

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION
DUE PROCESS HEARING

Name of Child: L.B.

ODR #15422/14-15 AS

Date of Birth:
[redacted]

Dates of Hearing:
November 24, 2014
January 16, 2015

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Representative:
Jennifer Bradley, Esquire
McAndrews Law Offices
30 Cassatt Avenue
Berwyn, PA 19312

Hamberg Area School District
701 Windsor Street
Hamberg, PA 19526

Mark Walz, Esquire
Sweet, Stevens, Katz and Williams
PO Box 5069
331 Butler Avenue
New Britain, PA 18901

Date Record Closed:
Date of Decision:
Hearing Officer:

February 10, 2015
February 26, 2015
Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is a late teen-aged 12th grade student who is eligible for special education under the classifications of speech/language impairment and specific learning disability. The Parents brought this due process matter pursuant to the Individuals with Disabilities Education Act [IDEA]², Section 504³ and Pennsylvania Chapters 14 and 15. The District and Parents came to a resolution in a previous matter and the terms of the agreement included funding an educational trust for Student. The Parents chose to use funds from the trust to enroll Student in a private school [Private School] for students with learning disabilities beginning in the 2012-2013 school year; the fund covered two years of tuition. The parties' agreement also included the provision that the District would re-evaluate Student in spring 2014. Based upon the evaluation results the District sought to return Student to the District high school for senior year. The Parents disagreed, kept Student at Private School and seek tuition reimbursement for the 2014-2015 school year. For reasons put forth below I find for the District.

Issue[s]

Was the final IEP the District offered to Student for the 2014-2015 school year appropriate?

If the IEP was not appropriate, was the placement the Parents unilaterally chose to continue appropriate?

If the IEP was not appropriate and the Parents' unilateral placement was appropriate, are there equitable considerations that would remove or reduce the District's obligation to reimburse the Parents for tuition?

Findings of Fact

1. Student is a 12th grade eligible student living with the Parents within the boundaries of the District but attending Private School. Student attended school in the District from kindergarten to mid-10th grade, the 2011-2012 school year. [NT 23, 27-28, 74]
2. When Student was in 9th grade the Parents engaged an advocate to assist with IEP meetings because Parents were concerned about Student's progress in reading and in math. [NT 61]

¹ This decision is written without further reference to the Student's name or gender. Other singular characteristics have also been removed to protect Student's privacy.

² 20 U.S.C. § 1400 *et seq.*

³ Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794.

3. In eighth grade Student was bullied about Student's speech by one peer in particular and the Parent was at the school at least once a week to address this. [NT 62]
4. Student was bullied in 10th grade, was afraid throughout the school day of being bullied, and was failing all subjects. [NT 23, 52]
5. Peers called Student names based on Student's disability and/or perceived disability. Student was depressed, walked with head hung down, and had to be forced to go to school. [NT 63-64]
6. On February 21, 2012 Student was assaulted by four other students off school property and suffered loss of consciousness, a concussion and [other injuries]. [NT 29-34]
7. At the time of the assault, two of the assailants were in Student's grade [10th] and two were 9th graders. [NT 58, 61-64]
8. The assault was videoed and other students may have viewed the video. [NT 34-35, 64]
9. The police were called and charges were filed against the assailants. Student had to testify against one of the four assailants; that assailant was placed in a juvenile facility. [NT 35-36]
10. Student did not see any of the four assailants in the school during the two days Student was back after the assault. There were no further incidents involving Student and the assailants at the high school. Student had four or five friends at the high school. [NT 35, 37, 45]
11. Student had been back at school after the incident for two days when the Parents removed Student from school as they believed that the school could not ensure Student's safety. They considered the District's proposal to have Student accompanied from class to class a 'punishment' for Student. A peer had beaten up one of Student's assailants and the Parents thought things were "spiraling out of control" around Student. [NT 34, 38, 65]
12. The Parents kept Student out of school for several months with no academic instruction. The District denied their request for homebound instruction. [NT 65, 144]
13. In 2012, the District and Parent resolved a dispute through a settlement agreement wherein the District established a compensatory education fund. The terms of the fund allowed Student to use the funds to attend a private school unilaterally chosen by the Parent and the fund covered tuition for two years. [NT 80; S-2]

