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: Z.G.

ODR #16572/15-16 KE

Date of Birth:
[redacted]

Dates of Hearing:
September 22, 2015
October 30, 2015
November 11, 2015

OPEN HEARING

Parties to the Hearing:	Representative:
Parent[s]	Sean Summers, Esquire 35 South Duke Street York, PA 17401
York City School District 31 N. Pershing Avenue York, PA 17401	Brooke Say, Esquire Stock and Leader Susquehanna Commerce Center East 221 W. Philadelphia Street York, PA 17401
Date Record Closed:	December 1, 2015
Date of Decision:	December 2, 2015
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

Student[1] is a pre-teen aged 7th grade District resident who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the classifications of emotional disturbance and specific learning disability. As such, Student is also a qualified handicapped person / protected handicapped student under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), and Chapter 15 of the Pennsylvania Code.

Pursuant to a previous settlement agreement, during 6th grade (2014-2015 school year) Student attended a private school (Private School) for children with behavior difficulties. For the 2015-2016 school year the District sought to have Student return to a District placement (Proposed Placement); however, the Parents[2] opposed this move because they are pleased with the Private School. The Parents asked for this hearing because they do not want Student to leave the Private School which has remained Student's pendent placement through the due process proceedings as per this hearing officer's Order issued prior to the start of the current school year.

For reasons detailed below I find in favor of the District.

Procedural History

There were three matters that were presented to the hearing officer prior to the convening of this due process hearing. The first matter concerned the Parents' *pro se* filing of a prior complaint, the disposition of which would have required the hearing officer to interpret and enforce a settlement agreement. The District moved to dismiss the complaint based on, *inter alia*, lack of hearing officer jurisdiction and this hearing officer agreed, dismissing the complaint in a Final Decision and Order. The second matter was Student's pendency during the course of the current hearing, with a ruling in the Parents' favor. The third matter was the District's motion to dismiss the Parents' current complaint. The District's motion was denied in large part and the instant matter ensued. [HO-1]

Issues[3]

1. Is the placement the District has offered Student for the 2015-2016 school year appropriate?

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

[2] Both Parents were listed on the complaint and the hearing notices, but only Student's mother participated in the hearing. As the mother was the parent who had the majority of the contacts with the District and the Private School, in the body of this Decision when the term "Parent" is used it is understood that the mother was acting on behalf of herself and Student's father.

[3] The issue of Pendency that was included in the complaint and would have been addressed in the hearing became moot because just immediately prior to the beginning of the school year this hearing officer was asked to rule on this issue. Based on information that the Private School was the same program Student had been attending, but on a different campus, the hearing officer ruled that Student should remain at the Private School through the duration of these proceedings specifically to avoid a transition back to the District that could potentially be reversed mid-year if the Parent's position prevailed. The District references these events in its closing argument and although admitting that pendency is "water under the bridge" preserves its position for the record. [S-53, HO-2] Because the District's right to observe Student at the Private School was a provision in the settlement agreement this hearing officer also dismissed the issue in the Parents' complaint that the District conducted observations without first informing the Parents.

2. Did the District err in denying the Parent's request to tape an IEP meeting?

3. Did the District err in denying the Parent's request to fund an IEE?

Findings of Fact[4]

Placement

1. Student has been diagnosed with Oppositional Defiant Disorder and Bi-Polar Disorder and receives medication to address these conditions. [NT 293-294]

2. Prior to attending Private School Student received special education in an Intermediate Unit emotional support program. When, based on good behavioral progress, the IU recommended and the District sought to transition Student back to a District school the Parent objected and wanted Student to remain at the IU placement for another year. The IU and the District acceded to the Parent's wishes and Student remained at the IU behavioral program an extra year. [NT 115, 181-182, 259, 525]

3. The most recent re-evaluation conducted in 2012 provided information about Student's needs: specially designed instruction in basic reading skills, fluency and comprehension; math problem solving, calculation, and fluency; and written expression. Additional needs were: highly structured program; small class size; positive behavior support plan with concrete incentives; classroom management with frequent positive reinforcement; and instruction on self-regulation. [S-9]

4. Pursuant to the terms of a settlement agreement, after the IU program Student was to be placed for the 2014-2015 academic year at a certain very well-regarded private school for children with learning differences. However, the Parent did not make contact with that school and instead, based on conversations with other parents, determined that Student should be placed at Private School. The District offered alternatives but the Parent continued to request placement at Private School for 6th grade and the District ultimately acquiesced. [NT 159-160, 264; S-44]

5. Private School is a private licensed academic facility whose mission is to educate students who exhibited behavior problems in other settings. [NT 48-49, 179]

6. In Student's 6th grade class at the Private School, while all students were placed because of behavior problems, some students were classified as special education students and some were classified as regular education students. Of the 10 children in Student's classroom 7 including Student had IEPs and were classified in the IDEA category of emotional disturbance. [NT 47-49, 59, 109]

[4] The testimony of every witness, the content of each exhibit, and the parties' written closing arguments were reviewed and considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

7. Student's 6th grade classroom had 3 adults for the 10 children. The adults were a special education teacher, a non-BCBA behavior manager and a counselor. The children were in chronological 4th, 5th and 6th grades. [NT 59-60, 410, 416]

8. In 6th grade all subjects including specials were taught by the special education teacher assigned to the classroom; the counselor taught social skills twice weekly. [NT 60]

