

*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

Child's Name: S.M.

Date of Birth: [redacted]

CLOSED HEARING

ODR File No. 17175-15-16 AS

Parties to the Hearing:

Parent[s]

Representative:

Parent Attorney

Michael J. Connolly, Esquire  
McAndrews Law Offices, P.C.  
30 Cassatt Avenue  
Berwyn, PA 19312

Local Education Agency

Downingtown Area School District  
540 Trestle Place  
Downingtown, PA 19335-2643

LEA Attorney

Sharon W. Montanye, Esquire  
Sweet, Stevens, Katz & Williams LLP  
P.O. Box 5069, 331 Butler Avenue  
New Britain, PA 18901

Dates of Hearing:

February 19, 2016, April 21, 2016,  
April 28, 2016, and May 17, 2016

Date Record Closed:

June 13, 2016

Date of Decision:

July 1, 2016

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.  
NAHO Certified Hearing Official

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a late-teenaged student who resides within the Downingtown Area School District (District). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parents filed a due process complaint against the District in December 2015, asserting that Student was denied a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,<sup>3</sup> as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing,<sup>4</sup> with an initial session devoted to evidence on the scope of the hearing based on the IDEA statute of limitations. Following a ruling wherein this hearing officer concluded that the Parents had not filed their Complaint within two years of the "knew or should have known" date, the hearing was limited to the two year period immediately preceding the filing of the Complaint. (HO-1) Evidence on the substantive issues was presented in three subsequent hearing sessions.<sup>5</sup> The Parents sought to establish that the District failed to offer Student a program that would provide FAPE, seeking reimbursement for tuition at the private placements Student attended from October 2014 through the present. The District maintained that it was not obligated to evaluate Student or offer a special education program for the time period in question, and that no remedy was due.

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The term "Parents" is used when it appears that one of them, usually Student's mother, was acting on behalf of both.

<sup>2</sup> 20 U.S.C. §§ 1400-1482.

<sup>3</sup> 29 U.S.C. § 794. Pennsylvania implements Section 504 through regulations found at 22 Pa. Code §§ 15.1 – 15.11.

<sup>4</sup> References to the record will be as follows: Notes of Testimony (N.T.), Parent Exhibits (P-), School District Exhibits (S-), and Hearing Officer Exhibits (HO-). References to the few duplicate exhibits will be to one or the other or both. This hearing officer appreciates the cooperation of the parties and counsel in participating in the electronic exhibit pilot project in this case.

<sup>5</sup> Student was in private placements throughout the time period in question, so the current program was not at issue.

The record was closed upon receipt of the parties' written closing arguments.<sup>6</sup> For the reasons set forth below, the Parents will prevail on a portion of their claims.<sup>7</sup>

### **ISSUES**

1. Whether the District had an obligation to develop and offer a special education program to Student after the 2013-14 school year;
2. If the District had such an obligation, whether it should be responsible for reimbursing the Parents for tuition to the private placements Student attended from October 2014 through the end of the 2015-16 school year; and
3. Whether the Parents are entitled to reimbursement for an Independent Educational Evaluation obtained in the fall of 2015?

### **FINDINGS OF FACT**

1. Student is a late-teenaged student who is a resident of the District. Student is eligible for special education on the basis of an emotional disturbance. (N.T. 34-36)

#### **District Programming**

2. Student began attending school in the District in kindergarten. During the winter of the seventh grade school year (2011-12), Student began to exhibit some school avoidance behaviors. Student also began psychiatric counseling for [redacted], with the counseling continuing into eighth grade. (N.T. 48-50, 56-59, 61-62; P-1 p. 3)
3. In the spring of 2013, Student continued to demonstrate school avoidance behavior. In late April and early May of that year, Student expressed suicidal ideation and was psychiatrically hospitalized. Discharge diagnoses were Depression Not Otherwise Specified (NOS), Anxiety Disorder NOS, Social Phobia, and [redacted]. (N.T. 63-65; P-1, P-2; S-5 p. 6)
4. The District issued a Permission to Evaluate (PTE) form after the psychiatric hospitalization, and conducted an initial evaluation with the consent of the Parents. An Evaluation Report (ER) issued in October 2013, during the ninth grade school year, and a meeting was convened to discuss the results. (N.T. 66-67, 104; P-4; S-6)

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<sup>6</sup> The final record in this case incorporated the redactions discussed at N.T. 93-96, and specifically at N.T. 95 LL 19-21.

<sup>7</sup> This hearing officer declines the Parents' invitation to reconsider her ruling on the statute of limitations (Parents' Closing Argument at 1 n.1), and notes that the issue has been properly preserved.

5. The ER provided input from the Parents, a classroom observation, and teacher recommendations; however, no private evaluation reports were provided to the District. Benchmark assessments did not reveal concerns with Student's academic performance. Cognitive assessment for the ER yielded an average full scale IQ (Wechsler Intelligence Scale for Children – Fourth Edition), with variability among subtest scores (working memory was a relative strength and processing speed was a relative weakness). Student's performance on academic achievement assessment (Wechsler Individual Achievement Test – Third Edition) was reported to be in the average to above average range on all subtests and composites. (N.T. 137-39; P-4; S-6 pp. 8, 10-12)
6. Assessment of Student's behavior for the ER including executive functioning revealed parental concerns in the clinically significant range in many areas on the Behavior Rating Inventory of Executive Functioning (BRIEF) and Behavior Assessment System for Children – Second Edition (BASC-2), but teacher ratings were mainly in the average range with the exception of the metacognition index on the BRIEF (due to scores on the initiate and plan/organize domains), and several at-risk concerns on the BASC-2. The ER also included a report from the guidance counselor, and measures of Student's depression and anxiety. Student's own rating scales did not reflect concern in those areas, although the reporting of the results of the anxiety scale were likely not accurate. (P-4, S-6)
7. The ER reflected eligibility for special education on the basis of an emotional disturbance. The Parents agreed with the conclusions in the ER. (N.T. 67-68; P-4; S-6)
8. An Individualized Education Program (IEP) was developed in November 2013 following the ER. The IEP provided goals for problem solving, school attendance, managing emotions/using coping skills, and study and organizational skills; program modifications and items of specially designed instruction were also included. The IEP had a Positive Behavior Support Plan attached addressing the majority of the IEP goals. Student's program was itinerant emotional support. (P-5)
9. The Parents agreed with the IEP and approved the Notice of Recommended Educational Placement (NOREP). Student's IEP was implemented in a District high school. However, Student continued to miss school and a truancy elimination plan was developed. On December 20, 2013, Student withdrew from the District and was enrolled in a cyber charter school. (N.T. 68, 70, 73-79, 279, 281-82, 309; P-6, P-7; S-8, S-9, S-10)

Post-District Programming 2014-15: Cyber Charter School and Wilderness Program

10. