

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. 14266-1314 AS

Child's Name: J.M.

Date of Birth: [redacted]

Dates of Hearing: 11/26/13, 12/16/13

OPEN HEARING

Parties to the Hearing:

Representative:

Parent[s]

Parent Attorney

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School District

School District Attorney

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Date Record Closed:

January 20, 2014

Date of Decision:

February 4, 2014

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The family involved in this case has resided in the District for many years, but Student, whose IDEA eligibility is currently based on intellectual disability (ID), was enrolled in a private school throughout high school, funded initially by the District and later by Parents. After refusing to fund Student's private school placement for 12th grade, the District received Parents' permission to reevaluate Student and completed an evaluation late in 2012.

The evaluation confirmed Student's eligibility for special education until age 21, and the District offered an annual IEP to begin in January 2013. Although Parents wanted Student to complete the final high school year with classmates at the private school, the parties discussed various vocational training programs and locations for a "13th year" in the late spring of 2013.

At the end of the 2012/2013 school year, however, the District learned that the private school was prepared to issue a regular high school diploma to Student, having determined that Student met all of its graduation requirements, albeit in an entirely individualized program with content far below that expected to be mastered by students without an intellectual disability. Upon receiving that information, the District notified Parents that Student is no longer IDEA eligible, and, therefore, refused to provide ESY or other services.

Parents submitted a due process complaint challenging the District's decision, including its failure to issue a NOREP exiting Student special education services prior to refusing services. A two session hearing followed in November and December 2013. For the reasons explained in detail below, the District will be ordered to provide a full summer of ESY and a full year of transition services, extending beyond age 21 if necessary for Student to fully participate in an appropriate vocational training program.

ISSUES

1. Did Student earn a regular high school diploma by meeting all graduation requirements under Pennsylvania law, including the academic standards applicable to private schools?
2. Did the private school Student attended during high school award Student a regular high school diploma in May 2013, at the end of 12th grade, thereby terminating Student's eligibility for further special education services or was eligibility otherwise properly terminated?
3. Did the School District fail to follow appropriate procedures in terminating Student's IDEA eligibility?
4. Did the District's reliance on guidance from the Pennsylvania Department of Education make its actions in this matter substantively appropriate notwithstanding any procedural violation?
5. Does Pennsylvania law and/or federal law otherwise support the District's position that it is not required to provide further IDEA services to Student?
6. Should the District be equitably estopped from denying Student special education services based upon the circumstances presented by this case?
7. Is Student absolutely entitled to IDEA services until the age of 21 because the terms of the PARC Consent Decree guarantee such services to all intellectually disabled students in Pennsylvania?

FINDINGS OF FACT

Background/Student's High School Education

1. Student, born [redacted] is a post-teen age resident of the School District whose continued eligibility for special education services was the matter at issue in the due process complaint and hearing. (Stipulation, N.T. p. 15)
2. Student was most recently identified as IDEA eligible in the Intellectual Disability (ID) category, in accordance with Federal and State Standards. Student had previously been identified as eligible due to Traumatic Brain Injury (TBI). 34 C.F.R. §300.8(a)(1), (c)(6), (12); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 16; S-5 pp. 12, 13)
3. Student received early intervention services before attending District elementary schools, where Student continued to receive special education services through the end of 6th grade. Parents enrolled Student in a private school beginning in 7th grade. Student was enrolled in a different private school for 8th–12th grades. The private school Student attended for high school is licensed by the Commonwealth of Pennsylvania as a private

academic school and is also licensed as a special education school. (N.T. pp. 50, 53, 92, 358, 369, 370; P-9, p. 5, S-4, S-5 pp. 9, 10, 13, S-28)

4. Because Student was not placed at the private school or funded by a school district, Student was not provided with an IEP or any other written instructional or curriculum plan by the private school. (N.T. pp. 341, 359, 418)
5. Between 9th and 11th grades, Student was enrolled in 9 or 10 courses each semester. During the first 3 years of high school, Student had classes listed as English, Math (or Basic Math), Social Studies, Reading or Power Reading, Art and Physical Education on each year's transcript. Other classes listed on Student's transcripts but not provided every year were Music or Music Appreciation, Yoga, Chess, Film Studies, Creative Writing, Integrated Studies, Math Lab, Social Skills and Health. Student received Science in both semesters of 9th grade, but no classes designated "Science" generally, or a particular type of science, such as biology, are listed for 10th or 11th grades. The numerical grades listed on Student's 9th—11th grade transcripts ranged from 70—92. (S-28)
6. In 12th grade, Student's classes were listed as English, Reading, Business Math, U.S. History 3 and Civics (social studies), Science, Life Skills, Social Skills, Art, Yoga, Integrated Studies, Music, Wood Carving and Introduction to Spanish. Student's grades ranged from 70—87. (N.T. pp. 371, 372; P-6 p. 2, S-28)
7. The private school requires 28 credits to graduate, which must include 120 hours of instruction in 4 units of English, Math, Science and Social Studies, along with 2 units of Arts and/or Humanities, 1 unit of Health and Physical Education and 5 Electives. Credits are awarded for completing a course with a passing grade (above 59). By the end of 12th grade, the private school transcript indicated that Student had received 29.2 credits. (N.T. pp. 369, 370, 408; S-16, S-28 p. 1)
8. Although the classes listed on the transcript have descriptive names, Student was instructed in each class in whatever skills met Student's individualized needs, not in accordance with any set curriculum for the class. In Business Math, *e.g.*, Student was instructed in basic math skills and use of a calculator, since Student was at a very low level. (N.T. pp. 65, 339, 340; P-5 p. P-5, p. 3, P-6, p. 2)
9. Student received virtually all academic instruction on a 1:1 or 2:1 basis from special education teachers, and was provided a very specific, individualized program, including work with a reading specialist at least 3 times each week. The private school estimated that Student was at a 6th grade reading level by the end of 12th grade. (N.T. pp. 57—59, 61, 338—341, 377; S-5 p. 3)
10. Under the instruction of a special education teacher, Student completed a graduation project consisting of building a model of a roller coaster from small plastic blocks (LEGO or K'NEX) and presenting a Power Point. (N.T. pp. 63, 343; P-6 p. 2)