9. When Student entered Private School at the beginning of 6th grade, the 2014-2015 school year, Student was tested as reading on a 4th grade level. [NT 41, 68; P-55][5]

10. At Private School Student was placed for reading and math in the lowest instructional group with the 4th graders in a classroom of 4th, 5th and 6th graders. [NT 61]

11. Instruction in written expression was provided by one of the three adults in the classroom as Student was the lowest in the classroom in that subject. [NT 61-62]

12. At the end of 6th grade at Private School Student's math was on the 2nd to 3rd grade level and written expression was at the 2nd grade level.[6] [NT 51-55; S-24, P-55]

13. The Joseph K. Mullen [JKM] program provided training/certification in crisis management to Private School staff. [NT 416]

14. Student could not continue in the same campus for 7th grade as Student attended for 6th grade because the Private School in the original campus only has high school age students in a program for disruptive youth. [NT 411]

15. In the current 7th grade year the students move among various special education classrooms to receive instruction in different subjects. [NT 455, 457, 582]

16. At Student's current Private School campus all students are special education students. The placement is a full time special education placement; there are no regular education students there. [NT 411, 413, 561]

17. Student does well in a small group environment where there is a high teacher to student ratio. [NT 84]

18. Student profits from a structured and consistent incentive-based behavior management program. [NT 85]

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[5] An end of year progress report for 5th grade when Student was in a District-supported IU placement recorded Student's reading level as 2nd grade. Student spent the summer at home and did not receive any educational services from the District or the Private School. The Parent's attempt to show that Private School was responsible for the two-grade-level increase in reading as tested in September 2014 only two weeks after Student entered Private School must fail as the assertion is not credible. [NT 41-45, 68]

[6] Because a reevaluation had not yet been completed there are no current academic levels ascertained through standardized testing in the record. Anecdotally the 6th grade teacher noted Student had made academic progress but could not offer data to back up her recollection regardless of how persistently Parent's counsel questioned her to elicit this information. [NT 45-47]

19. Student can ask teachers for help when needed, but is also able to interact appropriately with other students during free time or recess. [NT 86]

20. Student gets along with everyone, is very outgoing, has a very good personality and is funny, with a good sense of humor. [NT 86-87]

21. Student displays optimism, and appears to be happy and flexible. [NT 655]

22. Student would try to motivate other students and generally was a student who modeled good behaviors to the other children in the 6th grade classroom. [NT 87]

23. Student has made progress in the use of self-calming strategies such as asking for walks, requesting to take a time out, and using a stress ball. [NT 57, 87]

24. Student did very well focusing throughout the 6th grade school year and attention was good. Toward the beginning of that school year Student went to time-out once for not paying attention and having to be redirected. [NT 62]

25. Student required emergency safety physical intervention (ESPI) only two times in the 2014-2015 school year, the first on September 5, 2014 and the second on November 3, 2014. [NT 72, 418-419; S-23, S-39]

26. Although Student exhibited some anxiety in early April 2015 around discussions about the need to transfer since Private School at the original campus stopped at 6th grade, Student rebounded in May and June. [NT 79, 87, 91, 108, 263; S-43]

27. Using an incentive-based behavior management program with a point system that translated into the Student's being able to earn rewards such as Fun Fridays (movies, snacks, playing outside) and monthly field trips Student earned almost all the Fun Fridays and all but two field trips. [NT 85, 637-638]

28. When Student entered Private School in September 2014 an initial behavioral goal was 85% compliance with two prompts and a May 2015 behavioral goal was still 85% with two prompts although in December 2014 a change was made from requiring 34 out of 40 points to 36 out of 40 points on Student's daily point sheet because Student was meeting the original goal. [NT 55-56; S-19]

29. By the end of the 2014-2015 school year Student met all IEP behavior goals with 90% success. [NT 419-420]

30. Student was successful in attending a community theater expression and arts camp during summer 2015. Although some of the adult camp staff are teachers there was no specific therapeutic support other than a junior counselor 'peer buddy' to assist if Student became upset. [NT 295-296]

31. The Parent was, and remains, happy with Private School because she perceives that Student has been more academically and behaviorally successful there than at previous placements. In a January 21, 2015 meeting among the District, the Private School and the Parent, the Parent stated that she did not want Student to return to the District "no matter what" and currently the Parent acknowledges that this is still the case. [NT 82, 92, 114, 134, 189, 215, 218, 259, 261, 285-286]

32. At a February 19, 2015 IEP meeting the Parent requested that for 2015-2016 Student have a placement with similar structure and system to that at Private School. [NT 185; S-22]

33. A District psychologist and a District Board Certified Behavior Analyst (BCBA) observed Student at Private School on March 13, 2015 and March 15, 2015 respectively. [NT 173-174, 536; S-41, S-42]

34. In both the April and the June IEP meetings the District directly asked the Parent which of the program features in Private School she believed were most important for Student. The Parent and her advocate identified structure, small group setting, low student/teacher ratio, behavioral incentives, and safe crisis management as the most significant characteristics for success. [NT 275-276, 474, 508; S-22]