14. The terms of the settlement agreement also set forth a detailed plan for the District to complete a reevaluation and propose a new IEP for Student's 2014-2015 school year. [S-2]
15. Student enrolled in Private School at the beginning of the 2012-2013 school year. [NT 29, 38; S-2]
16. Because Student did not complete 10th grade, Private School required Student to enter as a 10th grade student, thus adding another year to Student's high school tenure.⁴ [NT 87, 367, 372]
17. As per the settlement terms, the District started a reevaluation of Student on January 8, 2014 and completed the reevaluation report [RR] on March 14, 2014. Student and Parents cooperated with the reevaluation. [NT 174; P-12]
18. The RR classifies Student with a specific learning disability in reading and math, and speech/language impairment. The RR recommends specially designed instruction for reading and math, and speech/language therapy. [P-12]
19. Cognitive testing with the WISC-IV yielded a Low Average Full Scale IQ Score of 85, with Index scores within the Low Average Range for Verbal Comprehension and Perceptual Reasoning. Working Memory was in the Borderline Range, and Processing Speed was in the Average Range. [P-12]
20. Student made academic progress while in the District [late 2010-2011 school year through February of 2011-2012 school year] and while in Private School [2012-2013 school year to mid-March of 2013-2014 school year] as assessed on the WIAT-III as follows, with the first standard score being from an April/May 2011 Independent Educational Evaluation and the second standard score being from the District's March 2014 RR: Reading Comprehension 72/82; Math Problem Solving 75/95; Math Fluency Addition 77/95; Math Fluency Subtraction 88/100; Sentence Building 63/81; Sentence Combining 63/96; Theme Development 76/101; Word Count 64/91; Receptive Vocabulary 78/126; Oral Discourse Comprehension 67/85. [S-1, P-12]
21. On the CELF-4, an instrument assessing language skills, Student evidenced continuing needs. Index Standard Scores/percentiles were as follows: Core Language 79/8th percentile; Receptive Language 72/3rd percentile; Expressive Language 77/6th percentile; Language Content 82/12th percentile and Language Memory 74/4th percentile. [P-12]
22. The District psychologist met with Student's mother the morning of March 19, 2014 to go over the RR results. [NT 179, 181; S-7]

⁴ If Student had gone into Student's chronological 11th grade, the educational fund would have covered both junior and senior years.

23. On March 28, 2014 the Parents signed an Enrollment Contract for Student to continue at Private School for the 2014-2015 school year. [P-7]
24. The IEP team convened on April 4, 2014. The District distributed a draft IEP and proposed that it be implemented at the high school for senior year. Student's mother and Student did not request any specific changes to the content of the IEP. [NT 415-416]
25. Student's mother objected to Student's proposed return to the District, and made it known that Student would never return to the District's school. [NT 77, 104, 112, 147; S-8]
26. Student's mother stated her desire that the District continue payment of private school tuition, the District declined this request, and Student's mother and Student left the meeting before the entire IEP could be reviewed. [NT 229-230]
27. The IEP team reconvened on June 2, 2014 to revise and clarify the IEP. Student's mother again sought tuition payment to the private school and again the District declined, whereupon Student's mother stated that she then had no reason to continue the meeting and left. [NT 111, 277-278; S-10, S-11]
28. On June 10, 2014 the Private School notified the Parents that Student had been awarded a tuition discount of \$16,800 for the 2014-2015 school year. [P-7]
29. Taking the tuition discount into consideration the total remaining obligation for the Parents for Student's 2014-2015 school year is \$19,300 which includes the balance of the tuition, tutorials, speech and transportation. [P-7]
30. Parents rejected the NOREP for the proposed IEP on July 31, 2014, but did not identify any areas of disagreement with the IEP, or ask for any specific changes. [S-9]
31. On August 8, 2014, the Parents sent a letter to the Director of Special Education providing notice that the Parents were continuing Student's unilateral private placement, and stating the opinion that the proposed IEP "fails to meet [Student's] academic, social, emotional, and behavioral needs." The Parents did not offer any further explanation about the IEP's alleged shortcomings and did not put forth any specific changes to the IEP. [S-12]
32. The District convened the IEP team for the third time to discuss whether specific changes to the IEP could address Parents' concerns. Student's mother reiterated her position that the District should pay Student's private school tuition and again the District declined whereupon Student's mother again immediately left the meeting. [NT 123-124; S-13]

33. The Parents had no intentions of bringing Student back to the high school. At the hearing Student's mother freely admitted her position, "I told [the director of special education] that I would not be bringing [Student] back to this school. I just adamantly refused to bring [Student] back..."; "My husband and I had already made our decision; we would not bring [Student] back to this atmosphere for [Student] to be pulled down to the level [Student] was before. We had seen too much of a good change in [Student] to bring [Student] back here." [NT 77, 104, 112, 147]
34. Student's mother acknowledged that not only would she not consider the District's high school, but her intention was that Student was going to remain at the Private School. [NT 147]
35. As an alternative to full days at the high school the IEP team offered a schedule that would involve half-days at the [local] Career and Technology Center so that Student could begin to train in Student's selected trade. Student's mother dismissed that suggestion, stating that it was "not an option" because she needed Student to concentrate on schoolwork and feared that if Student were to attend the Tech Center, the District would start "slacking off" Student's academic needs. [NT 113-114, 162]
36. The June IEP [IEP] was the last IEP the District offered. It was a revision of the first post-RR IEP and was presented at the June 2, 2014 IEP meeting. Given that Student's mother left the meeting as soon as her request for tuition was denied, revisions were made without her input. [S-11]
37. The special education director, the special education teacher and the speech/language therapist represented the District at the June 2, 2014 IEP revision meeting. [S-11]
38. The IEP noted that the Student did not exhibit behaviors that impeded Student's learning or that of others. Neither a record review of past behaviors nor the Parents' input form for the RR indicated that behavior was a concern. [S-4, S-11]
39. The IEP's Transition plan for Post-Secondary Education toward the Goal of attending a technical school is as follows: Quarterly transition sessions with the transition coordinator; compile related post-secondary information in a transition portfolio; have assistance if needed with completing technical school applications; apply to the [local] Career and Technology Center. [S-11]
40. The IEP's Transition plan for Employment toward the Goal of a career as a [specific trade] and enlistment in the National Guard is as follows: Student Transition Planning Interview has already been completed; Student will take the ASVAB military entrance exam this summer and is already connected with a recruiter; completion of the Keys-2-Work pretests; apply to [the local] Career and

Technology Center for [selected area of trade interest] or a similar career path. [S-11]

41. The IEP's Transition plan toward the Goal of Independent Living is as follows: The team and Student have agreed that a goal in this area is not needed based on Student's previous completion of the Independent Living Informal Assessment and parent input. Student has a driver's permit and plans to get a driver's license this summer. [S-11]
42. The IEP's Transition plan notes that Student and family are already aware of OVR and that an OVR representative attended Student's most recent meeting at Private School. The IEP Transition plan also notes that Student will receive help with Voter Registration and [redacted] if needed. [S-11]
43. Projected courses of study for the 2014-2015 school year to prepare for post high school Transition were English [Comprehension], Mathematics, Science, History, Physical Education and possibly Technical School enrollment [for part of the day]. [S-11]
44. Needs identified in the IEP are math concepts and applications, math computation, reading comprehension including inferential comprehension skills, identification and use of auditory language memory skills, and receptive language. [S-11]
45. The IEP provides a goal to address Student's needs in the area of inferential comprehension /receptive language as follows: Given a passage or narrative on the modified 11th grade level presented verbally, Student will correctly answer literal and inferential comprehension questions including main idea, prediction, sequencing, cause/effect, and problem/solution with 85% accuracy over six data collection sessions. The baseline⁵ obtained on March 14, 2014 was 70% using an 8th grade level passage, 70% using a 6th grade passage and 80% using a 5th grade passage AimsWeb considers mastery at these levels at 75%. [S-11]
46. The IEP provides a goal to address Student's needs in the area of reading comprehension as follows: Given an 8th grade curriculum based cloze passage, timed, Student will be able to choose the correct option (word) out of three to complete sentences/phrases with at least 28 corrects and no more than 3 errors on 3 consecutive bi-weekly trials. The baseline on March 14, 2014 was 27 correct with 2 errors. AimsWeb norms indicate mastery at the 8th grade level when a student receives at least 28 correct. [S-11]

