

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: E.R.

ODR #15917/14-15 KE

Date of Birth: [redacted]

Dates of Hearing:

April 7, 2015

May 4, 2015

May 29, 2015

June 1, 2015

CLOSED HEARING

Parties to the Hearing:

Parent[s]

West Chester Area School District
829 Paoli Pike
West Chester, PA 19380

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Leah Batchis, Esquire
Batchis & Nestle
Two Bala Plaza, Suite 300
Bala Cynwyd, PA 19004

David Painter, Esquire
Sweet, Stevens, Katz and Williams
331 East Butler Avenue
New Britain, Pa 18901

June 13, 2015

July 1, 2015

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

Background

Student¹ is an elementary school-aged child residing in the West Chester Area School District [hereinafter District] who prior to age three was found eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] and Pennsylvania Chapter 14 under the classification of speech/language impairment. After receiving two years of preschool early intervention through the IU to address speech/language and behavior issues, Student entered the District's kindergarten. However, after two weeks Student's mother [hereinafter Parent] moved Student to a private Kindergarten while the District continued to provide related services, then enrolled Student in a charter school for 1st and 2nd grades, and finally sent Student to an out-of-state private school [hereinafter private school] for 3rd and 4th grades. Near the conclusion of Student's 3rd grade, the Parent requested that the District offer Student programming for the 2014-2015 school year, Student's 4th grade year. The District sought and obtained Parent's permission to conduct an evaluation.

After conducting its evaluation the District concluded that Student was not eligible for special education programming under the IDEA, but that Student is a qualified handicapped person / protected handicapped student under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the federal regulations implementing §504 (34 C.F.R. §§104.32—104.37), and Chapter 15 of the Pennsylvania Code. The Parent disagreed and asked for this hearing, alleging that the District's April 2014 evaluation was inappropriate, as was the ensuing Section 504 Service Plan, and that Student remains eligible for special education programming under the IDEA with the classifications of autism, speech/language impairment and other health impairment [ADHD].

The Parent is seeking reimbursement for a privately obtained educational evaluation and a privately obtained speech/language evaluation, tuition reimbursement for the unilaterally chosen out-of-state private placement during the current school year 2014-2015, and prospective placement at or reimbursement for the private school for the 2015-2016 school year. The District's position is that it conducted an appropriate evaluation, that Student is not eligible under the IDEA, that it offered Student an appropriate Section 504 Service Plan, that the private placement is inappropriate, and that therefore no reimbursement for evaluations or tuition and/or prospective placement is warranted.

Having considered all the evidence provided to me I find in favor of the Parent.

Issues

1. Is Student eligible for special education under the IDEA?
2. If Student is IDEA-eligible, under what eligibility classifications?

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

3. If Student is not IDEA-eligible, was the offered Section 504 Service Plan appropriate?
4. If Student is IDEA-eligible, or if Student is not IDEA-eligible but the Section 504 Plan was not appropriate, was the placement unilaterally selected by the Parent appropriate, and if so are there equitable considerations that would remove or decrease the District's responsibility for tuition reimbursement for the 2014-2015 school year?
5. Must the District reimburse the Parent for the private educational evaluation and/or the private speech language evaluation?

Findings of Fact

History of Eligibility, School Placements and Events Leading to Due Process Hearing

1. Student is a District resident who at the time of this hearing was in 4th grade. Student attended an out-of-state private school during the 2013-2014 and the 2014-2015 school years.² [NT 38; S-1; P-77]
2. Student was evaluated for early intervention services before age three, and was diagnosed with an expressive language disorder. Student was found eligible for special education under the category of speech/language impairment. Student received sixty minutes a month of speech therapy and sixty minutes a week of specialized instruction. [NT 40; S-1]
3. At age three, Student transitioned to the IU's preschool early intervention program and was enrolled for a half day in a regular education preschool program and a half day in the IU's special education preschool. [NT 35-36; S-1]
4. In the IU program Student's Individualized Education Plan [IEP] provided for speech/language services as well as behavioral supports to address difficulty transitioning and temper tantrums. [NT 36, 40-41]
5. Upon entering kindergarten in the District for the 2010-2011 school year Student had an IEP that provided for speech/language services in the form of small group therapy for 30 minutes three times weekly as well as support for math. [NT 36, 42; S-2]
6. Because Student was exhibiting behavior that concerned the Parent, the Parent removed Student from the District after a few weeks and placed Student in a private kindergarten. [NT 37]

² As noted earlier, the Parent is seeking reimbursement for the 2014-2015 school year only, in addition to prospective placement in the Private School for the coming 2015-2016 school year.