35. Despite the Parent's clear preference for Private School, the District offered Student the Proposed Placement for the following reasons: Student had been meeting the behavioral goals in the Private School IEP at a 90% or better success level, suggesting that a move to a less restrictive emotional/behavioral support placement was appropriate; the high frequency of communication the Proposed Placement staff have with the parents of the students in the Proposed Placement would benefit Student and assist in repairing the relationship between the Parent and the District; the Proposed Placement offers the elements of small class size, excellent teacher to pupil ratio, and a highly structured program that the Parent valued in the Private School; as Student's behaviors have improved and Student's learning disabilities become more an area of focus the Proposed Placement offers the availability of learning support programs; the Proposed Placement is housed in a K to 8 building, thus allowing Student to be educated in an environment with access to non-disabled peers, fulfilling the IDEA mandate for a placement in the least restrictive environment (LRE) appropriate for Student. [NT 564-566, 586-587, 614-615]

36. The District's Proposed Placement as well as the Private School placement were discussed with the Parent and her advocate at April 2015 and June 2015 IEP meetings. The Parent was given a brochure about the program and the special education teacher and the District's counsel provided explanations about the program. Because the Proposed Placement was fairly new all the Parent's questions could not be answered. [NT 186-187, 219-220, 224, 265-266, 573-575 S-22]

37. As the special education teacher for the Proposed Placement tried to explain the program at the April IEP meeting, he was interrupted by many questions from the Parent's advocate and did not have the opportunity to explain the program fully. His experience

was similar at the June IEP meeting. Likewise at the April IEP meeting the District psychologist was interrupted when she attempted to discuss her observations of Student at Private School[7]. [NT 343-344, 542-544, 649-650, 654]

38. Many of the questions the Parent and the advocate had at the IEP meetings were "obviously geared"[8] toward Student remaining at Private School. [NT 661]

39. Although the draft IEP of June 2015 did not include the specific name of the District's Proposed Placement, the Parent knew what the Proposed Placement was given the discussions at the April and June 1EP meetings. [NT 272, 554-557, 603; S-35]

40. On June 19, 2015 via a Notice of Recommended Educational Placement (NOREP) the District formally offered the Proposed Placement for Student. [S-34, S-35]

41. The Parent disapproved the June 19, 2015 NOREP in part because she objected to the designation of 'emotional support', writing "My child is not diagnosed as an emotional support student, therefore this is not an appropriate placement." When she signed the June 19, 2015 NOREP the Parent checked the box indicating that she wanted a due process hearing. [NT 291-292, 558; S-35]

42. Student has received special education emotional support programming under the eligibility category of emotional disturbance all along, with specific learning disability as a secondary category. [NT 526-531, 606-607; S-6, S-7, S-8, S-16, S-18, S-29, S-32]

43. The Parent has signed and approved all previous evaluations and Notices of Recommended Educational Placement [NOREPs] that designated Student as eligible for emotional support programming except for the NOREP issued in June 2015. [NT 536; S-16, S-35]

44. The District's Proposed Placement is an intensive emotional support therapeutic program/placement for students with significant behavioral needs that often have interfered with their academic progress. The Proposed Placement is based on an IU program with which the District had a previous partnership. The premise upon which the program operates is that inappropriate behaviors interfere with learning and that when behaviors improve academics will also improve. [NT 119, 135-136, 203, 369-372, 379, 382-383, 626; S-48]

45. The Proposed Placement is not for "predatory" conduct-disordered youth. [NT 626]

46. The Proposed Placement is specifically designed for students who otherwise would have to be transported outside the District to meet their educational/behavioral needs. The

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[7] The social worker assigned to the Proposed Placement has had ongoing contact with the Parent including home visits and described that relationship as 'okay'. As the note-taker for the IEP meetings, although he tried to have the notes be as verbatim as possible he did not record bickering back and forth between the parties, interruptions and the like, nor did he include any interpretations of what the participants were saying. [NT 639, 641-642, 652, 659]

[8] Verbatim characterization by Parents' counsel in cross-examination of social worker.

goal is to address students' behavioral needs and to bring students back up to or close to their grade level in academic subjects. [NT 160-161, 302-303]

47. The special education teacher in the Proposed Placement articulated the goal of returning the students to regular education settings as quickly, efficiently and competently as possible so that behavior changes are real and not temporary. [NT 626]

48. The Proposed Placement is in its second year of operation and is located in a District school, a Kindergarten through 8th grade building offering special education programs within the milieu of regular education peers. [NT 132, 135, 144, 629-630, 662]

49. The Proposed Placement classroom is designed for an enrollment of six to seven students in grades 5, 6, and 7 (and eventually 8) and currently has four[9] students (one in 5th grade, two in 6th grade and one in 7th grade); Student would be the fifth pupil and the second 7th grader. The staff in the classroom are an experienced certified special education teacher who is a male, a board certified behavior analyst (BCBA) who is also a male and two female para-educators. The program is served by the building's full time psychologist, full time speech pathologist, and by guidance services, and there is a social worker assigned to the building who visits the Proposed Placement three or four days a week. [NT 138-140, 143, 305-306, 312, 345, 621, 625, 627-628, 639; S-55]

50. The Proposed Placement has a relationship through the IU with a psychiatrist who can offer the students evaluations and medication management as appropriate, a much needed service in a geographical area where psychiatric services have limited availability. [NT 624-625]

51. Classroom staff and hall monitors who supervise lunch as well as other staff in the school are certified in safe crisis intervention through the Crisis Prevention Institute (CPI). Refresher training was held on the date of the third hearing session and the next full certification training is scheduled for late January 2016. [NT 368-369, 386-387, 634-635, 667, 670[10]]

52. The social worker, one of two CPI trainers in the District, describes the CPI model as 70-80 percent verbal de-escalation strategies with physical restraints being used as an absolute last resort, when a child is in danger of hurting self or others. [NT 666-667]

53. Students in the Proposed Placement have a very structured day with intensive one-to-one or small group instruction/attention. [NT 308-336, 354, 363-364, 383-384]

54. Educational technology is integrated throughout the day into the instruction in the Proposed Placement according to a student's individual needs. [NT 362-363]

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[9] One more child was added between the first and the second hearing sessions, hence the discrepancy in two witnesses' testimony.