⁵ It took several searches through the IEP to locate the baselines and match them to the needs and goals. Even though baselines are presented under Present Levels, it would be helpful to the reader if the baselines obtained during the RR had then been repeated and inserted into the Goals in the form of "In light of Student's need in the area of [specific deficit] Student will increase performance from [baseline] to [target]". This is certainly not a fatal flaw but the suggested format should be considered in future drafting of IEPs.

47. The IEP provides a goal to address Student's needs in the area of auditory [language] memory as follows: Given a visual or verbal cue, Student will improve auditory memory skills by demonstrating the use of introduced memory strategies such as auditory rehearsal, paraphrasing, chunking, forming associations, writing down steps, and/or visualization in order to accurately repeat information presented verbally with 85% accuracy over six data collection sessions. Although Student's CELF-4 scores were presented in present levels, this goal carries no discernable baselines. [S-11]
48. The IEP provides a goal to address Student's needs in the area of mathematics computation as follows: Given an untimed 8th grade curriculum based computation assessment, Student will be able to obtain at least 28 points on three consecutive bi-weekly trials. Student's score using an 8th grade level assessment on March 14, 2014 was 17 points [AimsWeb considers mastery at 28 points]; on a 7th grade level assessment was 31 points [AimsWeb considers mastery at 31 points], and on a 6th grade level assessment was 40 points [AimsWeb considers mastery at 33 points]. [S-11]
49. The IEP provides a goal to address Student's needs in the area of mathematics concepts and applications as follows: Given an untimed 8th grade curriculum based concepts and applications assessment, Student will be able to obtain at least 13 points on three consecutive bi-weekly trials. Student's score on an 8th grade level assessment on March 14, 2014 was 3 points [AimsWeb considers mastery at 13 points]; on a 7th grade level assessment was 14 points [AimsWeb considers mastery at 18 points], and on a 6th grade level assessment was 21 points [AimsWeb considers mastery at 19 points]. [S-11]
50. The IEP provides for a number of methods of specially designed instruction [SDI] to assist Student. These include testing accommodations [taking tests in the resource room; questions read, rephrased and/or clarified; extended time to double the amount]; chunking information and directions presented auditorially, checks for understanding, encouraging Student to make visual representations of information; setting smaller due dates for long term projects; providing guided notes when information is provided in a lecture format; preferential seating close to instructional area; weekly grade reports to Student, weekly electronic updates to Parents; use of a calculator for benchmark assessments and in all classes; instruction in reading comprehension using a research validated program [SRA]; instruction in math concepts, applications and computation with a research-based program [Saxon Math]. [NT 400; S-11]
51. Under the IEP Student would be checking in with the guidance counselor at least once a week for a minimum of 25 minutes, and would have the opportunity to request to go to the guidance office, case manager or other staff at any time throughout the day. [S-11]

52. The IEP provides related services in the form of group Speech/Language therapy for one 40-minute session per cycle and for one individual 20-minute Speech/Language therapy session per cycle. [S-11]
53. The District is a “one-to-one” school district and as such every student receives a laptop that allows provision of any necessary technology for a student. If needed the laptop is loaded with speech-to-text software or text to speech software. Students’ laptops are customized with programs that meet their specific needs. [NT 425]
54. All Student’s regular education teachers would receive a copy of the IEP, the case manager would offer consultation to all regular education teachers at any time needed, and the special education teacher would receive consultation once a month from the speech/language therapist. [S-11]
55. Student’s special education program would be delivered in Student’s neighborhood school with Supplemental Learning Support: special education personnel providing services for more than 20% but less than 80% of the school day. [S-11]
56. Student feels treated with respect at the Private School, and there is no bullying there. [NT 39]
57. Student has made friends at Private School, numbering ten or twenty. [NT 40, 45]
58. Student’s grades have been As, Bs and Cs at Private School. Student receives speech services, tutoring, and utilizes assistive technology. [NT 39]
59. Student has joined Student Council at Private School, and engaged in volunteer activities with younger children. [NT 39-40]
60. Student is graduating at the end of the current school year. [NT 42]
61. In preparation for graduation Student has a transition class and will be going on an internship. [NT 42]
62. Student aspires to attend a trade school after high school graduation and wants to join the National Guard. [NT 42]
63. Student does not know if any of the youths who participated in the assault still attend the high school and neither Student nor the Parent know if any Students who may have viewed the video are still at the high school.⁶ In her due process

⁶ Student was required to repeat 10th grade upon enrolling in the Private School. Provided that Student is correct that two of the assailants were in Student’s grade in the high school [10th in the 2011-2012 school year] and that two were freshmen [9th grade in the 2011-2012 school year], unless the older two were left

- complaint the Parent acknowledges that the assailants no longer attend the high school. [NT 45, 66, 148; S-14]
64. Student continues to have friends at the high school. [NT 45, 396]
 65. Student testified that Student felt scared that someone would bully Student when Student came to the high school for testing in April or May 2014, and is scared about the prospect of having to return to the high school currently. [NT 43-44, 46-47]
 66. When Student was at the high school for testing in spring 2014, Student showed no outward signs of anxiety or PTSD. [NT 219, 395-397]
 67. Student interacted positively with the special education teacher and other students within the special education classroom, and had lunch in the cafeteria with some students who were Student's friends when Student attended the high school. [NT 47, 396-397]
 68. Student indicated having no difficulty concentrating on the required work on the testing day. [NT 48]
 69. On the WIAT-III administered on the day of testing, Student showed evidence of being able to perform without undue interference as evidenced by Student's generally raised scores over previous levels. [S-1, P-12]
 70. With regard to Student's social, emotional and behavioral functioning the BASC-2 indicated improvement in the home setting as indicated by the Student's and the Parent's having not rated any areas in the clinically significant range. The Parent also did not rate any areas in the at-risk range. [P-12]
 71. The BRIEF indicated significant improvement in Executive Functioning in the home setting, especially in Metacognition. [P-12]
 72. The Conners-3 indicated significant improvement in all areas in the home setting. [P-12]
 73. The district psychologist concluded that [Student] had made significant improvement in all areas which were elevated in 2012 compared to 2014. "[Student] is not exhibiting any elevated concerns which would be related to ADHD nor executive functioning." [P-12]

back they would have graduated in June 2014. Unless they dropped out, the younger two would be fellow seniors at the high school for 2014-2015, the school year for which the District sought Student's return. [NT 58]

74. Student was not seen by a psychiatrist or social worker following the February 2012 assault. [NT 58]
75. Student is not currently seeing a psychiatrist, psychologist, or other mental health professional. [NT 143]
76. Student has never been diagnosed with Posttraumatic Stress Disorder [PTSD]. [NT 143-144]
77. Student exhibits no clinical signs of anxiety, and is able to successfully employ emotional regulation. [NT 66, 224-225; P-12]
78. In answering a Parent Questionnaire as part of Student's reevaluation the Parents listed strengths, among others, as "outgoing" and "very social". [S-4]
79. On the Parent Questionnaire Parents noted that Student "behaves very well in class" and put a zero beside each significant problem area queried. For home behaviors the Parents endorsed a minor concern ['1'] for poor attention span, sloppy table manners, and poor memory. [S-4]
80. Although the sources of her information are unknown, Student's pediatrician was willing to provide input and noted in a November 14, 2014 letter prepared shortly before the first hearing session that "[Student]" has blossomed at [Student's] two years at [Private School]" and "has made wonderful strides at the school from both an academic and social interactions standpoint". [P-9]

Legal Basis and Discussion

Burden of Proof: The burden of proof is composed of two considerations: the burden of going forward (introducing evidence first) and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer). In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁷ that the other party failed to fulfill its legal obligations as alleged in the due process complaint. *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). In this case the Parents asked for the hearing and thus bore the burden of persuasion. As the evidence was not equally balanced the Schaffer analysis was not applied.