7. The District continued to provide Student with speech/language services three times a week and then two times a week at Student's home elementary school through a dual enrollment service plan. [NT 43-44; S-5, S-6]
8. Student enrolled in a charter school for 1st grade [2011-2012 school year] where special education services continued under IEPs providing for specially designed instruction related to self-advocacy, organization, and speech/language deficits. Student also received RAP Title 1 services for reading. Student's 1st grade teacher recommended that Student join a social skills lunch bunch group. [NT 37, 51; S-15, S-16, S-17, P-83]
9. Student's charter school's original IEP and the revised IEP of November 2012 provided for 180 minutes direct speech/language therapy and up to 60 minutes indirect consultative services per school calendar month. Student also received guidance counselling two times per cycle for fifteen minutes each session, and the team utilized organization logs and home/school communication logs to address executive functioning weaknesses. [NT 48-50; S-15, S-17, P-83]
10. In January 2013 the charter school provided OT and PT evaluations and revised Student's IEP to include monthly PT and OT consults, use of an iPod to reduce noise distraction at lunch, and daily pull-out for sensory integration/heavy work breaks. Student could sit on a ball and had use of the elevator because of Student's knees subluxing.³ [NT 49-50; S-17]
11. Despite the special education supports offered through the charter school Student struggled to make academic progress and exhibited behavior problems. Student refused to do homework and had auditory sensitivities that made attending to learn difficult. Student came home daily and told Parent that Student's "head was full of words" and it felt like it was going to explode. Student perceived bullying by other children at the charter school and had difficulty with peer relationships. [NT 51, S-15, P-67, HO-7]
12. In August 2013 Parent applied to four private schools, three of which are in Pennsylvania. None of the three Pennsylvania schools accepted Student as they did not feel they could support Student's social, pragmatic, emotional and behavioral needs. Student was accepted at the Private School and Student started there for 3rd grade on September 17, 2013. [NT 37-38, 51, 91-93; P-84, P-95, HO-8]
13. The Parent requested that the District develop an IEP for the 2013-2014 school year, but when the District issued a Permission to Evaluate [PTE] the Parent refused to sign it because Student had had recent private speech/language and

³ In March 2014 a geneticist offered the impression that Student has connective-tissue related Ehlers-Danlos syndrome, hypermobility type, with joint laxity. [NT 57-60; P-74]

- neuropsychological testing⁴ and the Parent was looking for an IEP offer rather than another evaluation. [NT 52; S-16, S-20]
14. The private speech/language evaluation the Parent referenced found continued need for speech/language therapy and recommended continuing of school-based therapy and implementation of private therapy. [NT 55; S-16]
 15. The private neuropsychological evaluation the Parent referenced concluded that “although [Student] was not demonstrating a specific learning disability in any area, [Student] was exhibiting an alarming pattern of academic underachievement as a result of executive functioning deficits and language processing issues.” The evaluator conferred a diagnosis of Attention Deficit/Hyperactivity Disorder. [NT 55-56; S-20]
 16. The Parent signed an enrollment contract for Student with the private school for the 2014-2015 school year. At the time she signed she indicated she was considering other options; the house in which she lived had been put up for sale the previous August [2013] and she was not sure of the geographical area where she would be living. [NT 102-105, 141; S-28; P-81]
 17. In a letter dated April 29, 2014 addressed to the principal of Student’s home school the Parent again communicated that she “may send [Student] to [Student’s neighborhood] elementary for the 2014-2015 school year...[and] would like to begin the process of getting [Student] an IEP for the 2014-2015 school year.” She enclosed the then-current IEP, and the recent private speech/language and neuropsychological evaluations. [NT 61-63, 66, 143-144, 552; S-17, S-20, S-21, S-28, P-83]
 18. On May 9, 2014 the District’s psychologist called the Parent to say that the letter and information had been received and that the District would be issuing a PTE so that more information could be obtained. [NT 63; S-29, HO-1]
 19. Although dated May 9, 2014, the PTE and the accompanying packet were not received by the Parent until May 14, 2014. Mother signed the PTE, scanned it and returned it to the District that same day, May 14th. [NT 64; P-93]
 20. The Parent sent a records release for the private school to share information with the District. She also sent other information including a Sensory Integration Praxis Test from May 2013, a Theraplay speech therapy progress report from July 2013, and a letter from Student’s treating psychologist noting diagnoses of ADHD, Mood Disorder and Adjustment Disorder. [NT 65-66]
 21. The District conducted its evaluation on June 4, 2014 and June 14, 2014. Neither the District psychologist nor the District speech/language therapist observed Student at the private school, with the psychologist giving as her reason her belief that her

⁴ Again, the Parent is not requesting tuition reimbursement for the 2013-2014 school year. [NT 52]

- practice jurisdiction was limited to Pennsylvania.⁵ The Parent was told to expect that the evaluation would be completed mid-July 2014 with an IEP meeting in early August 2014. [NT 66, 79, 554]
22. The Parent heard nothing further from the District, so on August 15, 2014 she sent an email inquiring about the status of the evaluation/IEP process and informing the District that since no IEP had been offered she was keeping Student in the private school for the 2014-2015 school year and requesting that the District fund that placement. [NT 54-55, 70-71; S-37]
 23. After failing to adhere to the timelines it had given to the Parent three months earlier, upon receipt of the Parent's letter the District responded very promptly by email on August 18, 2014, sending the Parent a letter, the evaluation report dated August 19, 2014, and a Notice of Recommended Educational Placement [NOREP] dated August 18, 2014. The District denied the request to fund Student's placement at the private school. [NT 72; S-41, S-42, S-43, P-86]
 24. The District's August 19, 2014 evaluation report concluded Student did not have a disability under the IDEA but did continue to demonstrate features of ADHD previously diagnosed by Student's developmental pediatrician and neuropsychologist. [NT 339-341, 431-434; S-42]
 25. The NOREP noted that a comprehensive reevaluation had been conducted and it was determined that Student did not qualify for special education and that Student's issues related to needs in the areas of focus and organization could be met through a 504 Plan. [NT 74; S-43, S-44, S-45]
 26. The Parent did not have an opportunity to discuss the evaluation results with the District before it issued its exit NOREP. [NT 559]
 27. The Parent did not approve the NOREP and asked for mediation which the District declined. [NT 74-75, 569; P-95]
 28. The District's August 19, 2014 evaluation report consists of a review of records including previous assessment results and educational plans from the private school, parent input, teacher input from Student's then-current teachers, standardized achievement testing by the District's school psychologist and standardized assessment by the District's speech and language therapist as well as observations/ screening by the District's occupational and physical therapists. [S-42]