[10] The social worker's testimony about CPI training was more up-to-date than the special education teacher's was, hence the difference in the citations.

55. The Proposed Placement offers structured progress monitoring in academic areas and behavior areas. Students also engage in daily self- evaluation. [NT 360-362, 373-374, 387-389; S-49]

56. The Proposed Placement is based on an Applied Behavioral Analysis (ABA) model. As part of the classroom staff of the Proposed Placement the experienced BCBA collects data on behavior daily, looking at behaviors in terms of their antecedents (triggers) and consequences (motivations and outcomes) and using that data the BCBA designs interventions to increase positive behaviors and decrease inappropriate behaviors. [NT 622-623, 625, 633; S-54]

57. Parents can access progress monitoring on behavior and ongoing real-time daily student activity through ClassDojo, a computer program. Access can be through the parents' computers or Smartphones and parents can send the special education teacher a text message if they have questions. Students also have access to view their progress on ClassDojo. [NT 373-377; S-49]

58. Parental involvement and carry-over from school to home is a core value of the Proposed Placement in the belief that a student's success is directly correlated to parental involvement. There is daily communication between the program and parents, and sometimes there are multiple communications in one day. [NT 377-378, 628-629]

59. Depending on the IEP students in the Proposed Placement can receive some instruction in the regular education classrooms. As part of the transition process the BCBA would go out to the classrooms where Student would be with a regular education teacher, explain what the reinforcement program is like, explain what the behaviors are, and explain how the program staff would like the teacher to respond to Student. [NT 141, 384, 632-633, 655-656]

60. Initially one of the classroom staff would accompany Student to regular education classes and would intervene if behaviors warranted it. [NT 674-675, 677]

61. Student's IEP for the Proposed Placement specifies that Student will be with non-disabled peers for lunch, recess[11] and assemblies. [NT 595-596; S-20, S-21]

62. The special education teacher and the BCBA give students in the Proposed Placement social skills instruction on an ongoing basis as situations arise in the natural setting. Further, the BCBA has developed a new structured social skills curriculum that will be implemented shortly. [NT 346-348]

63. Students in the Proposed Placement have a structured behavior support system for the classroom and for each individual student. The behavior support system includes rewards chosen according to a child's individual interests. Similar to the 'Fun Friday' at Private School, at the Proposed Placement Students who have earned the privilege

[11] To the extent, if any, that the 7th graders go to recess.

participate on Fridays in a more extended relaxed period when they can access their earned privileges. [NT 139 312-314, 316-317, 337-338, 349, 355-359, 638]

64. The Proposed Placement moves students through four levels of privileges, from lowest to highest: Sapphire, Pearl, Ruby and Diamond. Because of progress at the Private School where Student met behavior goals at the 90% level Student would enter the Proposed Placement at the highest level, Diamond. [NT 314-316, 381, 392, 397-399]

65. Rather than transition students back into emotional support classrooms, the aim of the Proposed Placement is to transfer students back into regular education classrooms with pull-out services or into a learning support classroom if needed. [NT 379-380, 402]

66. The IEP presented in draft form at the June IEP meeting was sent to the Parent prior to the meeting. During the meeting there was considerable open dialogue between the parties and extensive handwritten changes were made to the draft that reflect the input of the Parent and her advocate. [NT 274-286, 447; S-20 compared with S-21]

67. The changes to the June 2015 IEP's Goals and Specially Designed Instruction (SDI) the Parent and the advocate proposed aligned very closely with what Student was receiving at the Private School. The Parent wanted to keep what was working in place. The things the Parent valued most about the Private School were small class size, high teacher to student ratio and a high degree of structure. [NT 289-290, 344, 473-474, 496, 498, 549-553]

68. Behavior goals in the June IEP are based on the success Student had achieved in Private School. [NT 395-399; S-20, S-21]

69. The Parent has not contested the content of the IEP, and has indicated that as long as the IEP has "what [Private School] does," then she is in agreement. [NT 290; S-20]

Audiotaping the IEP Meeting

70. There is no written District policy prohibiting audiotaping of an IEP meeting. [NT 148, 191]

71. If a parent gives prior notice a parent could audiotape the meeting and the District would also audiotape the meeting; there would be two independent recordings to ensure that the recordings would be clear and that there would be no alteration of the audio tapes. [NT 149-150, 202]

72. The District has followed this procedure on at least one other occasion when a parent gave prior notice that he wanted to audiotape a meeting. [NT 150, 160]

73. The Parent has chronic anxiety; when she is anxious it is difficult for the Parent to focus and remember what she has heard. [NT 225-226, 229-230]

74. The Parent has developed some mistrust with regard to the District. [NT 458-459]

75. The Parent was accompanied to two IEP meetings by an advocate who helped her understand what was happening and to regain her composure as needed. [NT 268-270]

76. Parent's advocate is experienced, has attended hundreds of IEP meetings and assisted seven families regarding special education services. [NT 436, 444]

77. Without giving notice ahead of time the Parent and her advocate asked for the first time to audiotape the June 2015 IEP meeting. The Parent did not state that she was making the request because of her anxiety issues. [NT 227, 445-446, 459-460, 559-560]

78. The Parent's stated purpose for recording the meeting was because she did not "trust the District" and wanted to record the meeting so there was no doubt as to what anyone had said. [NT 458-460]

79. The District denied the Parent's request to audiotape the meeting that day but offered to reconvene the meeting another day. [NT 302-303, 469-471, 560-561]

80. The Parent and her advocate declined the offer to reconvene the meeting. [NT 469, 561]

81. The Parent fully participated and expressed her opinion during the June 2015 IEP meeting as did the Parent's advocate. [N.T. 82; 268-272; 281-289; 445-448, 458]

Independent Educational Evaluation (IEE)

82. The District last fully re-evaluated Student in November 2012, and is therefore entitled to evaluate Student for the triannual re-evaluation in 2015. [NT 171; 297; S-13]

83. In the spring of 2015 when the IEP team was meeting to determine Student's placement for the 2015-2016 school year there was not a current evaluation of Student because the Parent would not sign a Permission to Re-Evaluate (PTRE). As of the first date of the hearing the Parent still had not signed the PTRE[12]. [NT 152, 17, 199-200, 232; S-13, S-14, S-36, S-38]

84. In part, the Parent's withholding of permission for a District re-evaluation and the request for an IEE was based on her mistrustful relationship toward the District. [NT 232]

85. However Parent also told the District that she would agree to sign a Permission to Re-Evaluate for a District re-evaluation if the District agreed to Private School as the pendent placement for Student. [NT 649]

86. At or shortly after the IEP meeting in April 2015 the Parent with assistance of her advocate requested an IEE to ascertain Student's current functioning. [NT 105, 193, 223, 440-441; P-65]

[12] Based on the Parent's apparent willingness conveyed in her testimony to have the District evaluate Student the hearing officer ordered the District to present the Parent with a PTRE before the last hearing session and told the Parent that she expected that she would sign it. The District and the Parent complied. [NT 298, 487, 679; S-57]

87. In asking for an IEE the Parent was not stating her disagreement with the last evaluation performed on Student, an audiological evaluation, nor with the psychoeducational re-evaluation completed in 2012. [NT 539; S-9, S-2]

88. The Parent did not ever disagree with any of the District's previous evaluations/re-evaluations. Specifically, the Parent did not disagree with the District's last re-evaluation of student, conducted in 2012, which confirmed Student's eligibility for special education under the classifications of Emotional Disturbance and Specific Learning Disability. [13][NT 538-539; S-6, S-7, S-8, S-9, S-12.S-13]

89. The Parent's advocate acknowledged that the Parent did not disagree with the most recent 2012 re-evaluation. [NT 538-539]

90. The District considered the Parent's request but declined to fund an IEE and issued a Prior Written Notice (PWN) to that effect. [NT 121-124, 170, 194; S-10, S-13, S-34]

Legal Basis and Discussion

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). 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 therefore 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); *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).

Although the Parent exhibited anxiety and became tearful right before the first session and occasionally during each of the sessions as reflected in the record, she understood questions

[13] The Parent made a request for an IEE on May, 24, 2013, but withdrew that request on June 13, 2013. [NT 168, 170, 526-528;S-10, S-34]

asked of her, was fluent and at times eloquent in her testimony, and demonstrated an adequate and in some respects advanced layperson's grasp of special education requirements (see e.g. NT 278-279). I did not give much credence, therefore, to her many references to being confused or not understanding what was going on at meetings as these statements seemed designed to convey the impression that she was a naïve mother being taken advantage of by the District (see, e.g. NT 222, 292). In fact, the Parent had previously engaged an advocate and retained an attorney and participated in a settlement agreement, had succeeded in enrolling Student in a private facility other than the one named in the settlement agreement, had re-engaged the advocate and retained new counsel for this hearing and had even contacted the advocate on behalf of another family who needed assistance. That having been said, the mother's care and concern for her child was palpable and there was no doubt that she was genuine in this regard. The Parent's advocate is to be commended for volunteering to work with the family and for providing guidance to several other families as well. Unfortunately I could not accord her testimony much weight even though she testified with confidence, given that she was incorrect on at least one significant detail, believing that the Student's current campus enrolled regular education students when she had been present for contradictory testimony from Private School staff (NT 456-457). Additionally, she denied that the Private School had "Fun Friday" even though she had listened to testimony where a Private School staff member used that very term; based several of her statements on uncertainties such as whether Student's current campus had teachers certified in subject areas; and only vaguely referenced the content of the Pennsylvania middle school curriculum (see, e.g. NT 452-454). While the above could be attributed to misinformation/confusion I could not find credible her assertion that after sitting in the April and the June IEP meetings where the special education teacher tried to explain the program being offered she had no idea that the District was offering Student the specific named Proposed Placement (see NT 467-469). Witnesses from Private School seemed to be testifying to the best of their knowledge and recollection, as did the District's witnesses. The most useful and credible information was supplied by the special education teacher in the Proposed Placement, and by the social worker assigned to the K-8 building; their testimony formed the basis of this hearing officer's understanding of the Proposed Placement, and was credible and persuasive.