⁷ A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, *Comm. v. Williams*, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. *Comm. v. Walsh*, 2013 Pa. Commw. Unpub. LEXIS 164.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). I did not find difficulty with the credibility of any of the witnesses. Of particular note, Student testified with poise and confidence, and based upon descriptions from an earlier time clearly has matured and progressed socially.

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

The District completed its reevaluation and offered its IEP for 2014-2015 well prior to the start of the academic year. The Parents based their claim for tuition reimbursement upon the allegation that the IEP offered to Student was inappropriate. The IEP for each student with a disability must include a statement of the student’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the student’s needs that result from the student’s disability to enable the student to be involved in and progress in the general curriculum and meeting the student’s other educational needs that result from the student’s disability; a statement of the special education and related services and supplementary aids and services to be provided to the student...and a statement of the program modifications or supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other students with disabilities and nondisabled students; an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class... 34 CFR §300.347(a)(1) through (4). Further for older students the IEP must include a detailed Transition Plan for post-secondary education, employment, and/or independent living.

The Parents have not produced any evidence to support their allegations that the IEP is inappropriate; I find that the IEP is clearly appropriate under the standards set forth in the IDEA. The IEP is based upon a thorough reevaluation that examined cognitive, academic, speech/language and social/emotional functioning by means of curriculum-based measures and standardized nationally normed instruments. Through the assessments the reevaluation identified educational Student's needs. The IEP presented measurable goals to address each of Student's educational needs. The IEP provided for specially designed instruction to assist Student to access the curriculum. The IEP provided related services. The IEP put forth a Transition Plan based upon Student's stated interests and upon steps Student had already begun to take to transition to post-secondary life. Notably the IEP also provided the possibility of Student's spending a half day at the high school and a half day at a career and technical school where Student could begin to take coursework in Student's area of interest. No behaviors of concern surfaced from any source during the reevaluation process, and assistive technology is afforded to all the District's students through laptops loaded with the specific educational software each child needs.

Given three separate IEP meetings, the Parents offered absolutely no input regarding changes they would like to see in the IEP. In fact, Student's mother sabotaged three IEP meetings, refusing to participate in the planning process beyond asking to what extent the District would fund Student's last year in Private School. Insofar as the Parents may allege that the District did not offer a plan for Student's gradual transition back to the high school, their refusal to engage in the IEP planning process when the transition could have been set forth nullifies this concern. I find that the issues the Parents raised about the IEP were stretches and red herrings, and that based on the mother's candid testimony I conclude that the Parents would have rejected any IEP the District offered that did not keep Student at Private School.

Tuition Reimbursement: Although parents have an absolute right to decide upon the program and placement that they believe will best meet their student's needs, public funding for that choice is available only under limited circumstances. The IDEA does not require that a school district "pay for the cost of education including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. §1412 (a)(10)(C)(i); 34 C.F.R. §300.148.

The United States Supreme Court established a three part test to determine whether or not a school district is obligated to fund a private placement. *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program legally adequate? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, *Florence County School District v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the student only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk*. The Third Circuit explains that while an “appropriate” education must “provide ‘significant learning’ and confer ‘meaningful benefit,’” it “need not maximize the potential of a disabled student.” *Ridgewood*, 172 F.3d at 247 (3d Cir. 1999); *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002). An IEP must provide a “basic floor of opportunity”. There is no requirement to provide the “optimal level of services.” *Mary Courtney T. v. School District of Philadelphia*; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania’s federal court in the Eastern District noted, [LEAs] “need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008).). The U.S. District Court for the Middle District of Pennsylvania has noted, “the standard is virtually minimal, indeed, “modest.” *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 1:11-CV-574, 2012 WL 2979038 at 27 (M.D. Pa. July 20, 2012). The law requires only that the plan was reasonably calculated to provide meaningful benefit at the time it was created.

