decisions made regarding the educational placement, or the provision of a Free, Appropriate, Public Education to Student?
4. Did the School District fail to appropriately consider all available supports and services, as well as fully consider a continuum of placements before selecting a private school for student's placement in December 2011, through the end of the period that Student was placed in that setting?
5. If Student was denied an appropriate placement in the Least Restrictive Environment, and/or if Parent was denied meaningful participation in the IEP process, is Student entitled to an hour for hour compensatory education award from the December 2011 private school placement until the end of the 2012/2013 school year?
6. Did the school District offer an appropriate program/placement in the last proposed IEP, dated November 29, 2012.

FINDINGS OF FACT

1. Student, a late-teenaged child, born [redacted] is a resident of the School District and is eligible for special education services. For the 2013/2014 school year (12th grade), Student has been enrolled in a cyber charter school, not in a District educational placement. (N.T. pp. 11, 12 (Stipulation), 41)
2. Student has been identified as IDEA eligible in the category of specific learning disabilities, in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 12)
3. Student consistently struggled with math and reading skills from the beginning of school, but exhibited no behavior problems during the elementary school years. (N.T. p. 42; J-1 p. 1)¹

¹ Commendably, the parties submitted primarily joint exhibits in this matter, which avoided an unnecessarily long documentary record. The joint exhibits are designated by the letter "J" followed by the exhibit number. Additional exhibits submitted by each party separately are designated "P" for Parent and "S" for School District followed by the exhibit number.

4. The District first evaluated and determined that Student met the criteria for a specific learning disability in reading in the spring of 2006 (4th grade), during Student's first year in the District. (N.T. pp. 41, 596, 597; J-1 p. 2)
5. Teacher observations included in the triennial evaluation of Student conducted in the fall of 2009 (7th grade) noted that Student was sometimes distractible, consistently failed to complete homework assignments, did not appear to be working outside of class to maintain skills, displayed inconsistent effort in class, was working below grade level in all academic subjects except social studies, and that in most academic subject areas, Student appeared to lack motivation. (N.T. pp. 598, 599, 601; J-1 pp. 4—6)
6. None of the teachers reported problems in demeanor, such as noncompliance with directives/classroom rules, or in behaving respectfully toward teachers. Parent's input, however, indicated some behavior difficulties at home when Student was unable to get what s/he wanted. (N.T. pp. 601—603; J-1 pp. 2, 4—6)
7. The 2009 reevaluation included no additional standardized assessments of ability or achievement, based upon the school psychologist's conclusion that there was sufficient data to determine continued IDEA eligibility and Student's needs. The District school psychologist also declined to follow the recommendation from behavioral health agency staff to assess Student for attention deficit/hyperactivity disorder (ADHD), since she did not believe an additional disability category would have added helpful information for Student's educational program/placement. She believed that the low grades reported by teachers were due to lack of motivation and interest. (N.T. pp. 601, 628—631)
8. Student's PSSA scores in 5th, 6th and 8th grades were in the "Below Basic" range on all skill and content areas assessed. (N.T. pp. 275; J-1 p. 3, J-8 p. 4)
9. In the summer between 8th and 9th grades (2010), Student received medical/psychological diagnoses of ADHD, oppositional/ defiant disorder (ODD) and depression. Student began taking medication for ADHD and depression. (N.T. pp. 43; J-8 p. 2)
10. When Student entered high school in the 2010/2011 school year, the District continued itinerant LS services pursuant to an IEP with two goals to address Student's learning disability in reading. LS services were delivered primarily in the regular education classroom, but Student was placed in a resource room math class. Student's English class was co-taught by a certified special education teacher. (N.T. pp. 45—47, 176; J-3, P-1 pp. 1, 5—7)
11. Early in 9th grade, Student began missing school due to complaints of illness, generally headaches and stomachaches. Student visited the nurse and the school social worker frequently on the days Student attended school. When Parent took Student to doctors for complaints, physical illnesses were diagnosed, including mononucleosis, migraines and pneumonia. (N.T. pp. 48, 49, 51, 360, 361; J-40 p. 11, J-42 pp. 1, 3—27)

12. Student fell behind in classwork early in 9th grade and began to engage in disruptive behaviors in the classroom. Problem behaviors at home also escalated. (N.T. pp. 50, 52, 53, 177)
13. By late September, Parent had verbally informed Student's special education teacher of the recent mental health diagnoses, prompting him to schedule a late October IEP meeting and inform the school psychologist who had conducted the 2009 evaluation, as well as raise the question whether Student's disability category might need to change. The District requested, and was granted permission by Parent to speak to Student's treating physicians, but no one from the District contacted them.² (J-51 pp. 2, 3)
14. In late October, 2010, Student was admitted to a psychiatric hospital for five days for mental health treatment due to threats of self-harm. (N.T. p. 50; J-42, p. 2)
15. A "staffing" meeting that included Student and Parent was convened on November 8, 2010 to discuss Student's transition back to the high school after the hospitalization, and a few additional days of absence due to mononucleosis. A staff member from the local behavioral health agency was also invited. An intervention that had been discontinued due to alleged abuse was reinstated, *i.e.*, Student was given a pass to be signed by the teacher upon entering and leaving the classroom for any reason such as using the restroom, visiting the nurse or the social worker. Developing parameters for appropriately using the pass was deferred pending further discussion with Student. (N.T. pp. 54, 58, 179, 183, 184, J-5, J-40 p. 13, J-51 pp. 12, 13)
16. Another meeting was convened on November 30 primarily because of staff concerns about Student's accountability for using the hall pass, as well as instances of Student's direct requests to Parent to be picked up before the end of the school day, resulting in staff being unaware that Student had left the school. At the November 30 meeting, Student's use of the hall pass was limited to once/day and a crisis plan was developed for dealing with serious escalations in Student's increasingly defiant behaviors and disrespect toward adults. Student could still request to see the nurse or the social worker after the pass was used for the day, but they would be asked to come to the classroom to meet Student and/or escort Student to their offices. (N.T. pp. 56, 183, 184; J-40 p. 13; J-51 pp. 14, 17, 19)
17. In addition to showing disrespect, Student was becoming increasingly resistant to and resentful of adult demands and challenges to Student's freedom to move around the school. Student would occasionally see the social worker during or after a difficult day, but was not always willing to talk to her about concerns, anxieties and frustrations either when the social worker or Student initiated a meeting. (N.T. pp. 55, 56; J-8 pp. 2—5, 7, 8, J-40 p. 13)

² The record is not clear with respect to whether Parent was ever presented with a written release to allow the District access to Student's medical records and whether Parent either signed or failed to sign a release, but it appears that the District expected Parent to obtain Student's medical records and provide them to the District. The record is also unclear with respect to whether Parent was aware of how the District expected to receive Student's medical records.

18. After the 11/30 meeting, the District requested, and was granted, permission from Parent for a reevaluation of Student, limited to conducting a functional behavioral assessment (FBA). (N.T. pp. 59; J-6 p. 7,)
19. Despite knowing of Student’s recent hospitalization and behavior issues in school, the District school psychologist who had completed the 2009 evaluation report did not believe that a full reevaluation of Student was warranted at that time. She believed that a return from a psychiatric hospitalization was an insufficient reason to “jump into a reevaluation” that might result in a change of disability category because behavior supports were to be put in place after the FBA was completed. The school psychologist believed it would be better to see how Student responded to the intervention before determining whether to reevaluate. (N.T. pp. 604—606)
20. The FBA was compiled by Student’s special education teacher and the school social worker. It was based upon a review of Student’s attendance records, a listing of numerous negative behaviors observed in the school setting, comments and descriptions by the school social worker of her interactions with Student, and a form with several questions, the answers to which indicated that Student’s behaviors could be related to physical and psychiatric conditions and medication side effects. (J-6 pp. 2, 3)
21. With respect to antecedents, the answers on the form and the school social worker’s comments noted that the behaviors always occurred when Student was told “No,” that Student became agitated easily when requests were refused, but calmed immediately as soon as Student was able to obtain what s/he wanted, that the behaviors occurred in response to demands and with authority figures, and that the behaviors were more likely to occur during the second half of the school day. (J-6 pp. 3—6)
22. The FBA also described interventions that were or had been in place, *i.e.*, opportunities to discuss concerns, frustration and anxieties; modified schedule due to physical illness, numerous Parent and staff meetings, and use of the hall pass. (N.T. pp. 189; J-6 p. 5)
23. The function of the behaviors was described as escape from or avoidance of aversive academic tasks. Consequences were described as leaving school upon demand, gaining attention from adults and the ability to use the hall pass to gain unstructured time to engage in desired activities rather than attend classes. (J-6 pp. 3—6)
24. Although no assessments of any kind were conducted other than the FBA, the District reviewed records and obtained Parent input, including information about Student’s mental health diagnoses, to compile a reevaluation report (RR) which concluded that “based on teacher reports and observations, [Student] does not demonstrate evidence of an emotional disturbance.” Student’s IDEA eligibility in the LD category continued, despite the significant behaviors that are not ordinarily associated with educational disabilities. The “teacher reports and observations” were not further identified, and the conclusion that Student did not meet the ED criteria, were not further explained in either the RR or in the hearing testimony of the school psychologist. (N.T. pp. 607—609; J-8 pp. 2—5, 7, 8)

25. Teacher comments in the RR attributed Student's low grades and missing assignments to Student's frequent absences from school, tardiness and absences from classes on the days Student attended school, due to overuse of the hall pass. All of Student's teachers noted that when in class, Student was able to effectively participate and complete the work. (J-8 p. 5)
26. An observation by Student's special education teacher in the Resource Math class noted that Student took notes and participated in class with some prompting cueing, and that Student was on task 90% of the time. (J-8 p. 5)
27. The District special education supervisor later conceded that a full reevaluation might have provided additional information to the IEP team to address Student's problem behaviors detailed in the RR and FBA. (N.T. pp. 266, 267; J-8 pp. 2—5, 7, 8)
28. In November and December 2010, Student resisted the limitations imposed by the hall pass system and continued to arrive late and miss classes. After the November 30 meeting, Student curtailed visits to school social worker in order to "save" the pass for visiting the nurse if needed. Student continued to ask to be picked up early by Parent. (N.T. pp. 56, 57; J-5, J-40 pp. 11, 12; J-51 pp. 19—26)
29. Student's IEP team met in January 2011 to review the RR and FBA and developed a new IEP with a behavior plan. The IEP and behavior improvement plan proposed by the District included one behavior goal, reducing the use of the hall pass to 2 times/week. In addition to the hall pass behavioral goal, the January 2011 IEP also included a goal for homework completion. (J-9 p. 4, J-10 pp. 16, 17)
30. As prevention strategies to forestall problem behaviors, the behavior plan continued the opportunity to discuss concerns, anxieties, frustrations, and the 1 time/day limit on the use of the hall pass, and prohibited cell phone use during the school day. As negative consequences for engaging in the behaviors of concern, Student was to be reported to the principal for cell phone use, receive detention for being tardy to class. Teachers were to strictly enforce the pass system. (J-9 p. 5)
31. Replacement behaviors were listed as, "Model positive personal interaction skills; Roll (*sic*) play potential situations when the negative behavior is typical to occur and discuss positive ways to resolve the situation; Use incidental teaching when the negative behavior does occur." (J-6 p. 5)
32. Positive consequences for engaging in replacement behaviors were described as positive student and staff interactions, positive learning situations and more time on task, successful completion of demanding tasks and improved grades. (J-9 p. 5)
33. Specially designed instruction (SDI) included the opportunity to take tests in the resource room with 100% extended time, check for understanding, break complex tasks into smaller components, encourage class participation and discussion, provide structured study guides, monitor rate of homework completion. The only SDI related to behavior

- issues was a recommendation to provide Student with 3—4 feet of personal space “during periods of escalation.” (J-9 p. 7, J-10 pp. 18, 19)
34. After the IEP meeting, Student’s special education services level was changed from itinerant to supplemental. A NOREP issued after a follow-up IEP meeting in early February 2011 described full time special education placement as too restrictive. (J-10 p. 22, J-13 p. 2)
 35. From the time Student returned to school in November 2010, no behavioral strategies other than the hall pass and the restriction on using it were initiated. Academic support included a brief period of homebound instruction when Student’s mental health related absence in late October was extended due to the mononucleosis. The high school assistant principal also arranged for an English tutor in November 2010, but scheduling tutoring sessions proved difficult. There was also a brief reference to biology tutoring, but the record does not disclose how much tutoring Student received in 9th grade and in which subjects. (N.T. pp. 58, 189, J-51 pp. 14—16, 18, 25)
 36. Progress monitoring reports from the second half of the 2010/2011 school year suggested moderate behavioral progress during the 3rd quarter that was not maintained through the 4th quarter. Teachers continued to report tardiness and disruptive behaviors. Parent perceived no change in Student’s behaviors based upon contacts from teachers during the remainder of the school year. District staff conceded that the behavior plan was not working as well as the staff had hoped, that Student’s behaviors did not improve overall or significantly with the behavior plan in place during 9th grade or as a result of numerous meetings. (N.T. pp. 75—77, 213, 282—284, 287, 455; J-11, J-40 pp. 3—11, J-51 pp. 27—40)
 37. Near the end of the school year, Parent notified the District that Student had again been hospitalized for mental health reasons. (J-40 p. 3)
 38. Student ended 9th grade with a 1.23 average, including four “Cs,” two “Ds” and an “F” in academic classes. (J-10 p. 17; J-50)
 39. When Student returned to school in 10th grade, the hall pass system was discontinued by the principal at Parent’s request, without an IEP meeting. The problem behaviors, including roaming the halls, tardiness and disrupting classes continued and increased in frequency and intensity. Student began having negative interactions with peers as well as adults. Student received nine out of school suspensions between September and December 2011. (N.T. 78—80, 82, 218—232; J-11 p. 1, J-16 pp. 2, 7, J-51 pp. 43—80, 82, 83, 86—91)
 40. In November, the District offered the Student Assistance Program (SAP) as a “next step” to correct the discipline issues before placing Student in alternative education, but Parent declined, believing that the program would not be helpful in developing new information or in addressing Student’s behavior issues. (J-51 pp. 80, 81, 85,)

41. The District did not propose formal revisions to Student's behavior plan, a new FBA or any other changes to Student's IEP. The District informally added additional supports, such as increased positive reinforcement and contact/meetings with Parent. (N.T. pp. 218—228)
42. On December 8, Parent notified Student's English teacher that Student's medications needed to be adjusted, which accounted for some absences due to Student' feeling ill, and for Student's additional classroom difficulties with focus and attention. Blood tests that Parent obtained in response to Student's complaints of not feeling well revealed the need for an adjustment. At the time of the message to the English teacher, Parent was waiting for the doctor to review the blood test results. (J-51 pp. 89—91)
43. On December 9, Student was involved in an explosive incident involving the school social worker and a peer with whom Student was involved in a long term romantic relationship. The peer spoke to the social worker after an argument with Student in the school cafeteria. The social worker called Student to her office and told Student that s/he should curtail the close contact Student sought with the other student during school hours. Concerned that Student might confront the peer after school, the social worker called the peer to her office before dismissal. Student was very angry that the peer was confiding details of recent difficulties in their relationship to the social worker, confronted the peer in the social worker's office and refused the social worker's request to leave. Concerned for their safety, the social worker locked herself and the peer in her office. A nearby staff member called for assistance, and the social worker called Parent to pick Student up to avoid further trouble. (N.T. pp. 84, 85; J-40 pp. 1, 2J-51 p. 92)
44. The District scheduled an IEP team meeting within a few days of the incident. Recognizing that the behavior interventions in place were not working, a review of records was undertaken for a reevaluation of Student. Upon determining that additional information was needed, the District issued a permission to reevaluate (PTRE) to Parent on December 23, 2011, January 6 and 17, 2012 which she did not return. In addition to review of records, parent input and classroom observation, the District proposed a new FBA and assessments of behavior and social/emotional functioning. (N.T. pp. 611, 612; J-16 p. 6, J-18 p. 1)
45. The draft RR compiled as a result of the December 14 meeting concluded that Student did "not demonstrate evidence of an Emotional Disturbance based on parent and teacher reports. [His/her] behavior is indicative of social maladjustment, which is a rule-out for Emotional disturbance." The District school psychologist defined "social maladjustment" as "a pattern of behavior that is willful, deceitful and volitional...something the student chooses to do despite knowing what appropriate social norms are." (N.T. pp. 615, 616; J-16 p. 12)
46. On December 15, 2011 the District issued a NOREP proposing to maintain Student's supplemental learning support services, but at a licensed private school that could offer a highly structured program with more intensive behavior support services. The NOREP noted that all levels of special education services in public school placements that were

considered were unable to provide the level of behavior support necessary to meet Student's needs. Although Parent recalled no discussion of placement options at the December 14 IEP meeting, she approved the NOREP. Student began attending the private school on December 19. (N.T. p. 88; J-15 p. 2)

47. In January 2012, after Student was enrolled for a few weeks, and in accordance with the private school's general policy, the parties met to develop an annual IEP. The IEP included no information concerning Student's inpatient psychiatric hospitalizations or depression and ODD diagnoses. The IEP noted only that Student had been diagnosed with learning disabilities and ADHD. The private school clinical director was unsure whether the staff who worked with Student, including therapeutic staff, knew of the diagnoses or of the medication Student was taking. (N.T. pp. 818; J-20)
48. Student's private school IEPs described the school as "fully inclusional" and provided that Student would participate in general education classes with disabled and non-disabled peers for the entire school day. The school frequently serves students with behavior problems and mental health diagnoses. The private school assigns a therapist to each student and "infuses" therapy into the curriculum. Its educational strategies are based primarily upon small class sizes. Student's academic classes ranged from 2—8 students. (N.T. pp. 802, 807, 820; J-20 p. 23, J-31 p. 35)
49. Although the January 2012 IEP indicated that Student had behaviors that interfered with learning, requiring a positive behavior support plan (PBSP), the private school followed its general procedure of waiting another few weeks to determine whether Student needed an individual behavior plan or whether the school-wide positive behavior plan would be sufficient. (N.T. pp. 823—826; J-20 p. 5)
50. Since Student never followed the school-wide plan, during enrollment in the private school, an individual plan was developed for Student. (N.T. p. 825; J-22)
51. Of the six academic courses Student took in 10th grade, three were taught by a special education teacher. In 11th grade four of seven academic classes were taught by a special education teacher. (HO-1 pp. 1, ¶¶6, 2, ¶¶13)
52. Despite an IEP goal for increasing attendance to 90% from an 85% baseline in January 2012, Student's attendance issues continued while enrolled in the private school. The attendance goal remained in the next IEP, developed in November 2012, but the goal was reduced to 85% because Student's attendance baseline had dropped to 60% by November 2012. The private school staff believed that Student could have benefitted from its program with regular attendance. (N.T. pp. ; HO-1 p. 3, ¶¶ 18, 21, J-20 pp. 7—9, 17, J-31 pp. 7, 8, 27)
53. Other IEP goals included in both the January and November 2012 IEPs were increasing homework completion and increasing positive peer interactions. Although the baselines for both goals dropped between the January and November IEP meetings, the goals remained the same. (J-20 pp. 17—19, J-31 pp. 26—28)

54. Both the January and November 2012 IEPs included the same SDI: Clear, concise directions; Small class/school size; Positive reinforcement; Modeling/prompting; Allow to take “5;” Anger management techniques; Extended time; Frequent breaks. (J-20 p. 20, J-31 p. 32)
55. In addition to Student’s worsening attendance, the other problem behaviors that Student exhibited in the public school continued in the private school through the end of 10th grade and into 11th grade. Parent believed that Student’s behaviors worsened at the private school because Student was exposed to more negative behaviors from peers. Soon after beginning the private school placement, Student sustained a concussion in an attack by a peer. (N.T. pp. 96, 97, 812; J-47)
56. The strategies that the private school staff used to de-escalate Student’s behaviors sometimes worked, but more often did not. The private school therapeutic staff members were unable to when strategies were likely to work or why the same strategies that worked at some times did not work at other times under similar circumstances. (N.T. pp. 821, 822)
57. Student ended the 2011/2012 school year (10th grade) at the private school with three “Ds,” two “Fs” and a “C” in academic classes. (J-50)
58. At the beginning of the 2012/2013 school year, Parent requested that Student be returned to the public school high school placement. In response to Parent’s request, the District sought and obtained Parent’s permission to reevaluate Student. The reevaluation was conducted by a contract school psychologist (N.T. pp. 251, 707, 708; J-28)
59. Based upon rating scales of social/emotional functioning completed by teachers, and relying most heavily on Student’s self report, the school psychologist recommended no change in either disability category or placement. Despite conceding that Student made no academic progress in the private school placement, the RR concluded that the private school was an appropriate placement for Student because it offered the “most effective therapeutic and behavior supports.” District staff did not believe that a return to the public high school was appropriate, based upon the lack of improvement in Student’s behaviors at the private school. (N.T. pp. 251, 252, 728—730, 735; J-28 pp. 8, 9)
60. In addition to the three goals carried over from the January 2012 IEP, the IEP developed in November 2012, after the reevaluation, added an additional goal for attending school or providing documentation for absences, a goal for developing coping skills, and a goal for developing self-advocacy skills. There were no new or additional SDI added to the IEP. (J-31 pp. 29—31)
61. In the fall of 2012, Student expressed interest in attending the local vo-tech school, but the private school and District members of Student’s IEP team, as well as a representative from the vo-tech school believed that Student’s school attendance and behavior issues would preclude acceptance into the vo-tech program. The consensus was that Student

would have to meet the IEP goals before Student would be considered for admission to the vo-tech school. (N.T. pp. 248—250, 669—673, J-28 p. 8)

62. At the end of the first semester of the 2012/2013 school year (11th grade), Student's grades in academic classes were two "Cs," and three "Fs." Student's classes included English II, taught by a special education teacher, which Student had failed in 10th grade, and was failing again in 11th grade. Student also took American History II, earning a "C." In 9th grade at the District high school, Student failed U.S. History II. Another of Student's "F" grades was in American History I, taught by a special education teacher. Student's "C" grades were in Physical Science, a regular education class, and American History II, taught by a special education teacher. Student's third "F" was in Basic Reading and Composition. (HO-1 p. 2 ¶14, J-35)
63. In February 2012, Parent and the District reached a mediation agreement that provided for Student to receive homebound instruction for the remainder of the 2012/2013 school year upon presentation of physician prescription, which Parent provided. (N.T. pp.112—114, 253, 254; J-33, J-34)
64. In the 4th quarter of 11th grade, when Student's academic services were delivered through homebound instruction, Student received "B" grades in Math Fundamentals, English II and American History II, a "C" in Basic Reading and Composition, and a "D" in Physical Science. (J-35)

DISCUSSION AND CONCLUSIONS OF LAW

IDEA LEGAL STANDARDS APPLICABLE TO THE MATTERS IN DISPUTE

FAPE/Meaningful Benefit

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009).

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd

Cir. 1999). Moreover, an eligible student’s special education placement and services must be provided in accordance with a procedurally and substantively appropriate IEP, since

The centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir.2003). The IEP consists of a detailed written statement developed for each child summarizing the child's abilities, how the disability affects performance, and measurable annual goals. *Id.* The IEP specifies the special education services and supplementary aids the school will provide the child, explaining how these will allow the child to progress. *Id.*

Damian J. v. School District of Philadelphia, 2008 WL 191176 (E.D.Pa. Jan. 22, 2008) at *1, FN.2.

In order to properly provide FAPE, therefore an eligible student’s IEP must specify educational instruction designed to meet his/her unique needs, and must be accompanied by any other services necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, however, an LEA is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

Least Restrictive Environment

The federal IDEA regulations provide that an eligible student’s program is to be delivered in the least restrictive environment (“LRE”) appropriate for the student, *i.e.*, one in which the student is educated with children who are not disabled to the maximum extent

appropriate. 34 C.F.R. §300.114(a)(2)(i). In order for a proposed placement to meet LRE requirements, school districts must, at a minimum, assure that placement decisions are “made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options” §300.116(a)(1); are “determined at least annually” §300.116(b)(1); are “based upon the child’s IEP” §300.116(b)(2). In addition, unless an eligible child “requires some other arrangement, the child [must be] educated in the school he or she would attend if not disabled.” §300.116(c).

The United States Court of Appeals for the Third Circuit provided additional guidance for applying LRE requirements in *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993), and subsequently in *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995), as well as in *T.R. V. Kingswood Twp. Board of Education*, 205 F.3d 572 (3d Cir. 2000), holding that LRE requirements apply to pre-school students. In accordance with *Oberti*, the first step in evaluating a program and placement to determine whether it meets LRE criteria is an assessment of whether the student can be educated satisfactorily in the regular classroom with supplementary aids and services. *Greenwood v. Wissahickon School District*, 571 F.Supp.2d 654 (E.D. Pa. 2008). In making that determination, a school district is required to consider the full range of aids and services available, with the goal of placing the student with a disability in the regular classroom as much as possible. Consideration must also be given to the unique benefits that a student with a disability will derive from placement in a regular classroom, and those benefits must be compared to the benefits likely to be derived from a more segregated setting. Finally, the district must determine whether there are likely to be any negative effects upon the education of the other children from placement of a particular student with a disability in the regular classroom.

If education outside of the regular classroom for all or part of the school day is found necessary, the proposed placement must be evaluated to determine whether it provides for contact with non-disabled peers to the greatest extent appropriate. In *Oberti*, the court noted that the continuum of placements mandated by the IDEA statute and regulations is designed to assure that a school district does not take an “all or nothing” approach to the placement of a student with a disability, but considers using a range of placement options to assure that the unique needs of each child are met. A school district’s obligation to place an eligible student in the least restrictive environment does not diminish its responsibility to educate an eligible student appropriately. *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 390 (3rd Cir. 2006).

Evaluations/Reevaluations

The federal IDEA regulations include specific requirements for evaluations and reevaluations for disabled students. 34 C.F.R. §300.301, *et seq.* The regulations require that school districts must provide a reevaluation in accordance with the evaluation procedures listed in §§300.304 through 300.311 “if the district determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation,” or if the student’s parent or teacher requests a reevaluation. 34 C.F.R. §300.303(a). However, the reevaluation must occur at least once every three years, unless the parent and the district agree that the reevaluation is not necessary. 34 C.F.R. §300.303(b).

In conducting evaluations/reevaluations, school districts are required to ensure that a variety of assessments are used in order “include those tailored to assess specific areas of educational need,” since a child must be assessed in all areas related to the suspected disability, including social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. §300.304(b), (c)(2), (4). An evaluation

must be sufficiently comprehensive to “identify all of the child’s special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified,” §300.304(c)(6), and assessment tools and strategies that provide relevant information to determine the education needs of the child must be used. §300.304(c)(7).

Procedural Safeguards/Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, because Parents have challenged the District’s actions during the period in dispute, Parents must establish the violations they alleged and that were identified at the beginning of the due process hearing in this case.

The Supreme Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding. Allocating the burden of persuasion affects the outcome of a due process hearing only in that rare situation where the evidence is in “equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012)

From the findings of fact above, and the discussion of the specific claims that follows, it should be quite clear that the decision in this case does not depend upon allocation of the burden of proof, since the evidence in this matter is far from “equipoise”.

Parent’s Claims/Basis for Decision

Overview

The testimony of the witnesses produced by the District and the documentary evidence left the distinct impression that although the District acknowledged that Student has a disability, and recognized that in order to provide Student with an appropriate educational placement and special education services, it was required to address the significant behavior issues that first arose in 9th grade, the District did not fully grasp the implications of either the IDEA LRE requirements, or of its obligation to assure that Student was reasonably likely to make meaningful progress in the educational placements it provided for Student. Consequently, in addressing Student’s significant and, and from the District’s vantage, seemingly intractable behavior issues, the District treated Student like a non-disabled child with significant, disruptive behaviors when it changed Student’s placement to the private school in December 2011 and maintained that placement in the fall of 2012.

Initially, the District initially did not adequately address Student’s behavior needs during the 2010/2011 (9th grade) school year, and the District did not fully consider whether/how it might have met Student’s academic and behavior needs in the public high school setting in the late fall of the 2011/2012 school year before changing Student’s placement.³ Finally, when

³ There is no claim for IDEA violations or remedy requested for 9th grade., but evidence concerning the dramatic and complete reversal of Student’s behavior history within the District that occurred at that time is relevant for background and context, since the behaviors issues that first arose in 9th grade continued and increased substantially during the 10th grade school year, as to which there is a claim for denial of FAPE. In addition, the behavior plan and interventions that the District developed in Student’s 9th grade school year continued during the next school year, until the private school placement began.

Parent requested that Student return to the District for the 2012/2013 school year, the District ignored a plethora of evidence that Student had made little, if any, academic progress in the private school placement and regressed with respect to skipping school and classes, the behavior that all teachers believed had the greatest adverse impact on Student's academic progress.