General Principles of FAPE: The IDEA requires the states to provide a "free appropriate public education" (FAPE) to a student who qualifies for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. An appropriate education encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (citing *M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir. 1996)). Moreover, a child's educational performance can be affected in ways other than achieving passing grades, such as by an inability to engage in appropriate social relationships with peers.

The *Rowley* court held that a state's obligation under the IDEA is limited to providing an eligible child with some educational benefit – that is, educational benefit that is more than "trivial", but less than that which would be needed to maximize the child's potential. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and

"meaningful benefit" under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995); *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 268-269 (3d Cir. 2012). Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). See also *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1998); *T.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000)* (quoting ***P**olk 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)*; *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008), citing *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995); *Neena S. ex rel. Robert S. v. School Dist. of Philadelphia*, 2008 WL 5273546, 11 (E.D.Pa., 2008); *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 IDEA also provides that a child's free, appropriate public education be delivered in the "least restrictive environment" (LRE) that is appropriate for the individual child and which permits the child to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); 22 Pa. Code § 14.145; *T.R. v. Kingwood*. In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the school has included the child with non-exceptional children to the maximum extent possible. *Id*. All local education agencies are required to make available a "continuum of alternative placements" to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa Code § 14.145(5).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, an LEA is not required to provide an eligible student with services designed to provide the best possible education to maximize educational benefits or to maximize the child's potential. *Mary Courtney T*; *Carlisle*. Pennsylvania's Eastern District Court held that under the IDEA "schools are held to a minimum baseline standard, a standard that may fail to meet the expectations of the parents of disabled and nondisabled children alike". *Sinan L. et al vs School District of Philadelphia*, 2007 WL 1933021 (E.D. Pa. 2007). 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).

In *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) the court noted that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives" and that failure to agree on placement does not constitute a

procedural violation of IDEA); *Yates v. Charles County Board of Education,* 212 F.Supp.2d 470, 472 (D.Md.2002) ("[P]arents who seek public funding for their child's special education possess no automatic veto over a school board's decision"); *Rouse v. Wilson,* 675 F.Supp. 1012 (W.D.Va.1987); 34 C.F.R. Pt. 300 App. A, at 105 ("The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive [a free appropriate public education]."

Issue – Appropriateness of Placement:
The District's Proposed Placement for the 2015-2016 school year is appropriate and is now Student's pendent placement.

If an LEA offers a child a program and placement reasonably calculated to confer meaningful educational benefit then that LEA's program is appropriate. The IDEA does not charge hearing officers or courts with deciding which of two programs is more appropriate for a child; the inquiry is simply whether the program/placement offered by the LEA is appropriate.
The parties worked extensively on the June 2015 IEP, with the Parent providing a great deal of input regarding goals and specially designed instruction such that in this hearing the central focus was the appropriateness of the District's proposed *location for the implementation* of the IEP rather than the appropriateness of the IEP itself. The June 2015 IEP was collaboratively written by both parties, and upon review by this hearing officer, it is deemed to be an appropriate educational plan for Student subject to revision when the results of the District's evaluation-in-progress can more fully inform academic goals.

Given no substantive disagreement between the parties with the IEP document in and of itself, this hearing officer applies the "*Burlington-Carter"* analysis for tuition reimbursement as the structure under which the placement issue is determined. Long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide a free, appropriate public education ("FAPE") to a child with a disability, a program that is reasonably calculated to provide meaningful education benefit. (34 C.F.R. §300.148; 22 Pa. Code §14.102(a)(2)(xvi); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993); *Sch. Comm. of Burlington v. Dep't. of Educ. of Mass.*, 471 U.S. 359, 105 S.Ct. 1996 (1985). Under the three-step *Burlington-Carter* analysis, the first step is an examination of the appropriateness of a school district's proposed program. If it is found to be appropriate, no further analysis is necessary because the school district has met its obligation to provide FAPE to the student. However, if the district's program is found to be inappropriate, the second step is the examination of the appropriateness of the private school program which the parents have selected. If the private school program is found to be inappropriate, no further analysis is necessary because the parents have failed to provide what they claim the school district did not provide. Finally if the district's program is inappropriate and the private school chosen by the parents is appropriate, the third step is an examination of the equities, to determine whether tuition reimbursement is a fair remedy and, if so, in what amount.

Having heard extensive testimony about the Proposed Placement and having reviewed pertinent documents I find that the District has offered an appropriate program that goes far beyond the "minimum baseline standard" that Pennsylvania's Eastern District Court references in *Sinan L.* The District's Proposed Placement is reasonably calculated to provide meaningful educational

benefit to Student in the least restrictive environment and is, in fact, an exemplary program of which the District has every reason to be proud. Student is more than ready to leave the segregated campus of Private School and to re-enter a setting where Student can be integrated with nondisabled peers.

Student is eligible for special education under the category of emotional disturbance and specific learning disability. Student has a history of exhibiting behaviors that interfered with Student's learning, but also has a history of responding quite well to small, structured therapeutic programs. Student's Parent was so pleased with Student's progress at the IU program that at the end of 4th grade she prevailed upon the District to continue that placement for another year for 5th grade even though program staff and the District agreed that Student was ready to return to a placement in a District school. Likewise, in 6th grade and now in 7th grade Student has been very successful in significantly improving Student's behavior in both campuses of Private School, clearly meeting behavior goals in spite of a transition from one campus to another and one faculty to another.

The IDEA demands that students be educated in the least restrictive environment, that is, with nondisabled peers to the extent that is appropriate, and requires that Districts provide adequate supports and services to allow a child to be successful in a regular education milieu. Student has demonstrated for 4th and 5th grades in the IU program, in 6th and currently in 7th grades at Private School, that Student has acquired sufficient behavioral control such that a segregated facility is no longer appropriate. Although the Parent's recurring desire to keep Student in programs that she perceives are working and in which she feels confident is acknowledged and understood, Student cannot remain segregated on a campus for youths with behavior disorders when Student is not demonstrating inappropriate behaviors in school at any appreciable frequency or intensity. Student must return to a District public school where there is the opportunity to associate with and to learn among nondisabled peers.

The Parent may be entirely correct that for now Student still requires a small class size, a favorable teacher to student ratio, and a very structured behavior support system with meaningful incentives. Certainly the Parent seems to require, and is entitled to, open and frequent communication with school personnel. The fundamental disagreement between the parties is the location of such a program. The Proposed Placement is an ideal vehicle to help transition Student from segregated facilities to a typical public school building, and to build upon previous success toward a return to a supplemental learning support environment or to receiving special education in an inclusive regular education setting. Having the Proposed Placement in a public school K to 8 building provides the continuum of services that Student may access as appropriate.

Although there was no reliable data regarding Student's current academic status, the classification of learning disability in addition to emotional disturbance, as well as the last known academic levels, warrants more emphasis on learning support and perhaps less on emotional support as Student adjusts to being in a typical school environment. The fact that the special education teacher and the Board Certified Behavior Analyst planned to enter Student in Diamond, the highest level of the Proposed Placement's behavior support system, strongly suggests that Student may fairly quickly be able to be successfully integrated with support into special education learning support for reading, math and written expression as well as into

regular education settings for other subjects. Student's proposed IEP calls for Student to attend lunch, recess and assemblies with regular education peers and this must be implemented with supports as needed. In addition, however, the IEP team will be directed to consider the range of appropriate opportunities available to move Student prudently, but without undue delay, into learning support and/or regular education classes still while having a home base in the Proposed Placement.

Issue - Audiotaping the IEP Meeting:
The District did not err in denying the Parent's request to audiotape the June 2015 IEP meeting.

Both the IDEA and Pennsylvania Chapter 14 regulations require local education agencies to satisfy strict procedural requirements, including the assurance of parental participation. The requirement for parental participation is reflected in 34 C.F.R. § 300.513(a)(2)(i-iii). "In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE *only if* the procedural inadequacies impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or caused a deprivation of educational benefit". The United States Court of Appeals for the Third Circuit has held, "[a] procedural violation of the IDEA is not a *per se* denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.' " *K.C. ex rel. Her Parents v. Nazareth Area Sch. Dist.*, 806 F.Supp.2d 806, 830 (E.D.Pa.2011) (citing *C.H. v. Cape Henlopen School Dist.*, 606 F.3d 59, 66 (3d Cir.2010)).

As the District points out in its closing argument, the United States Supreme Court, the Pennsylvania Supreme Court, and the United States Court of Appeals for the Third Circuit have never issued a written opinion on audiotaping an IEP meeting. Additionally no such opinion has been issued by the Pennsylvania Commonwealth Court. However, instructive but not binding is a 1996 Pennsylvania Special Education Appeals Panel opinion that addressed the question of whether a parent can audiotape an IEP meeting. (*Robert R*, Special Education Opinion No. 704). In that case the appeals panel cited the IDEA's emphasis on parent participation in IEP meetings to ensure the provision of a free appropriate public education for children with disabilities, and noting that its finding was "fact-specific" ruled that the parent did have a right to record the meeting because the mother had a statutory right to participate in the IEP meeting that far outweighed the district's alleged interest in preventing taping from becoming a "barrier to effective communication" under the IDEA.

In support of its position, the District cites several cases that are instructive but not binding in this jurisdiction. A Florida administrative law judge found that "Parent was fully capable of understanding and actively participating in the meetings without having an electronic record of them…." *Jackson County School Board*, 61 IDELR 120, pp. 622-623 (Florida State Education Agency, Feb. 13, 2013). In *E.H. v. Tirozzi*, 735 F.Supp. 53 (D. Conn. 1990), a non-native speaking parent sought permission with ample advance notice to audiotape the IEP meeting as an aid to reviewing and understanding what was said and she prevailed. In *V.W. v. Fravolise*, 131 F.R.D. 634 (D. Conn. 1990), the parent advised the school that he needed to audiotape the IEP meeting because an injury to his hand made note-taking difficult. Though the district refused

permission because audiotaping the meeting allegedly would inhibit or "chill" the free flow of information at the meeting, the parent prevailed because the court rejected such an argument on the grounds that the district lacked any statutory authority to limit the parent's right to participate in the meeting.