After a careful review of the IEP the District offered to Student I find that it more than satisfied the requirements for an appropriate IEP under the IDEA. Having found that the IEP the District offered to Student for the 2014-2015 school year was appropriate, there is no need to reach the second and third prongs of the *Burlington/Carter* analysis.

Conclusion

Student suffered an after school hours assault by peers off school grounds three years ago and after only two days back in the District the Parents became convinced that the District could not keep Student safe and so kept Student at home for several months. The District and the Parents later settled a dispute that was resolved through the creation of an education fund that the Parents chose to use for tuition to a private school for students with learning differences. The fund was in an amount great enough to cover two years tuition at the private school. The resolution of the dispute also contained a provision that the District would reevaluate Student in spring 2014, and the District fulfilled its end of the agreement in a timely manner.

When based upon the reevaluation results the District created a draft IEP and proposed that it be implemented back in the high school, the Parents adamantly refused to return Student to the District and asserted that they intended to keep Student in the private school. In fact, the Parents signed an enrollment contract for private school after

receiving the RR results but before a draft IEP had been presented. At each of three IEP meetings wherein the District sought the mother's input about possible revisions to the IEP mother asked if the District was going to continue to fund Student's private school placement. When the District stated that it was not going to provide another year of tuition Student's mother abruptly left the IEP meetings. The Parents clearly had an agenda, and after the reevaluation was completed they did not cooperate in any way with the District.

Parents did not file for due process until late in September after the academic year had begun, and it was not until their due process complaint that they brought up concerns about the IEP itself, making these concerns their basis for seeking tuition reimbursement. Concerns about the IEP that were raised - behavior planning, assistive technology and transition - were all answered effectively by the District. I find that the IEP the District offered Student more than met the standard for appropriateness under the IDEA and Pennsylvania Chapter 14. Accordingly there is no need to examine the appropriateness of the Parents' unilateral placement or to weigh the equities.

Mother's testimony at the hearing raised the strong inference that no IEP, regardless of how excellent or how perfect it might be, would be acceptable to the Parents. Their issue is not the IEP at all, rather the bottom line issue is their desire to have Student remain at Private School at public expense. Student has done very well at Private School and the funds from the settlement seem to have been well spent for this student. It is not difficult to empathize with Student's and Parents' desire to keep Student at Private School for another year. However the Parents adduced no proof that returning to the high school as a senior would, as they allege, increase Student's anxiety and cause "undue stress and emotional trauma" that would impede Student's learning. They provided not a trace of evidence that the high school environment is "hostile" and triggers "post-traumatic stress symptoms" in Student. Student has never been diagnosed with PTSD, and Student has never required the services of a mental health professional, neither immediately subsequent to the attack nor in the intervening years since. Student was able to perform quite satisfactorily during testing at the high school in the spring of 2014, and was able to socialize with friends in the high school cafeteria.

By all accounts Student has matured and blossomed academically and socially. In March 2014 the Parents described Student as "outgoing" and "very social" and their endorsements on two assessments of social/emotional/behavioral functioning resulted in no scores of clinical significance or even scores indicating some risk. At the hearing Student testified confidently and competently and carried [] self well.

While sentiment nudges in the direction of Student's being happier staying in Private School, and agreeing to reimburse the Parents for tuition for another year would have been a most generous gesture on the part of the District, the District also must be conscious of its fiscal responsibility to its other students and its duty to expend public funds judiciously. Having kept its part of the agreement by funding Student's educational trust, the District was under no obligation to continue the Parents' chosen placement once the funds were exhausted and an appropriate IEP was on the table. The

Parents have not met their burden of proving their allegations that the District offered an inappropriate IEP or that returning to the District would have been harmful to Student. For these reasons I must find for the District.

Order

It is hereby ordered that:

The final IEP the District offered to Student for the 2014-2015 school year was appropriate.

The District is under no obligation to reimburse the Parents for Student's placement at Private School for the 2014-2015 school year.

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

February 26, 2015
Date

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