11. Throughout high school, Student was unable to participate, academically, in classes taught by regular education teachers, but was exposed to subject matter concepts presented at Student's ability level. In Intro. To Spanish, *e.g.*, Student may have learned to speak a few Spanish words with review and repetition, but did not learn to speak Spanish. (N.T. pp. 342, 385, 403—405)
12. The private school provided Student with opportunities to develop and demonstrate strength in the arts, particularly acting and music. (N.T. pp. 97, 123; S-4 p.2)
13. In addition to report cards, Student received progress reports with letter grades in the areas of Academics, Attitude and Application for each assigned class. The letter grades were based on Student's ability level and each teacher's subjective assessment of Student's production, not on any objective standard of achievement. All computer-generated, teacher-selected comments under the Academics progress category reflected Student's level of participation, attention and effort. Nothing in the progress reports reflected an objective level of either skill mastery or acquisition of information in any class. Like the instruction Student received in all subject areas, Student's grades were completely individualized. (N.T. pp. 353—355, 380; S-29c)
14. When Student finished 12th grade at the private school, Student had not received instruction at, and was not anywhere close to, a 12th grade, or high school academic level in any subject area. (N.T. pp. 345, 385, 409)
15. Student participated in all activities for seniors during the 2012/2013 school year, was pictured in cap and gown in the private school yearbook and participated in graduation ceremonies. The private school, therefore, intended to issue a diploma to Student. (N.T. pp. 106—108, 362, 374, 381; S-19 p. 1, S-29c)
16. The private school typed Student's name onto a diploma dated May 24, 2013 which stated that Student "satisfactorily completed a Course of Study prescribed for Graduation from this School and is therefore awarded this Diploma." (N.T. p.381; S-29a)

District's Involvement with Student During High School—Evaluation, IEP Offer

17. Prior to the 2010/2011 and 2011/2012 school years (10th and 11th grades), at the direction of the District's director of special services a supervisor of special education contacted Parents to inquire whether they wanted the District to provide transition services for Student. Parent did not request transition services or any other District-provided services for Student during the 2010/2011 or 2011/2012 school years. (N.T. pp. 89, 90, 95, 129, 130, 229; S-31)
18. Before the 2012/2013 school year began, Parents informed the District that they did not believe it could meet Student's needs within a District program and requested that the District financially support Student's private school placement. (N.T. pp. 65, 130; S-1)

19. The District's letter refusing the request cited a lack of current data as the reason, and enclosed a permission to evaluate form (PTE), which Parents approved and returned to the District in late September 2012. The purpose of the evaluation listed on the PTE, as well as on the subsequent evaluation report (ER), was to determine an appropriate educational placement for Student. (N.T. pp 65, 66, 93—96, 131; S-3 p. 1, S-5 p. 1)
20. Two days after the District received the PTE signed by Parent, the special education supervisor's secretary copied her on an e-mail stating to the recipients that the director of special services had informed the secretary that Student should be maintained in the District system as "dual enrolled." (N.T. p. 153; P-1, S-3)
21. The District school psychologist obtained Parent input, observed Student during testing, administered several standardized tests and conducted a classroom observation at the private school, culminating in an ER dated 12/1/2012. The report noted that Student's instruction was delivered in either a small group or 1:1 daily and that teachers had no recommendations. Nothing in the record indicates that Student's private school records were reviewed or requested or that teachers were interviewed. Parent was not asked for a release for the District to review Student's private school records. (N.T. pp. 67, 159; S-5 pp. 2, 3)
22. The school psychologist described Student's significant off-task behaviors and attempts at off-topic conversations during her classroom observation of reading and math instruction, and reported the teacher's comment that Student generally produced more work than was completed during the observation. (S-5 pp. 2, 3)
23. Student's Mother and the private school's director of pupil services completed the Adaptive Behavior Assessment System-2nd Edition (ABAS-II) ratings by parent and teacher. Parent's ratings placed Student in the average range in several adaptive skill areas although her overall rating placed Student in the below average range. The private school's ratings fell into the "Extremely Low" range on all adaptive skills. (S-5 pp. 6—8)
24. Student's cognitive ability was assessed with the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), which yielded a full scale IQ score (FSIQ) of 55, in the Extremely Low range. All component index scores (55-66) were also in the Extremely Low range. (S-5p. 17)
25. Academic achievement, assessed with the Wechsler Individual Achievement Test-Third Edition (WIAT-III), fell into the Very Low (Word Reading, Numerical Operations, Spelling, Math Problem Solving, Reading Comprehension, Sentence Composition) to Below Average (Oral Expression) ranges. Student's scores on the Pseudoword Decoding and Listening Comprehension subtests were in the Low range. Student would not attempt the Essay Composition and Oral Reading Fluency Subtests. (S-5 pp. 14—18)
26. Based on the evaluation results, the school psychologist concluded that Student met the eligibility criteria for the ID disability category, was in need of specially designed

instruction, and, therefore, eligible for special education. In describing the basis for her conclusion that Student's significantly sub-average intellectual ability and deficits in adaptive functioning directly and adversely impacted Student's educational performance, the school psychologist commented that, "Because of these deficits, [Student] has not been able to grasp academic concepts at a rate comparable to average age peers." (S-5 pp. 40, 41)

27. Needs identified in the ER included a transition to adult life plan, functional academics such as telling time and understanding the worth of coins, and development of adaptive skills in the areas of self-care, community use, safety, home-living and self-direction. (S-5 p. 42)
28. In January 2013, the special education supervisor met with Parent and her advocate to discuss the evaluation results and a draft IEP that had been e-mailed to Parents in mid-December 2012. The IEP team meeting also included a District special education teacher, regular education teacher and school counselor. No one from the private school attended the IEP meeting. (N.T. pp. 69—73, 135, 205, 428; S-6 pp. 4, 5)
29. In addition to goals in the areas of increasing attention and focus, social skills, functional math and adaptive skills, the IEP included a postsecondary education and training goal: "The student will be provided with opportunities to prepare for employment training after graduation." (N.T. pp. 75, 136; S-6 pp. 14, 20—23)
30. The District proposed that the IEP be implemented for the remainder of the school year in a supplemental Life Skills Support placement in a District high school. It also determined ESY eligibility, with summer services also to be delivered in a District Life Skills Support program. The IEP further proposed that Student resume services in a District Life Skills Support placement in September 2013, to continue through the end of the 1 year IEP term. (N.T. pp. 75, 76, 81, 98—100, 136—138, 166, 437; S-6 pp. 1, 27—31, S-7 p. 1)
31. Parent did not sign and return the NOREP presented to her at the January 2013 IEP meeting, but did approve a second NOREP, dated June 4, 2013, for ESY services. (N.T. pp. 81, 100; S-7, S-8)
32. Before the January 2013 IEP meeting, Parent determined that Student would complete 12th grade at the private school and expressed that intention at the IEP meeting. There was no discussion at the IEP meeting concerning a potential impact on Student receiving ESY and transition services if Student completed 12th grade at the private school. (N.T. pp. 76, 77, 100, 101, 140, 429—431, 436, 439)
33. There was also no discussion of Student's graduation at the January 2013 IEP meeting. After reviewing the evaluation results, the District's special education supervisor did not believe that Student would meet the criteria for receiving a regular high school diploma because Student could not have met the District's regular education graduation criteria since Student was not demonstrating the academic skills of age-appropriate peers. The

- District considers IDEA eligible students attending a District high school unable to meet District requirements for a regular high school diploma under such circumstances when they also have a continuing need for transition services. Parent's advocate believed that in light of Student's obvious need for transition services, graduation/accepting a diploma from the private school was an option for Student that would have no consequences with respect to continuing IDEA eligibility. (N. T. pp. 74, 76, 81, 158, 159, 161, 163, 165—167, 170, 171, 173, 205, 260, 262, 431, 437—439, 444—447)
34. Parent and the District met for another IEP meeting in May to discuss the next steps, including vocational training programs that might interest Student and Parent's plan to visit potential placements. Student's graduation from the private school was not discussed at the May 2013 IEP meeting. (N.T. pp. 77, 172, 431, 432)
 35. Parent and Student identified two programs of high interest during an early June visit to a county vo-tech school with the District special education supervisor. Parent determined that the program would be appropriate, but was concerned about the limited number of available slots. The parties discussed Student beginning the program in the fall. (N.T. pp. 77—81, 141, 432—434)
 36. At about the same time, the District's director of special services instructed the special education supervisor to contact the private school to determine whether Student had graduated. (N.T. pp. 231, 232)
 37. On June 11, 2013, the special education supervisor notified Parent that the District had been informed that the private school intended to issue a diploma to Student, and, therefore, that in accordance with "guidance...received from the Pennsylvania Department of Education," the District was "legally unable" to provide transition services because Student had "graduated from an accredited school providing secondary education." The supervisor sent another letter to Parents on June 20, stating that the District had received "final confirmation" from the private school that Student met graduation requirements, and reiterating the District's inability to provide additional services based upon "guidance" from the Department of Education. (N.T. pp. 144—146, 148; S-19, S-20)
 38. The District did not check the private school's graduation requirements at the time of the IEP offer, or at any time until learning in June 2013 that the private school considered Student to have met graduation requirements. The District also never inquired into the specifics of Student's private school program, including how Student received the credits listed on the transcript, but relied entirely on the private school's conclusion that Student had earned sufficient credits to meet the private school's graduation criteria. (N.T. pp. 162, 164, 167, 168, 170, 270)
 39. Although Student was dually enrolled in the District, the District had determined via an evaluation completed by a District school psychologist that Student met the disability and need for specially designed instruction criteria for continuing IDEA eligibility, and during Student's 12th grade school year, the District offered an IEP for services in three

distinct time periods, two of which began after graduation ceremonies, the District has never issued a NOREP proposing to exit Student from special education services. (N.T. pp. 56, 57, 256, 257; P-1, S-5, S-6)

40. In June and August 2013, Parents again requested ESY services from the District, as well as a transition program beginning in September 2013, which were refused by the District. (N.T. pp. 85, 86; S-25, S-26, S-27)

Graduation Events Involving Student; Private School & District Graduation Policies and Procedures for Special Education Students

41. The private school never presented or sent the diploma it had prepared for Student due to a still outstanding tuition balance. In early June, Parent requested that the private school not issue the diploma to allow Student “to...receive services until the age of 21.” (N.T. pp. 82, 84, 109, 110, 360, 361, 364, 367, 403; P-37 p. 1)
42. Although the private school director of pupil services notified the District of Parent’s request in an e-mail message dated June 13, and stated that the private school “will honor that request,” she testified at the hearing that the e-mail did not accurately express what she meant because it was “always” the private school’s “intention to grant [Student] the diploma upon payment of tuition.” The private school witness acknowledged that she did not express that intention in the June 13 e-mail message to the District. (N.T. p. 361, 362, 364; P-37 p. 1)
43. Within a few minutes of receiving the June 13 e-mail message from the private school, the District’s Director of Special Services responded, questioning whether the school intended to withhold Student’s diploma at Parents’ request despite meeting graduation requirements, noting that he believed that either a student met graduation requirements or did not. (N.T. p. 234; P-37 p. 1)
44. The private school’s director of pupil services also stated that it would not be the private school’s “call” to “hold a diploma for [Student] to receive services.” (N.T. p. 364)
45. There are times when special education students placed at the private school by public school districts receive additional, school-district funded special education services from the private school after completing 12th grade. When that occurs, the private school meets with the public school district in order to develop a transition plan. The school district, not the private school, issues diplomas to those students. (N.T. pp. 412, 414—416)
46. The private school has also been involved in situations in which special education services are to continue in a public school or other setting provided by a school district, not at the private school. In those circumstances, the private school typically participates in IEP meetings with the school district. (N.T. p. 417)

47. When the private school knows that a special education student enrolled in the private school is to continue receiving services funded by a school district, he or she still participates in all senior and graduation activities, but the private school does not issue a diploma and does not consider that student “graduated,” whether the services are to continue at the private school or elsewhere. (N.T. pp. 415, 416, 423)
48. The private school was not aware that Parents and the District were discussing a 13th year of special education/transition services to be provided by the District after Student completed 12th grade. The private school did not participate in the IEP process and Parent never discussed Student’s post high school plans with the private school. (N.T. pp. 101, 135, 413)
49. Special education students enrolled in the District and attending a District high school who do not meet the general education criteria for a District diploma remain eligible for special education services. Such students participate in graduation ceremonies with their 12th grade class, but are not issued a high school diploma at that time. A diploma is issued to those students at the end of their special education programming if they meet IEP goals. (N.T. pp. 143, 161, 162, 164, 165, 213)
50. The determination whether a special education student who is either receiving services directly from the District or is placed/funded by the District in a different setting remains eligible for special education services after completing 12th grade is made entirely through the IEP process. (N.T. p. 222)
51. When the District determines that a special education student attending a District high school has met graduation requirements and is no longer eligible for services, the District issues the “graduation NOREP” notifying parents prior to graduation that services will be discontinued because the student completed his/her program. (N.T. pp. 212, 256)
52. Students who are enrolled in private schools may receive a District diploma if they meet District graduation requirements. (N.T. p. 227)
53. On June 6, 2013 the District’s Director of Special Services sought advice from a special education advisor from the Bureau of Special Education (BSE) with respect to “a lot of requests from parents who have unilaterally placed their child in a private school and graduated from the private school. They then come to us wanting transition services. Are we correct that...they are not eligible for services any longer?” The adviser responded that “If the student has received a HS diploma they are no longer eligible for services under IDEA.” (S-14 p. 1)
54. Although the situation with Student was the reason for the District’s e-mail to BSE, the District did not provide the special education advisor with any information concerning Student’s specific circumstances. (N.T. pp. 240, 241, 293)

55. Based upon the advice of the special education adviser, the District believed that its decision to provide services to Student, or not, was governed entirely by whether the private school intended to graduate Student. (N.T. pp. 235, 251)
56. In an October 2013 message in response to the District’s statement that “The parents are claiming that because the diploma is from a private school it is not a ‘regular’ high school diploma,” the advisor confirmed that diplomas from private school are regular high school diplomas. Again, the District did not disclose any information with respect to Student’s circumstances. In his response, however, the adviser cautioned the District that parents could file a state or due process complaint claiming a failure to meet child find obligations if the District refuses services based upon graduation from a private school. (N.T. pp. 240, 241; S-15 p. 1)

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Legal Standards/Legal Issues

Entitlement to FAPE

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). The IDEA regulations further provide that “A free appropriate public education must be available to all children residing in the state between the ages of 3 and 21, inclusive....” 34 C.F.R. §300.101.

Unlike most special education cases, there is no dispute in this case with respect to whether the District has offered Student an “appropriate” public education. There is also no dispute that Student remains within the age range for receiving FAPE, and that Student meets the disability and need for services criteria for eligibility found in 34 C.F.R. §300.8(a)(1) (FF 1, 26)

The overarching legal issue in this case is whether the School District in which Student resides remains responsible for providing FAPE under the facts established by the record in light of an important exception potentially applicable to eligible students at the upper end of the age range for IDEA eligibility, found in 34 C.F.R. §300.102(a)(3):

(a) General. The obligation to make FAPE available to all children with disabilities does not apply with respect to the following::

...

(3)(i) Children with disabilities who have graduated from high school with a regular high school diploma.

(ii) The exception in paragraph (a)(3)(i) of this section does not apply to children who have graduated from high school but have not been awarded a regular high school diploma.

(iii) Graduation from high school with a regular high school diploma constitutes a change in placement, requiring written prior notice in accordance with § 300.503.

(iv) As used in paragraphs (a)(3)(i) through (a)(3)(iii) of this section, the term regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general educational development credential (GED).

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 challenged the District's actions, they were required to establish that the District's decision to deny Student

special education services due to termination of IDEA eligibility was improper and that Student remains eligible to receive a FAPE from the District.

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)

In this case, both parties produced evidence in support of their respective positions and the record amply supported Parents’ contention that Student’s IDEA eligibility continues despite the private school’s intention to award Student a diploma based upon completion of graduation requirements.

Overview of Factual/Legal Basis for Decision

This case presents a classic “form over substance” situation that arose from the District’s inattention to Student’s educational status prior to the date of the private school’s graduation ceremony. That, in turn, resulted in the private school’s decision to consider Student graduated and prepare a diploma for Student in May 2013, on which the District then relied to deny Student’s continued IDEA eligibility and to refuse to provide the post high school special education services it had previously offered to Student. (FF 15, 16, 36, 37, 38)

Of the three participants in Student’s education during 12th grade, the District was in the best position to avert the current dispute, and could have done so simply by fully informing Parents how the private school’s actions could affect Student’s right to receive a FAPE through age 21. The record in this case establishes that when the District offered Student an IEP in

January 2013 that contemplated services continuing after Student completed 12th grade at the private school, the District assumed that Student would not meet the private school's graduation requirements because Student clearly would not have met the District's criteria for receiving a regular high school diploma. (FF 30, 32, 33, 36, 38) The District, therefore, never asked Parents whether the private school intended to issue a diploma to Student at the end of 12th grade, or explained to them that if Student graduated from the private school with a regular high school diploma, it would consider itself "legally unable" to provide special education services because the private school's graduation determination would terminate Student's IDEA eligibility. (FF 33, 34, 37)

The record also established that the private school's determination whether a special education student who completes its program through 12th grade has fulfilled all graduation requirements, and, therefore, is entitled to receive a regular high school diploma is a procedural decision that depends upon the involvement of a public school district in a special education student's education rather than upon whether such student substantively meets regular education academic standards, which Student in this case did not. (FF 14, 33) The testimony of the only witness from the private school who testified at the due process hearing unequivocally established that the private school does not issue a diploma to similarly situated special education students when a school district determines that a student is otherwise eligible for post-high school special education services. (FF 45, 46, 47) In this case, however, the private school was unaware of the results of the District's 12th grade evaluation of Student and of its January 2013 offer to provide special education services to Student extending into the current school year before preparing a diploma for Student in May 2013. (FF 16, 26, 30, 48) It would be grossly inequitable to validate the District's conclusion that it can rely on the private school's conclusion

that Student met graduation requirements, and, therefore, that Student's IDEA eligibility was terminated based, in essence, upon the private school's lack of knowledge and non-participation in the IEP process for Student between January and May 2013.

Finally, as Student's LEA, based upon both residence and dual enrollment in the District (FF 1, 20), the District was responsible for assuring that all IDEA requirements were met, including proper prior notice to Parents that because of the private school's determination that Student met its graduation requirements, it was refusing to provide the IDEA services it had previously offered based upon termination of Student's IDEA eligibility. (FF 37)

Because of the District's assumptions, inadvertence and inattention to both procedural and substantive matters surrounding Student's completion of the private school's high school program, despite its own determination that Student was entitled to post-high school services, the District failed to fulfill its legal obligation to provide special education services to Student, and Parents were deprived of the opportunity to take appropriate steps to protect Student's right to receive a FAPE from the District through age 21.

The Private School Did Not Meet Pennsylvania Private School Graduation Standards In Determining That Student Was Entitled to a High School Diploma

As noted above, the IDEA regulations provide that the term "regular high school diploma does not include an alternative degree that is not fully aligned with the state's academic standards such as a certificate...." 34 C.F.R. §300.102(a)(3)(iv). An essential question in this case, therefore, is whether the diploma that the private school prepared for Student is, substantively a "regular high school diploma" or is more properly considered a "certificate" because it does not represent a "degree...fully aligned with the state's academic standards." The District, indeed, argued that the "sole question" in this case is whether Student earned a regular high school diploma, resulting in termination of IDEA eligibility. (District's Closing Statement

at 8). The District also argued that the private school's determination that Student met its graduation requirements is the only criterion for answering that question. That argument, however, does not withstand factual or legal scrutiny.

To establish that the private school's determination that Student met the requirements for a regular education private school diploma has a substantive and dispositive effect on Student's continued IDEA eligibility, the District relies entirely on 22 Pa. Code §§57.31(a), which lists the courses required for graduation. Subsection (b) of §57.31, however, provides that a private school,

shall identify planned courses--§51.52 (relating to curriculum requirements) curriculum requirement—for which credit shall be awarded. The written planned courses shall be on file at the school and shall be made available upon request for review by the Board or its designated representatives.

The graduation requirements section further provides that students must be taught four planned courses in English, three in Mathematics, Science, Social Studies and one in Health.

§57.31(d)

Moreover, the regulatory section relating to curriculum requirements referenced in §57.31 provides that,

Written planned course outlines shall be on file for subjects taught. Planned course outlines shall describe the following:

- (1) Goals and student learning objectives.
- (2) General content, methods and materials used to accomplish goals and objectives.
- (3) Strategies for evaluation of pupil progress.
- (4) Expected levels of student achievement.

22 Pa. Code §51.52(b)

The private school diploma “certifies” that Student’s fulfillment of its graduation requirements was based upon satisfactory completion of “a course of study prescribed for graduation.” (FF 16, S-29 (a)) The record established that Student was assigned each year to classes designated “English,” “Social Studies,” and “Math, purportedly assuring that the number and distribution of “units” required for graduation under Pennsylvania law, and the private school standards would be met, at least in form. (FF 5, 6, 7)¹

The record also established that in each class, in each year, Student was provided a highly individualized, much modified curriculum without benefit of any pre-written plan or standards against which progress could be measured, was both instructed and assessed in accordance with whatever subjective standards each teacher developed and was passed from grade to grade based entirely on the subjective assessments of the teachers who provided the instruction. (FF 8, 9, 10)

It was absolutely clear from the testimony of the private school witness that whatever written course outlines applicable to regular education students that the private school maintains, Student was not responsible for meeting any general goals and learning objectives, and that no objective expected levels of achievement were specified for Student. (FF 13)

The record unequivocally established that Student’s private school program was neither developed nor delivered in accordance with the provision of Pennsylvania regulations relating to private school curriculum requirements. Although the witness from the private school answered “yes” to questions that Student completed a course of study filed with the academic school’s licensing board (N.T. pp. 423—425), her short answers to the District’s leading questions

¹ It appears from the records provided by the private school that Student was assigned to only two science classes during high school. Student’s transcript indicates a half credit for science in both semesters of 9th and 12th grades, but no other classes listed on the transcript suggest that the subject matter, even nominally, was science. (FF 5; S-28) Consequently, Student may not have received either the 3 credits of science required for high school graduation by the Pennsylvania private school regulation, or by the private school itself, even if IDEA requirements for a regular high school graduation can be fulfilled simply by Student having been assigned to enough classes that bear the proper titles, notwithstanding Student’s inability to achieve in accordance with grade level standards and the absence of a written plan of instruction for Student. (FF 7; S-16 p. 1, S-17)

designed to elicit the testimony the District needed to support its position were inconsistent with testimony in her own words describing Student's educational program as completely individualized in both content and grading, and delivered in accordance with no written plan of any kind. (FF 4, 8, 9) The record establishes that Student could not have met any objective, criterion-based graduation standards that the private school may use, generally, to assess whether its students meet its graduation "requirements" since none were identified for Student.

In addition, it appears that the private school did not fulfill legal requirements for educating students with disabilities. A private school licensed as a special education school is required to evaluate and develop an IEP for special education students, must provide an instructional program "designed to meet the needs of the exceptionality" and if issuing a diploma, must assure that the program meets the graduation criteria applicable to all private academic schools. *See*, 22 Pa. Code §§59.21, 59.51. The record of this case did not disclose whether Student was enrolled in the private school in regular or special education, but did establish that the individualized instruction Student was provided was not delivered in accordance with an IEP or any written plan. (FF 4) Student's graduation, therefore, could not have been based upon fulfilling IEP goals rather than meeting general education standards.

The Private School's Decision to Award Student a Diploma at the End of 12th Grade Was Not Based on Any Consistent, Objective Criteria Related to Meeting Academic Standards

Despite Student's participation and passing grades in classes with titles suggesting high school level classes, there does not appear to be any dispute that Student was far below academic levels ordinarily expected of students without disabilities at the end of 12th grade. (FF 14, 33)

Student's purported fulfillment of the private school's graduation "requirements," therefore, signified nothing more substantive in terms of achievement of academic or real-life skills other than Student's faithful attendance at the private school for four years and recognition

that in the absence of a school district-funded continuation in the school for another year, Parents would likely be unwilling to continue paying tuition. In cases where there has been a district-supported “13th year” of a special education placement due to a student meeting the criteria for continued IDEA eligibility, the private school has not issued a diploma to such student, although he or she may have followed a similarly individualized academic program and been assigned to classes that that would have nominally fulfilled the private school’s graduation requirements. (FF 45, 46, 47)

The evidence in this case, therefore, supports the conclusion that the private school’s decision to prepare a diploma indicating that Student had met graduation requirements was based primarily upon its ignorance of the District’s involvement with Student during 12th grade. There is every reason to believe that the private school would not have issued a diploma to Student had it been aware that the District was intending to provide special education services, since it does not do so when notified by a public school district that a special education student is to continue receiving services. (FF 46, 47, 48) Moreover, despite the private school’s unconvincing retreat, during testimony, from its written statement that it would honor Parent’s request not to issue a diploma, the evidence supports the reasonable inference that the private school would have refrained from preparing a diploma for Student had that request been made by the District, or even by Parent, before the District questioned the school’s right to reconsider its determination that Student had met graduation requirements. (FF 42, 43, 44)

Parents Are Not Attempting to “Bank” a Properly Awarded High School Diploma

The District contends that it is improper for a student who has met graduation requirements to refuse a high school diploma in order to prolong IDEA eligibility. Although that may be accurate as a general principle, the record in this case, as discussed above, does not

support the conclusion that Student actually earned a “regular” high school diploma, in accordance with the applicable federal and state legal standards, or, indeed, with any objective standards consistently applied by the private school.

Moreover, the record established that Parents in this case are seeking nothing more than the same benefit of continuing special education eligibility that the District regularly offers to special education students attending a District high school or privately placed by the District. The testimony of District staff clearly established that the District regularly withholds high school diplomas at the end of 12th grade for students it has placed when it determines that a special education student continues to meet the disability/need for services criteria for IDEA eligibility, while permitting such students to participate in graduation ceremonies with his/her 12th grade class. (FF 49) In addition, the continuing eligibility decision is made entirely through the IEP process. (FF 50)

In this case, however, the question of Student’s graduation status was not discussed in an IEP meeting and the District admittedly took no steps to determine whether Student was “on track” to graduate from the private school. (FF 33, 38) The District, therefore, did not take responsibility for assuring that Student’s IDEA eligibility was not terminated by the private school issuing a “regular” high school diploma to Student at the end of 12th grade, and the private school had no opportunity to apply the situational criteria it uses to award or withhold a diploma to a special education student because it did not participate in the IEP meeting in January 2013, and did not discuss Student’s post high school plans with Parent. (FF 28, 48)

The District special education supervisor testified that after reviewing Student’s educational levels in the District’s own evaluation results, it did not occur to her that Student would meet the requirements for a regular high school diploma, and therefore, she did not think

it was necessary to mention that a determination by the private school that Student met all requirements for a regular high school diploma would terminate Student's IDEA eligibility. Obviously, Student did not miraculously overcome the effects of an intellectual disability and reach the academic proficiency levels expected of a typical 12th grade student in the months between the District's January 2013 ER review/IEP offer and the May 2013 graduation date, yet the District now asserts that once the private school typed Student's name on a diploma form, Student's eligibility was irrevocably terminated.

The District noted that its IEP offer was to begin immediately in January 2013 (FF 30) and implied, at least, that had Parents immediately enrolled Student in the District, the graduation problem would have been avoided. Reduced to its essence, the District's position in this case is that it was entitled to treat Student differently from similarly situated IDEA-eligible District residents either enrolled in a District high school, or placed by the District in a private school, in terms of even discussing with Parent whether the private school intended to issue a diploma to Student at any time before that event occurred. The District, therefore, apparently believes that it is appropriate to consider Student's IDEA eligibility terminated because Parents elected to continuing paying for a private school so Student could enjoy the social benefits of being a senior and participating in memorable end of high school activities with the classmates with whom Student had shared all other high school experiences.

There is no substantive difference between what the Parents are requesting here and what the District regularly and routinely provides to IDEA-eligible students entitled to services beyond the chronological end of high school. There is also no rational basis for denying Student continuing IDEA eligibility based on whether Student attended a private school that provided a substantially modified, very much individualized curriculum as a Parent-funded choice or as a

District placement. It is, in short, entirely unreasonable to conclude that the same circumstances constitute impermissible “banking” of a diploma with respect to a Student enrolled in a Parent-selected private school but not when the District determines, through the IEP team process, that a high school diploma should not issued to eligible students it places in either its high schools or in private schools.

Parents Had No Notice or Opportunity to Be Heard Prior to the District’s Non-Eligibility Decision

Although the District relied heavily, indeed, exclusively on the substantive effect of “form” in this case, *i.e.*, the private school’s decision to issue a diploma and consider Student “graduated” at the end of 12th grade, the record established that the District did not comply with the required “form” necessary to properly terminate Student’s special education rights, since the District failed to issue a NOREP, the document necessary to provide proper notice (prior written notice) to Parents of the District’s refusal “to initiate the provision of FAPE “ to Student. *See* 34 C.F.R. §300.503(a)(2). (FF 39)

The District asserts that no NOREP was necessary here because it was not providing services to Student at the time of the private school’s decision to issue a high school diploma that purportedly terminated Student’s IDEA eligibility. The District’s position does not conform to applicable legal standards with respect to the IDEA NOREP requirements. *See* 34 C.F.R. §§300.102(a)(3)(iii), 503(a). The District’s position, in effect, would write out of the statute and regulations the obligation to issue a NOREP when an LEA refuses to evaluate, identify or provide FAPE to a potentially eligible or formerly eligible student at any time a school district is not currently providing services to a school-age child. If the District’s position that it was not required to issue a NOREP because Student was not attending a District school or otherwise receiving District services were accepted, school districts would arguably be relieved of the

obligation to issue a NOREP anytime they conclude that a Student is not IDEA eligible, such as *e.g.*, when a district determines after an initial evaluation or reevaluation that one of the eligibility criteria—existence of a disability or need for special education—has not been met.

It appears that the District’s legal position with respect its obligation to issue a NOREP in this case is really an after the fact attempt to conform its legal obligations to the facts. By the time the District withdrew its January offer of FAPE, as well as its renewed offer of ESY services in June 2013 based upon Student’s purported “graduated” status, the “graduation” and purported termination of IDEA eligibility had already occurred. (FF 30, 31, 36, 37) A District “graduation NOREP,” therefore, could certainly not have provided “prior” written notice, as it is designed to do. The District acknowledged that for students attending a District school is considered “graduated,” the District issues a NOREP. (FF 51)

Even putting aside, the District’s clear procedural violation that had an adverse substantive effect on Student’s right to a FAPE to age 21, the record makes it very clear that Parents had no opportunity to avoid the District’s non-eligibility decision before the decision was made. As noted, the graduation/non-eligibility issue arose because the District failed to make any prior inquiry into Student’s graduation status or inform Parents that Student’s participation in graduation ceremonies would result in the District withdrawing its offer of FAPE for the 2013/2014 school year based on termination of IDEA eligibility.

In the absence of the District informing Parents of the effect of a “regular” graduation on Student’s IDEA eligibility and its obligation to provide Student with special education services to age 21, Parents were deprived both procedurally and substantively of one of the bedrock requirements of due process—notice of an impending adverse action to be taken by a government entity. The record established that Parents did not know, and had no reason to

suspect, that the private school's act of preparing a diploma with Student's name on it would divest Student of an important statutory right—to receive special education services until age 21.

Early in 12th grade, Parents permitted and participated in an evaluation by the District, and later reviewed with the District the ER which confirmed Student's continued eligibility under the criteria of existence of a disability and need for services, participated in development of an IEP and visited potential placements for the current school year with District staff. (FF 19, 21, 23, 28, 30) All of those contacts with the District occurred without a word of either inquiry or warning to Parents with respect to potential termination of eligibility due to a "regular" graduation. Moreover, the transition goal in the IEP proposed by the District referred to Student's opportunity to prepare for employment training "after graduation." (FF 29) Parent had no reasonable way of knowing that "graduation" meant participation in ceremonies but not actually receiving a diploma.

The District supervisor of special education who worked with the family testified candidly that she did not think that Student might fulfill the requirements for a "regular" high school diploma based on the academic levels in the ER. And, indeed, as noted above, Student did not, in fact, qualify for a high school diploma based on any objective criteria other than having been assigned to classes for four years with designations that ostensibly provided the number of "units" required to meet private school graduation requirements. That and the statement on the diploma that bears Student's name that Student met graduation requirements by completing an unspecified, unwritten, entirely individualized "course of study" is the District's entire basis for considering Student divested of IDEA eligibility, after the fact, with no prior notice whatsoever to Parents.

The effect of Student receiving a diploma, even one that was issued according to the entirely subjective standards of the private school, should have been explained to Parents in order to give them the opportunity to forestall that effect and preserve Student's IDEA eligibility. The District's failure to do so deprived Parents and Student of due process under IDEA specifically, and in general, since Parent had no prior notice and no prior opportunity to be heard before losing an important substantive right to which Student was otherwise entitled because Student admittedly met IDEA eligibility criteria.

Finally, the record also establishes that Parents had no reasonable alternative means of protecting Student's rights in the absence of explicit notice from the District concerning the effect of a regular high school diploma. Although Parents were working with an advocate throughout the evaluation and IEP process in Student's 12th grade year, her testimony demonstrated that she did not have an accurate understanding of the law in terms of the effect of receiving a regular high school diploma on a continuing right to IDEA services of a student with a disability. (FF 33)

District's Reliance on PDE/BSE Advice

The District maintained that it sought, received and was entitled to rely on the advice of staff from BSE who stated unequivocally that a student who has met a private school's criteria for receiving a "regular" high school diploma is no longer IDEA eligible and that a public school district is not permitted to provide special education services under those circumstances. (FF 53, 54, 55, 56) That is true as a broad, general statement of the law and the only possible legally correct answer that could have been given to the District's generic question, devoid of any facts relating specifically to the situation involved in this case. Now, however, the District contends that it is entitled to rely on that generally accurate response as if the advisor had been fully

informed of the underlying circumstances that prompted the question and that the hearing officer must conclude that knowledge of those circumstances would have made no difference to the answer the District received to its inquiry.

Whether the special education advisor's response to the District's inquiries would have been the same or different with full knowledge of the facts established by the due process hearing record is entirely a matter of speculation at this point. The District admitted that it never provided any factual details relating specifically to this case, or even hypothetical facts suggesting that: 1) the student in question has an intellectual disability; 2) that fulfilling graduation requirements for a "regular" diploma was based on a significantly modified curriculum; 3) that the graduating student's academic skills remained at a very low level; 4) that a District evaluation a few months before "graduation" established continuing IDEA eligibility past 12th grade; 5) that the District had offered Student an IEP for the year following 12th grade; 6) that the District knew Student was in 12th grade but never inquired of either Parent or the private school whether the private school intended to issue a diploma.

It is hard to imagine that the District would have received a simple and straightforward "no eligibility" answer if the District had revealed more than the proverbial "tip of the iceberg" when it requested the advice of a BSE special education advisor and revealed even some of the above facts. It is also telling that even with only the barest information available, the advisor still noted that other circumstances, such as a successful child find claim, could affect the District's obligation to provide services if a parent initiated a due process complaint. That caveat may have indicated some level of suspicion on the part of the advisor that the general question, to which there is such an obvious answer, may not have revealed important details. In addition, the reference to a due process complaint conveys the equally accurate information that a hearing

officer who hears evidence, determines the facts and applies the law to specific facts may very well reach a different conclusion after compiling a full record. That, indeed, is the situation in this case. Not only is a due process hearing officer not bound by the advice provided to an LEA by PDE/BSE, that advice was not considered a true interpretation of the law here, where the general question that was posed omitted essential details that might have prompted at least a more nuanced response, if not an entirely different answer.

CONCLUSION

The District's position that it is no longer required to provide special education services to Student because Student graduated from a private high school with a "regular" diploma is indefensible. The record established that Student met no objective, criterion-based standards to "earn" a regular high school diploma because the private school identified no standards and had no written plan that could serve as the functional equivalent of an IEP that Student successfully completed. In addition, the District failed to provide the required statutory prior written notice before refusing to provide Student a FAPE in accordance with the IEP it offered in January 2013, or to convene an IEP meeting to update its proposed IEP after the 2012/2013 school year ended. The District also failed to take the same procedural steps, such as discussion of graduation status at an IEP meeting or a prior inquiry into Student's graduation status, that it would take with respect to special education students who are either attending District schools or a District-supported placement.

Since Student was impermissibly denied special education services during the current school year, as well as the ESY services the District offered for the summer of 2013, the District will be ordered to immediately convene an IEP meeting to determine Student's current educational needs and begin providing appropriate special education services as determined by

Student's IEP team, which shall specifically consider Student's eligibility for ESY services during the summer of 2014. The District will also be ordered to provide Student with compensatory education for the full number of ESY hours not provided in 2013, as well as full days of compensatory education to equal the number of hours of educational services Student would have received in the vocational program in which Student wanted to enroll during the 2013/2014 school year, until such time as Student begins receiving services under a new IEP. The compensatory education hours may be used for appropriate instruction to meet Student's need identified in the most recent District evaluation. (FF 27)

The IEP team shall also consider whether Student needs a vocational program to begin in the fall of 2014 and if so, take whatever steps necessary to enroll Student in an appropriate program. The District shall assume financial responsibility for the program, provided, however, that its financial responsibility for a vocational program will end should Student leave the program before completing it.

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. Immediately convene an IEP team meeting to determine Student's current educational needs and begin providing appropriate special education services as determined by Student's IEP team. The IEP team shall specifically consider and determine Student's eligibility for ESY services during the summer of 2014 and provide ESY services if Student is eligible for such services.
2. Provide Student with compensatory education for the full number of ESY hours not provided in 2013, as well as full days of compensatory education to

equal the number of hours of educational services Student would have received in the vocational program in which Student wanted to enroll during the 2013/2014 school year until such time as the District begins providing special education services to Student in accordance with a new IEP. The compensatory education hours may be used for appropriate services to meet Student's needs identified in the most recent District evaluation.

3. Consider, via the IEP team process, whether Student needs a vocational program to begin in the fall of 2014 and if so, take whatever steps necessary to enroll Student in an appropriate program. The District shall assume financial responsibility for the program, provided, however, that its financial responsibility for the vocational program will end should Student leave the program before completing it.

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

February 4, 2014