In the instant matter, without providing prior notice to the District the Parent and her advocate requested to audiotape the June 2015 IEP meeting. It is surprising that the experienced advocate did not consider the need to make an advance request so that the District could prepare adequate equipment. For its part given its admitted experience with at least one other case it is surprising that the District did not already have a protocol in place and equipment at the ready. Importantly, however, the District did not make a blanket denial of the Parent's request and offered to reconvene, which Parent and advocate refused. As it turned out, the Parent with the assistance of her advocate was able to participate meaningfully in the meeting, voicing among other things her opinion as to her favored placement for Student. The Parent was not "significantly impeded" from particpating in the June 2015 IEP meeting and her recall likewise did not appear to be impacted. Four months later, even under the considerable stress of testifying in the due process hearing, the Parent demonstrated detailed recall of the June 2015 meeting, testifying to various interactions with the IEP team about the draft document discussed and even during cross-examination correcting counsel on a question regarding documents dicusssed in the April 2015 IEP meeting versus the June 2015 IEP meeting. Additionally Parent had her advocate with her who also had a very detailed recollection of the June 2015 IEP meeting itself; the advcoate testified to her view of multiple, indepth conversations with the IEP Team members.

Issue - IEE:
The District did not err in declining to provide Student with an IEE 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).

"If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

In the instant matter the Parent was not asking for an IEE because she disagreed with the District's last evaluation done in 2012 but because she wanted a clearer picture of Student's functioning. As such the District was under no legal obligation to fund the IEE or go to due process to defend its latest evaluation. The District in its closing argument provides the following on-point citations from recent Pennsylvania cases: "Parents are certainly free to obtain an IEE at their own expense for that purpose, but cannot obtain public funding for it unless the District's

evaluation is inappropriate, or when there is a compelling equitable basis for it." *M.D. v. Downingtown Area*, ODR No. 13126-1213 KE (Carroll, 2013, pp.19-20); *see also A.H. v. Boyertown Area Sch. Dist.*, ODR No. 00098-09-10-LS (McElligott, 2010, p.18); *L.G. v. Central York*, ODR No. 01792-10-11JS (Carroll, 2011, p.28); *G.W. v. Methacton Sch. Dist.*, ODR No. 14072-1213KE (Ford, 2013, pp.23-24).

Parental agreement with all the District's previous evaluations, including the 2012 evaluation was demonstrated by physically checking boxes indicating agreement. There has never been a parental assertion of disagreement with an evaluation. The Third Circuit upheld a district's denial of reimbursement for an IEE, on the specific point that parents in that matter had expressly checked that they agreed with a district evaluation. *Lauren W. v. Dr. John A. Deflaminis*, 480 F.3d 259 (3d. Cir. 2007). Further, even if the Parent had based her disagreement with the November 2012 reevaluation report as the reason for her request for an IEE in March 2015, this two-and-a-half year lag is a significant lapse of time that suggests that there is no genuine disagreement with the District's evaluation.

The District had been asking the Parent's permission to re-evaluate Student to ascertain present levels of functioning to inform programming but the Parent withheld permission until the hearing. Now that an evaluation is in progress and must be completed with a written report given to the Parent within 60 calendar days of the date the PTRE was signed, the parties should gain the clearer understanding of Student's status. If after the District produces its evaluation the Parent disagrees with the results she may then ask for an IEE at public expense, with the District having the option of granting the request or filing for a due process hearing to defend its reevaluation.

Dicta: Although the Parent and some District staff were observed by this hearing officer to be cordial and even friendly during breaks and before the sessions were convened, for example discussing Halloween and an upcoming play in which the Parent was performing, the record does reflect that there is some mistrust in the relationship. The parties may wish to consider inviting a neutral facilitator from ODR to future meetings rather than involving counsel or advocates as they again begin to work together to address how to meet Student's needs. It is respectfully suggested that the parties set aside their differences and look toward the future, not the past, in the Student's best educational interests which is of course their major joint focus.

Order

It is hereby ordered that:

1. The District's Proposed Placement for the 2015-2016 school year is appropriate and is now Student's pendent placement.

   Student shall begin attending the Proposed Placement on the District's first day of school in January 2016 after the 2015-2016 winter holiday break.

No later than December 11, 2015 the IEP team shall meet to plan Student's transition from the Private School to the District's Proposed Placement. The June 2015 IEP shall be in effect upon Student's transition to the Proposed Placement.

In order for Student to become acclimated to the transition to the District, implementation of the IEP provision that Student shall attend lunch, recess and assemblies with nondisabled peers may be postponed for two weeks, but implementation of this provision shall commence no later than Student's 11th school day in the District building.

No later than ten calendar days after the District completes its reevaluation report the IEP team shall meet to revise the June 2015 IEP's present levels, goals and specially designed instruction as appropriate in accord with the reevaluation results. At that meeting the IEP team must also determine on an individualized basis in which learning support and/or regular education classes, in addition to lunch, recess and assemblies, Student will begin to be included, as well as ascertaining the supports and services necessary to make these inclusion opportunities successful.

2. The District did not err in denying the Parent's request to audiotape the June 2015 IEP meeting.

3. The District did not err in declining to provide Student with an IEE at public expense.

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

December 2, 2015
Date

Linda M. Valentini, Psy.D., CHO

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