Evaluation Issues

Parent did not, in the end, argue that the District's failure to appropriately evaluate Student in the fall of 9th grade, and/or later, to add or substitute ED as a disability category, and to fully assess all of Student's special education needs constituted an independent claim for a violation of FAPE, although those issues were identified on the record at the first hearing session. Nevertheless, the record supports the conclusion that the District violated the evaluation provisions of the IDEA regulations described above, and that the District's lapse in fully and appropriately evaluating Student was an underlying factor in the substantive LRE and FAPE violations.

In November 2010, the District should have proposed a more comprehensive reevaluation of Student than an FBA and record review for several reasons: First, there was a significant negative change in Student's behaviors in the school setting from the beginning of 9th grade (FF 6, 12 17) In the 7th grade (2009) reevaluation, middle school teachers noted that Student's strengths included compliance with directives/requests and respect for teachers, but in 9th grade, Student was becoming increasingly defiant, disrespectful and disruptive. Second, Student received several mental health diagnoses during the summer of 2010. (FF 13) Third, Student developed a number of somatic complaints that led to frequent absences and visits to the nurse beginning in the fall of 9th grade. (FF 11) Finally, Student was admitted to a psychiatric hospital for mental health treatment in late October 2010. (FF 14)

Perhaps none of those circumstances alone would have suggested the need for a full reevaluation, but the convergence of all of those issues within just a few months should certainly have triggered a request by the District for a more extensive reevaluation than an FBA and record review. (FF 18, 19)

In addition, there were indications in both the FBA and the record review of a need for more information, as a District witness conceded during testimony at the hearing. (FF 27) For example, the FBA form as completed by District staff suggested that Student's behaviors may have been related to physical conditions, psychiatric conditions or medication side effects, but there is no indication that any of those factors were ever fully and thoughtfully considered as a reason for Student's behavior issues. (FF 20)

When further deterioration of Student's behaviors prompted the District to change Student's placement to the more restrictive private school setting the following school year, the District should have followed the typical practice of reevaluating Student first, and conducted a thorough and objective evaluation. (N.T. p. 653; FF 43, 46) Although the District did propose to conduct additional assessments after a review of records in December 2011, and sent a PTRE to Parent three times but never received a signed permission form, it is notable that the first PTRE was sent several days after the change in placement occurred. (FF 45, 46, 47) Moreover the District's conclusions in the fall of 2012, after assessments of social and emotional functioning were conducted, calls into question whether the District's purpose in proposing a more comprehensive reevaluation in 2011 was to seek information concerning the appropriateness of change of placement decision or find after the fact justification for it.

The conclusions the District reached from the results of the assessments of the reevaluation it conducted in the fall of 2012 amounted to a failure of the District to fully consider

the evaluation data in order to appropriately determine the nature and extent of Student's disabilities and to fully assess all of Student's needs. (FF 58, 59)

The District's reluctance to identify Student as IDEA eligible in the emotionally disturbed (ED) disability category, either instead of or in addition to the learning disabilities category was a factor that contributed to the District's violation of the LRE and FAPE requirements when it initially changed Student's placement in the fall of 2011, and to continuing those violations after the 2012 reevaluation, when the District maintained the private school placement. It appears that the District may have believed that it could better justify the private school placement for behavior issues if Student was identified in the LD category with significant behaviors not generally associated with an educational disability. (FF 24)

In any event, the District was unwilling to seriously consider ED as a disability category for Student. In the fall of 2011, in connection with the FBA and review of records, the District simply concluded, without attempting to explain, that Student was not exhibiting ED symptoms. When problem behaviors increased in the fall of 2012, the District concluded that Student was "socially maladjusted," not exhibiting symptoms of ED. (FF 45) There was, however, no persuasive evidence that the District had a real and reasonable basis for concluding that Student's behaviors were the result of "social maladjustment" rather than ED. Rather, the testimony of the District witnesses left the distinct impression that the primary basis for that conclusion was that it was the only way to avoid identifying Student in the ED disability category.

In the end, however, determining the accuracy of the disability category applied to Student—or any other IDEA eligible child, is not nearly as important as determining whether the District provided a FAPE in the least restrictive environment in which Student had the opportunity to make meaningful progress.

LRE/FAPE Violations

The record in this case provided no evidence that the District considered supports and services that would have permitted Student to remain in the public high school despite significant behavior problems. The testimony of District witnesses was directed entirely toward justifying the private school placement, initially, in 2011, and the decision to maintain that placement in the fall of 2012. The evidence also established that the District provided no real strategies and services to address the behaviors that were interfering with Student's academic progress when Student was still enrolled in the District high school in the fall of 2011.