⁵ The state where Private School is located allows psychologists licensed in another state to conduct limited professional activities in that state. "Nothing in this chapter shall be construed to prohibit the practice of psychology in this State by a person holding an earned doctoral degree in psychology from an institution of higher education, who is licensed or certified as a psychologist under the laws of another jurisdiction; provided, that the aggregate of 6 days of professional services as a psychologist, per calendar year, under the provision of this subsection is not exceeded." [State abbreviation redacted] ST Title 24 §3510(c). Pennsylvania's regulations are not in evidence. [District's Closing Brief]

29. The District's evaluation recommended the following supports and accommodations for Student: break down large tasks into smaller tasks; give directions in a variety of ways to increase the probability of understanding; positively reinforce [Student] for beginning, staying on task, and completing assignments; provide [Student] with appropriate time limits for the completion of assignments; preferential seating; verbal and nonverbal redirections; organizing and planning assignments; extended time to complete assignments as needed; scheduled breaks throughout the day; small group testing; organized notebook for each class; fill in the blank notes for classroom instruction. [S-42]
30. On September 8, 2014 the District sent a draft 504 Plan which was put into final form following a meeting with the Parent, District psychologist and District guidance counselor on September 17, 2014. The Director of Special Education was not present, nor were any of the District's evaluators other than the psychologist. The District's proposed Section 504 Service Agreement included supports and accommodations related to impulsivity from the District's August 19, 2014 RR. [NT 75-76, 559, 569-570, 572, 780-781; S-42, S-54, S-55]
31. The Parent signed the 504 Plan, noting that she believed Student was eligible for an IEP but that special education services should begin. [NT 77]
32. At the September 17, 2014 meeting the reevaluation report was discussed. The District representatives, referencing a progress report from the private school, noted that although Student had some reading weaknesses Student was doing so well that special education services were no longer needed. [NT 78-79; P-98]
33. The Parent disagreed with the District's evaluation and requested Independent Educational Evaluations [IEEs] at District expense. The District declined and Parent and District filed for a due process hearing. The Parent meanwhile obtained private neuropsychological and speech/language evaluations at her own expense. [NT 84, 571-576; S-37, S-51, S-52, S-56, S-61, S-62]
34. On November 25, 2014, Parent emailed the IEEs to the Director of Special Education and the District psychologist. On December 8, 2014, the District psychologist emailed Parent and invited her to participate in a 504 meeting as the school had reviewed the IEEs. She also informed the Parent that the District's position had not changed and that it would not find Student eligible for special education services under an IEP, nor would it reimburse Parent for the 2014-15 Private School tuition. The Parent filed the due process complaint on February 19, 2015. [NT 580-582; S-63, P-92, P-93]

Student's Disabilities and Need for Special Education Services

35. Cognitive testing performed by the first of two private neuropsychologists and accepted and incorporated into the District's re-evaluation report shows that Student has a GAI of 132, which is in the very superior range at the 98th percentile. [NT 313-315; S-20, S-42]

36. Student's disabilities are complex and affect Student's ability to learn and to relate with others in various ways. [NT 669, 670, 688; S-20, P-69, P-102]
37. Multiple evaluators, as well as Student's teachers, in both public and private school, have recommended special education services for Student. School evaluators and private evaluators have concluded that Student is eligible under the classifications of Autism, Speech/Language Impairment and/or Other Health Impairment [S-10, S-14, S-15, S-18, S-20, S-26, S-27, S-62, P-67, P-68, P-69, P-70, P-75, P-76, P-98, P-101, HO-6.]
38. When Student was assessed for Early Intervention the IU evaluator noted, "at times throughout testing it was difficult to regain [Student's] eye contact...Student was heard to echo words and phrases periodically....[had] the most difficulty answering direct questions using phrase speech." [NT 39, 676, 746-747; S-1, P-82]
39. In January 2011 through January 2014 Student began private treatment with a certified school psychologist, who diagnosed Student with sensory integration disorder and attention deficit/hyperactivity disorder combined type in addition to separation anxiety disorder, adjustment disorder, and developmental coordination disorder. Student also received twice weekly private speech/language therapy to address articulation and expressive language issues. [S-4, S-14, P-72, P-101, P-102]
40. From June 2012 to January 2014 Student also received wraparound services through two behavioral health agencies including eight hours of BSC services per month to address social skills, emotional regulation skills and organizational skills. [S-14, S-18, P-101, HO-5, HO-6]
41. The evaluations conducted during this period for determining need for community-based behavioral health services ["wraparound services"] did not report any assessment results derived directly from school personnel. [S-14; S-18; P-101, P-102]
42. During Student's tenure at the charter school [1st and 2nd grades], Student was evaluated several times and received a number of diagnoses involving speech/language [Expressive Language Disorder, Speech/Language Delay, Mixed Expressive/Receptive Language Disorder] as well as Depressive Disorder NOS⁶, Attention Deficit Hyperactivity Disorder Combined Type, Anxiety Disorder NOS, Separation Anxiety Disorder, Developmental Coordination Disorder, and Sensory Integration Disorder. [S-14, S-18/P-102, S-20, P-83, P-101]
43. The District re-evaluated Student in the spring of 2011 and concluded that Student's overall receptive and expressive language skills were within the average

⁶ Not Otherwise Specified

range for chronological age. However, the District determined that Student continued to be eligible for speech/ language services. The evaluator noted that “[Student’s] fluency of speech is affected at times when [Student] is asked to recall verbally presented information or verbally communicate information when [Student] is excited or upset. [Student] continues to need verbal prompts to ask questions using appropriate syntax.” [S-10]

Autism:

44. Recent research has found that [some children] who do not present with an intellectual disability are diagnosed with autism much later than [other children] and that autism in [some children] may be masked and identified as emotional difficulties. [NT 688-690]
45. In 2013 Student’s pediatrician at The Children’s Hospital of Philadelphia, recommended that Student be evaluated by a developmental pediatrician and that PDD-NOS be ruled out. [P-67]
46. The term of art “rule out” means that a diagnosis needs to be considered and either adopted or not later because at the time there is not enough data to determine whether or not a person has that diagnosis. . [NT 682]
47. In December 2013 the developmental pediatrician evaluated Student “due to a history of concerns around developmental delays and behavioral and emotional difficulties” and the “question of a diagnosis of an autism spectrum disorder.” The developmental pediatrician reported that a psychiatrist had earlier diagnosed Student with anxiety and “possibly PDD” prior to age three. The developmental pediatrician noted that Student “demonstrates some nice social behaviors including use of eye contact and empathy. Social relationships are improving. [Student] does not meet diagnostic criteria for an autism spectrum disorder *at this time.*” [Emphasis added] [NT 673; S-20, P-67, P-76]
48. The Parent’s private neuropsychologist who provided expert testimony “became concerned very specifically about the developmental piece, the social pragmatic piece and whether or not Student may potentially be a student who has autism.” [NT 672]
49. Although Student’s history from early on was consistent with a diagnosis of autism, no one had performed the ADOS or other screenings for autism. [NT 673; S-62]
50. The Parent’s private neuropsychologist administered the Autism Diagnostic Observation Schedule - 2 [ADOS-2] and rating scales, conducted an extensive history review, conducted the ADI-R (Autism Diagnosis Interview), held conversations with teachers and completed an in-school observation. [NT 674-675; S-62]

51. During the in-school observation Student “had a lot of difficulties in terms of noticing the other kids.” [NT 671-672; S-62]
52. Student’s reading skills teacher shared with the private neurologist that Student “can be quite literal and really struggled with interaction and with the social pragmatic piece and when [Student is] sharing in the classroom doesn’t always meet the appropriateness of the audience.” [NT 672]
53. The neuropsychologist observed that Student’s eye contact was poor, as Student rarely looked at the examiner when Student spoke or engaged in conversation; likewise, Student did not pair shifts in eye gaze with verbal comments or requests. Atypical eye contact has been recurring throughout evaluations/observations: IU - at times throughout testing it was difficult to regain Student’s eye contact; 1st grade teacher - reported lack of eye contact; occupational therapy- Student did not turn head at any time to look at the teacher or engage in conversation with peers and teacher; speech/language - eye contact is better in peer activities than one-on-one and Student demonstrated an at times inconsistent level of eye contact; behavioral health psychologist - minimal eye contact; developmental psychologist - use of eye contact was present, but decreased for age expectations. [S-1, S-15, S-16, P-68. P-75, P-101]
54. The private neuropsychologist testified that her observations of Student were important in her understanding of and conclusions about Student’s needs, in addition to looking at Student’s test results. [NT 671-675]
55. The ADOS is a generally accepted assessment in the field of psychology for the identification of autism.⁷ [NT 662-663, 815-816]
56. The private neuropsychologist has undergone extensive training in administration of the ADOS and administers the ADOS about 20 times per year. [NT 813-816]
57. Student’s overall total score on the ADOS-2 was 15 and the comparison score was 9, which meets the cut-off criteria for autism. [S-62]
58. The private neuropsychologist concluded that Student “showed language and communication needs throughout the ADOS-2.... used mildly atypical prosody/intonation...some formal/atypical and idiosyncratic use of words were noted. With structure and prompting, Student was able to offer information about Student’s own ideas, experiences and thoughts ... [Student] did not ask the examiner about the examiner’s experiences, feelings, beliefs or ideas/thoughts.” She further observed that Student “encountered significant difficulty when asked to identify and/or describe internal feelings/emotions of sadness, loneliness, fear/excitement, anger or happiness.” [NT 817-819’ S-62]

⁷ The ADOS is frequently referenced as “The Gold Standard” for diagnosing autism.

59. In February 2015, after reviewing the October 20, 2014 neuropsychological evaluation report the developmental pediatrician wrote, Student's "presentation is atypical due to [Student's] demonstration of empathy and social interest in others and that [Student] is high functioning...struggles around social interactions, reciprocal conversation and understanding nonverbal cues...use of communication skills is well below what would be expected given [Student's] very well developed cognitive abilities...some rigid behaviors, restricted interests and sensory differences." The developmental pediatrician concluded, Student "meets diagnostic criteria for an autism spectrum disorder at this time, [Student's] presentation is not typical and [Student] is very high functioning" and noted that "an autism [school] program would not be appropriate for [Student] despite [Student's] recent diagnosis." [NT 107; P-75]
60. The District's psychologist testified that she had no reason to believe that a diagnosis of autism should have been considered, and she did not do any assessment designed to screen for or rule out autism. [N.T. 352-353]
61. The District's psychologist's belief was contradicted by the information that had been provided, and in fact the District psychologist deliberately decided against including in the history the early recommendation for a rule-out of PDD-NOS. [NT 353-355; P-67; HO-1] The District psychologist also had a number of rating scales, child functioning questionnaires, and teacher observations in progress reports noting peer relationship issues, issues related to attention and anxiety, social pragmatics issues, and attention & executive functioning issues. [S-15, P-67, P-73, P-98]
62. The District's psychologist admitted that certain teacher comments leaned in the direction of autism spectrum disorder. [NT 396-397]
63. District evaluators found Student to be "odd." The occupational therapist reported that "[Student] has an odd personality" in that Student told a previous evaluator that Student remembered the person from two years ago because of remembering the way the person "smelled". [P-94]

Speech/Language Impairment

64. Student was classified as being eligible for special education as a child with speech/language impairment since age 2 years 9 months. Student's deficits in that area have been addressed in early intervention and in preschool early intervention through the IU, in kindergarten by the IU through a dual enrollment agreement, in 1st and 2nd grades through the charter school and in 3rd and 4th grades in the private school. [S-1, S-2, S-5, S-6, S-15, S-16, S-17]
65. In November and December 2012 a team of private speech/language therapists comprehensively evaluated Student administering the Peabody Picture Vocabulary Test-Fourth Edition; Expressive Vocabulary Test- Second Edition (EVT-2); Test of Language Competence: Level 1 (TLC-1); The Listening

- Comprehension Test-Second Edition (LCT-2); Comprehensive Assessment of Spoken Language (CASL); The Expressive Language Test (ELT); the Social Language Development Test-Elementary (SLDT-E); Lindamood Auditory Conceptualization Test-Third Edition (LAC-3); Test of Auditory Processing Skills- Third Edition (TAPS-3); Detroit Test of Learning Aptitude (DTLA); and SCAN-3C. One member of the team also observed Student at the charter school. These two professionals concluded that Student “is a complicated little [child]....” [S-16]
66. The private speech/language team noted difficulties with pragmatic language, and noted a significant contrast between Student’s language skills with Student’s ‘excellent overall cognitive ability’ and verbal ability in the very superior range. They noted that Student’s receptive and expressive oral language and auditory perceptual/processing skills are not as developed as broad knowledge base and ‘thinking skills’ and cannot support Student at Student’s cognitive level. Making a number of specific recommendations for use in school and classroom, they concluded that Student requires more intensive speech/language and auditory perceptual skills to more closely reflect Student’s very superior cognitive ability.” [S-16]
67. In an April 2013 neuropsychological assessment a private neuropsychologist noted that Student’s ability to process and comprehend orally presented language on the NEPSY-II was a significant weakness falling in the borderline range. That evaluator concluded that Student is “more inconsistent in tasks that are related to right-hemispheric functions, such as language comprehension, and the more inferential and idiosyncratic aspects of language. Student exhibits evidence of significant difficulties in auditory processing of language.” [S-20]
68. Student has not met the speech/language objectives in the current IEP at the private school: answering questions about information presented aloud while using active listening techniques; stating why items are similar and different according to various attributes; using fluency enhancing techniques; making reasonable predictions about what others may be thinking based on eye contact, body language, and environmental clues; asking others questions and making comments based on information remembered about them to show interest and initiate conversation. [P-77]
69. Student’s private school speech therapist and teacher note Student has not yet generalized the skills worked on in therapy to the classroom. [NT 705-706; P-98]
70. In March 2014 the developmental pediatrician at DuPont Nemours recommended ongoing speech and language therapy. [S-26]
71. The District’s speech/language therapist administered the CASL; Word Test-2 Elementary; and the Social Language Test Elementary. She agreed that group listening situations create noise and distractions but Student took these tests in a

- quiet room and did not have to deal with background and foreground noises except for students passing in the hall or announcements on the loudspeaker. A turn-taking board game was used to increase Student's motivation to participate in the Word Test 2 Elementary because Student got out of the chair and wanted to leave at the first question. [NT 178-179, 185, 187-188; S-42]
72. The District's speech/language therapist did not observe Student in the classroom⁸, nor did she speak with Student's teacher or the speech therapist at the private school, instead exchanging only one email with the child's speech therapist. She did not review any writing samples for Student. She did not review any curriculum based assessments. She also did not perform any testing of auditory processing on Student, even though the District's 2013 PTRE had suggested assessing auditory processing and Student had auditory processing goals in the private school IEP. [NT 180-181, 195-198, 210-213, 506-307; HO-2]
73. Following receipt of the District's August 19, 2014 re-evaluation report that concluded that Student no longer required specially designed instruction for speech/language deficits, the Parent obtained a private speech/language evaluation. The evaluator administered the Test of Language Development – 1:4; the CELF: 5 Mental Linguistics Test; and the Test of Narrative Language. The evaluator concluded that “[i]ntervention is warranted and it is suggested that Student be seen once weekly for social skills training and once weekly for individual speech and language therapy.” [S-61]
74. The private speech/language evaluator concluded that Student ‘is at risk for not being able to verbalize what Student has accessed from the curriculum. [Student's] underdeveloped narrative skills potentially have the ability to impact [Student's] written language skills. Consequently, Student will require systematic teaching to increase the complexity of storytelling and descriptive abilities. [Student] will also benefit from pragmatic language intervention to develop [Student's] ability to revise and repair when communicating and not being understood, and to develop [Student's] other perspective taking skills.” [S-61]
75. Following discussions with one of the members of the two-person team of speech/language evaluators, with the most recent speech/language evaluator, and with Student's current speech/language therapist at the Private School, as well as the results of two subtests of the NEPSY along with the totality of the results of the other tests she administered, the private neuropsychologist concluded that Student “requires speech/language therapy based on [Student's] social/pragmatic needs, articulation delays and inconsistent auditory processing/attention. Direct

⁸ Although classroom observation was listed in the May 9, 2014 PTRE, the District's speech/language therapist did not observe Student in school. The special education supervisor emailed Parent on May 30, 2014 saying that the state in which the private school was located did not recognize the District therapists' Pennsylvania licenses such that they could not observe/assess Student there. However, she testified that she later learned that her information had been incorrect. [NT 209, 599-602, 659-660; HO-1]

intervention [pull-out as well as push-in] is recommended as well as consultation services to teachers, therapists and family so that learned skills can be generalized across people and settings.” [S-62]

76. The private neuropsychologist testified that Student has inconsistent and mildly atypical intonation and prosody [the rhyme and rhythm of language], sometimes lacks intonation and other times has a lot of intonation where it wouldn't make sense, had trouble retrieving something and describing it, especially if having to share a lot of information, and tended to focus on specific things. Student demonstrated deficits in pragmatic language and during testing and in interaction talked at length about Student's own interests and Student's self, and didn't say social things that other children tend to say to show interest in the evaluator. [NT 690-693, 817-819; S-62]

Other Health Impairment [ADHD]

77. The private neuropsychologist who is also a certified school psychologist concluded that in addition to ADHD Student also meets the classification of OHI because of anxiety disorder, depression and developmental coordination disorder and requires special education programming to address each of these impairments. [NT 665-666, 704:14-705; S-62]
78. The District does not dispute that Student has ADHD, but does dispute the diagnoses of autism and speech/language impairment as well as the presence of social and emotional needs. [NT 665-666; S-42, S-62, P-20]
79. Although Student is receiving intensive specially designed instruction at the private school to enable Student to access the curriculum and to develop social/pragmatic skills, the District believes Student is not eligible for special education services because the “ADHD is not impacting [Student] academically and functionally at a level that indicates the need for Specially Designed Instruction”. [NT 431-432; P-77, P-107]
80. The Parent's responses on rating scales found Student in the clinically significant range on inattention, executive function, peer relations, and DSM-IV ADHD inattentive type. The teacher scales rated Student in the clinically significant range on hyperactivity, impulsivity, defiance/aggression, DSM-IV hyperactive impulsive, DSM-IV oppositional defiant disorder and DSM-IV conduct disorder and at risk for problems with peer relations and inattention. [S-42]
81. Student's teachers reported that Student sometimes argues with adults, is irritable and acts in sneaky or manipulative ways, has few friends and sometimes has poor social skills. They also commented that Student's needs include social interaction and pragmatic language skills. They reported that Student distracts others, has an excessive need for teacher attention, talks excessively, has difficulty waiting for a turn to speak, has difficulty with empathy and taking the perspective of others and has the constant need to be the center of attention with peers and adults. The

- representative from the private school testified that Student has needs in the areas of social pragmatics, organization, and self-regulation and has difficulty making friendships. One of the teachers commented that Student can sometimes be unkind and disrespectful to classmates and teacher. [NT 343-346, 464-467; S-42, P-98]
82. Student demonstrates executive functioning problems and displays a high degree of impulsivity, has difficulty sustaining focus/attention on learning tasks, rushes through work and makes a lot of mistakes. During neuropsychological testing Student had difficulty dividing attention and following tasks correctly, and failed to engage in self-monitoring and self-checking. [NT 684-685; S-42, P-98]
83. Although the District did not collect data on the amount of time that Student is either on or off task in the classroom setting, the District did find that Student has difficulty with sustaining attention, poor concentration, difficulty keeping Student's mind on school work, trouble starting and finishing school projects, and has poor planning and organizational skills. [NT 339-341; S-42]
84. In exiting Student from special education services, the District also did not factor in Student's anxiety and depression.⁹ The District was aware that Student hid in the bathroom in the first several months at the private school and that emotional difficulties led to inappropriate behavior such as tearing up another student's book. Student requires a great deal of teacher attention. Student takes Prozac to address symptoms of anxiety and depression. [NT 154-156, 470-471; S-42, P-67, P-69, P-76, P-98]

Private School:

85. The private school is a small, independent school with approximately 150 students in grades kindergarten through eighth grade.¹⁰ [NT 456; P-103]
86. The private school is accredited by Middle States Association of Colleges and Schools, and is an approved private school for two of the states bordering Pennsylvania. [NT 455; P-103.]
87. The average class size at the private school is five to six students. [NT 456; P-103]
88. The private school provides individualized, research-based educational support to students with various learning differences based on their areas of need, including social pragmatics. [NT 453-454, 476, 502-503]; P-103]

⁹ In the testing session Student reported to the District psychologist that Student has considered self-harm. Although the District psychologist reported this to the Parent she inexplicably did not include this information in the re-evaluation report. [NT 66-69]

¹⁰ Although the private school is located in a neighboring state it is within the ten-mile radius for bus transportation from the District. [NT 605-606]

89. The private school develops an IEP for each student based on psychoeducational testing, speech and language evaluation, OT and PT testing, school records, parent interview and child visit. IEPs are updated three times per year and when goals are achieved, new goals are developed to replace those. [NT 463; P-103]
90. The private school employs a school psychologist, a school counselor, two speech and language pathologists, an occupational therapist and a physical therapist, as well as qualified teachers including special education teachers and reading specialists. [NT 453, 521-522, 525]
91. The private school teachers and therapists meet weekly to discuss each student and make changes to programming as appropriate. [NT 469-470]
92. When Student first arrived at the private school Student was viewed as “abrasive” by other children because of habits of “interrupting” and “speaking without thinking.” This behavior has very much improved, and Student now is “experiencing friendships for the first time.” [NT 465-466]
93. Student’s teachers noted that Student showed improvement over the 2013-14 school year. This is shown in curriculum-based testing. [NT 484, 496; S-42, P-98]
94. The private neuropsychologist observed Student at the private school in October 2014. She also reviewed Student’s IEPs and written observations from teachers and spoke to Student’s teachers, the head of school and to Student’s speech therapist. [NT 666-667, 705-714]
95. The private neuropsychologist testified credibly that the private school is meeting Student’s needs and is an appropriate placement for Student. [NT 706-709, 820-822]

Discussion and Conclusions of Law

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

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and,

accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). I found the mother to be highly credible. Despite being an attorney she was clearly anxious throughout her testimony, and seemed to be trying hard to be exact. She did not embellish, and acknowledged when she did not remember something. The District has alleged that she had no intention of sending her child to a District school, but this allegation must remain speculative. The undisputed fact is that the District dropped the ball when, after conducting an evaluation in early to mid-June, it did not produce the evaluation report promised for mid-July, or a NOREP, until August 18th after mother’s email declaring her intention to return Student to the private school. This was a particularly egregious professional and fiduciary misstep on the District’s part for two reasons: first, notifying a Parent sooner rather than later that her child, who had remained IDEA-eligible since before age 3 years, was no longer eligible should have been a very high priority; and second the District was singularly naïve to put a potential tuition reimbursement matter on the back burner, producing its evaluation report and NOREP over a month later than promised. More egregious was the District’s evaluators’ steadfast conclusion that Student was no longer eligible for specially designed instruction despite the tsunami of historical and current evidence at their disposal and despite their not having observed the child in the school environment, and their maintaining this opinion even after being provided by the Parent with additional in-depth diagnostic information from the private evaluations. I found the private evaluators to be credible and gave significant weight to their testimony as compared to the District’s evaluators.

Eligibility: The term “child with a disability” means a child (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairment, or specific learning disability; and (ii) who, by reason thereof, needs special education and related services. 20 U.S.C. Section 1401(3) (A) (2).

Contrary to law, Parent did not have an opportunity to discuss the District’s August 2014 evaluation results with the District before it issued its exit NOREP. Upon completion of appropriate assessments, “[a] group of qualified professionals *and the parent* of the child determines whether the child is a child with a disability...and the educational needs of the child”. [Emphasis added] 34 C.F.R. Section 300.306(a)(1).

Until the District abruptly exited Student from special education services, Student had continuously been deemed eligible prior to age three by the Intermediate Unit, the District and the charter school Student attended, as well as receiving special education supports and services at the private school which serves students with “learning differences”. I agree with the Parent that “while not dispositive of continuing eligibility alone, Student’s development and educational history, are entirely consistent with the classifications of autism, speech/language impairment and OHI.

Autism: As the Parent points out in her closing brief, “There is no precise standard for determining whether a student is in need of special education, and well-settled precedent counsels against invoking any bright-line rules for making such a determination.” *West Chester Area School District v. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002). A student's needs are not “a perfectly corresponding reflection of the Student’s categorical determination. They are a reflection of Student's unique characteristics - the term special education means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.” *M.P. v. Lower Merion Sch. Dist.*, Appeals Panel No. 1350 (2003) (citing 34 C.F.R. Sec. 300.26). The private neuropsychologist used past history, present functioning, discussion with those who know Student best, direct in-school observation and recognized psychological testing to assess Student. These pieces of data, along with but not solely based upon administration of the ADOS-2 led to her diagnosing an autism spectrum disorder. Reviewing the evidence I find that this diagnosis accounts best for the variety and type of behaviors Student has exhibited since toddlerhood, and like the neuropsychologist am aware of the recent research that [some] bright children are unfortunately diagnosed later rather than sooner in their school careers especially when their academic functioning masks or offsets their social deficits. Education is more than academics. In *Breanne C. v. Southern York County School District*, 2010 WL 3191851 (M.D. Pa. 2010) the court noted that when an eligible child receives an IEP, that IEP must be reasonably calculated to afford the child the opportunity to receive a “meaningful educational benefit” and that an IEP confers a meaningful educational benefit when it is more than a trivial attempt at meeting the educational needs of the student, and it is designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social and emotional. The parties agree that Student is a very bright child. Under these circumstances, even evidence that a child is doing well in a regular education setting—which the District does not have—does not automatically disqualify a student from eligibility. *See e.g., Z.S. v. Pittston Area Sch. Dist.*, ODR No. 7154/06-07KE (2007) at 10 [Nor are grades alone a litmus test for eligibility] and at 11 [Student should not be exited from special education, inter alia, because “[t]he record does not contain any systematic analysis of Student’s attentional and social skills problems”].

Speech/Language: Despite the early identification of and long history of speech/language deficits, despite the continued specially designed instruction and therapy to address these deficits, and despite the thorough private speech/language evaluation from November/December 2012, the District speech/language therapist decided that Student should be exited from special education speech/language eligibility, notably without having observed Student in the classroom or in school with peers and without speaking with Student’s teachers or current speech/language therapist. The District’s speech/language therapist did not revise her opinion even after reviewing the thorough private speech/language evaluation and the thorough neuropsychological evaluation the Parent obtained following the District’s August 2014 re-evaluation. “[T]he most important factor in determining [Student’s] progress in acquiring pragmatic language was how well he was able to apply those skills in peer settings on a daily basis.” *M.Z. v.*

Bethlehem Sch. Dist., No. 11-2887 at 6 (3rd Cir. 2013); *see also K.W. v. Pen Argyl School District*, ODR No. 13815-1213AS (2013) [District erred in exiting student from special education where student “had only begun to generalize S/L skills from small group to the classroom and demonstrated auditory processing difficulties.”].

OHI – ADHD: Although Student is receiving intensive specially designed instruction at the private school to enable Student to access the curriculum and to develop social/pragmatic skills, the District believes Student is not eligible for special education services because the “ADHD is not impacting [Student] academically and functionally at a level that indicates the need for Specially Designed Instruction”. This circular reasoning runs parallel to another analogy as in: ‘Jack has 20/20 vision. Jack’s 20/20 vision is achieved through wearing glasses. Since Jack has 20/20 vision, Jack does not need glasses’. As applied here, ‘Student is not experiencing adverse functional and academic impact because of ADHD. Student is receiving specially designed instruction to address adverse functional and academic impact of ADHD. Since Student is not experiencing adverse functional and academic impact of ADHD, Student does not need specially designed instruction.’

Standards for a Free Appropriate Public Education: Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §711.1 *et seq.* and 34 C.F.R. §300.300, *et seq.* a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA). A FAPE is “an educational instruction specially designed . . . to meet the unique needs of a child with a disability, coupled with any additional 'related services' that are 'required to assist a child with a disability to benefit from [that instruction].” *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007) (citing 20 U.S.C. § 1401(29)); *see also 20 U.S.C. §§ 1401(9), (26)(A)*.

IEEs at Public Expense: Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

Whether a school district's evaluation was appropriate is, obviously, the central test, as has been demonstrated when the issue has come before hearing officers, appeals panels and the courts. However, reimbursement for an IEE has also been considered if the IEE *answers questions not previously raised, provides essential new information, or adds something to the prevailing understanding of the student's disability*. In the instant matter I find that the neuropsychologist’s IEE accomplished all three of these purposes, and

therefore will award reimbursement. The findings and recommendations of the neuropsychological must be considered when the District convenes its IEP team to offer a program for Student for the 2015-2016 school year. Likewise I find that the accompanying private evaluations for related services provided valuable information I will award reimbursement for them.

Tuition Reimbursement: The inquiry progresses in this fashion: Did the District offer Student an appropriate educational program? If not is the program chosen by the Parent appropriate? If so, are there equitable considerations that would remove or reduce the District's obligation to provide tuition reimbursement?

Student is eligible for special education and was inappropriately exited from special education. The District failed to develop an IEP, hence consideration of the proposed Section 504 plan is irrelevant. The District did not offer an appropriate program to Student in that it offered no special education program at all. Turning to the appropriateness of the private school, I note the District has criticized the Private School in certain respects, and paid particular attention to the educational plans created for Student. The Court of Appeals for the Third Circuit has made it clear that a private school selected by parents is not held to the same special education standards as a public school:

A parent's decision to unilaterally place a child in a private placement is proper if the placement "is appropriate, i.e., it provides significant learning and confers meaningful benefit..." *DeFlaminis*, 480 F.3d at 276 (internal quotation marks and citation omitted). That said, the "parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA." *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir.1999). In fact, the Supreme Court has ruled that a private school placement may be proper and confer meaningful benefit despite the private school's failure to provide an IEP or meet state educational standards. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 14-15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).

The private school is appropriate under the Act as the Parent has demonstrated that the private school has provided meaningful benefit to Student; in making this finding I have relied heavily upon the expertise and the opinion of the private neuropsychologist. There are no equitable considerations that would remove or reduce the District's responsibility for tuition reimbursement. Therefore tuition will be awarded for the 2014-2015 school year.

Prospective Tuition Payment: The Parent requests that the District fund another year at the private school. This request is denied as Student is entitled to a free, appropriate public school education, not a private education at public expense, unless the District cannot provide an appropriate program. Although the District fell short with regard to the 2014-2015 school year, there is no reason to believe it cannot develop an appropriate program for Student for the 2015-2016 school year. Despite its glaring, and perhaps precipitously reached error based upon a pending tuition reimbursement request, the

District has now been instructed that Student is eligible for special education and related services under the classifications of autism, speech/language impairment and other health impairment. The District now also has the benefit of the independent evaluations provided by the Parent and these give a clear blueprint of what Student needs to receive FAPE. The District is entitled to the opportunity to develop an appropriate program and placement for the 2015/2016 school year.

Order

It is hereby ordered that:

1. Student is eligible for special education under the IDEA.
2. Student is IDEA-eligible under the eligibility classifications of Autism, Speech/Language Impairment and Other Health Impairment.
3. As Student is IDEA-eligible offering a Section 504 Service Plan was not appropriate and therefore the appropriateness of the content of that plan is moot.
4. The placement unilaterally selected by the Parent is appropriate, and there are no equitable considerations that would remove or decrease the District's responsibility for tuition reimbursement for the 2014-2015 school year. The child's educational trust should be reimbursed the amount paid for tuition.
5. The District must reimburse the Parent for the private evaluations she obtained after disagreeing with the District's August 2014 re-evaluation.
6. The Parent's request for prospective placement/tuition reimbursement for the 2015-2016 school year is denied. The District is ordered to convene an IEP meeting by July 15, 2015, to create an appropriate IEP for Student for the 2015-2016 school year, and to provide a final copy of the IEP with an accompanying NOREP no later than July 25, 2015.

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

July 1, 2015

Date

Linda M. Valentini, Psy.D., CHO

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