Teachers in 9th grade identified Student's absences from class and tardiness as the primary reason for Student's poor academic performance, noting that Student could effectively participate in academic tasks when Student was in class. (FF 25, 26) The District's only strategy for increasing Student's presence in class was to curtail use of the hall pass. (FF 29, 30) There was no evidence that the District considered strategies directed toward increasing Student's motivation to stay in class or toward addressing Student's defiant and disrespectful behaviors. Although the District believed it had knowledgeable staff, and, therefore, did not need outside help, such as from a behavior analyst, nothing the District did in either 9th or 10th grades was successful. The FBA that the District completed did not truly identify behaviors that Student should be encouraged to adopt to replace negative behaviors, but appeared to identify behaviors that staff would initiate before Student engaged in negative behaviors. (FF 34) There was also no evidence that Student was likely to be motivated by the positive consequences identified in the FBA. (FF 32) The prevention strategies identified in the FBA had already been in place, with very limited success. (FF 20, 22) Finally, there was no evidence that anything

included in the FBA, other than the limitation on using the hall pass, was ever used or referred to again once the FBA was completed.

In 10th grade (2011), the District eliminated the hall pass and did not attempt any systematic interventions, as Student's behaviors continued to escalate until the incident that led to the change of placement. (FF 39, 41, 43, 44)

The record also established that the private school placement did not improve the situation. Student's problem behaviors not only persisted, but further escalated, and academic achievement decreased. (FF 52, 55, 56, 57, 62) Nevertheless, although admitting that the private school placement had not been successful, the District recommended continuing it, with most of the same IEP goals and all of the same SDI. (FF 60)

The record leaves no doubt that the District cannot justify the change of placement on the basis that the private school, although more restrictive than the public high school, afforded Student the opportunity for meaningful educational progress. Virtually from the beginning of the private school placement there were clear indications that Student was not benefitting from the academic instruction and therapeutic supports available at the private school. Certainly by the beginning of the 2012/2013 school year, the District could not reasonably have concluded that the placement provided any benefit to Student. The only reasonable inference is that the District's primary purpose in recommending a continuation of the private school placement in November 2012 was to keep Student out of the high school to eliminate the difficulties Student caused.

Placement decisions made on that basis constitute both a denial of FAPE, generally, and an LRE violation specifically.

Denial of Parent Participation in the Private School Placement Decision

The District was clearly contemplating a change in Student's placement in the fall of 2012, as evidenced by its offer of the Student Assistance Program in November as a final attempt to avoid an alternative school. (FF 40) Nothing in the IDEA, however, prohibits the District from making contingency plans when it appears that a change of placement might be necessary, and nothing in the IDEA suggests that the parent of an IDEA eligible student must be involved in every step of the process of deciding on a potential placement.

Parent may have felt over-matched at times in the face of the District's very strong opinions that Student should not return to the high school but the record in this case suggests that Parent was initially supportive of the District's proposals for dealing with Student's behavior issues, including the private school placement. Parent was, however, a participant in the team that made Student's placement decisions. There was no procedural violation based on denial; of Parent's right to participate in determining Student's special education placement.

Remedy

An eligible student who has received no more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, an equitable "remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009) (internal quotation marks and citation omitted). Compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3rd Cir. 2010), citing *Reid v. District of Columbia*, 401 F3d 516, 518 (D.C. Cir. 2005).

Compensatory education is awarded for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *Mary Courtney T. v. School District of Philadelphia* at 249; *M.C. v. Central Regional School District*, 81 F.3d at 395; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3d Cir.1995). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known. *M.C. v. Central Regional School District* at 396.

In this case, the period for which Student is entitled to a remedy is the entire 2011/2012 school year, and for full days, since the District did little to address Student's significant academic and behavior needs as that school year began, a year after the needs arose, and then placed Student in a restrictive placement that denied Student special education services in the least restrictive environment.

Student is also entitled to an award of full days of compensatory education from the beginning of the 2012/2013 school year until homebound instruction began in February 2013 pursuant to a mediation agreement.

Based on the record of this case, Student primarily lost effective academic instruction and given Student's age, needs transition services. In addition, effective behavior support services from the District could have provided Student with counseling/psychological services. Student, therefore, will be permitted to use the compensatory education services to replace academic, transition and mental health treatment services, as well any other services to which the parties may agree.

ORDER

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

1. Provide Student with full days of compensatory education (5.5 hours/day) for every day school was in session in the District from the first until the last day of the 2011/2012 school year.
2. Provide Student with full days of compensatory education (5.5 hours/day) for every day school was in session in the District from the first day of the 2012/2013 school year until the date in February 2013 when Student began receiving homebound instruction pursuant to a mediation agreement between the parties.
3. The compensatory education award may be used for
 - a. Instruction/tutoring in basic academic skills and/or content areas, including but not limited to tutoring to assist Student in passing/benefitting from post-secondary education classes;
 - b. Assistive technology, including but not limited to computers, tablets, and software/applications to assist Student in post-secondary education and/or employment/employment training;
 - c. Employment skills training programs at any facility, such as traditional vo-tech schools or technical institutes, that serve both secondary students who have not yet graduated from high school and adults;
 - d. Counseling and/or psychological/ psychiatric treatment services;
 - e. Any other equipment or services as agreed by the parties.
4. The compensatory education award may be used from the date of this order until Student's 25th birthday.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

April 14, 2014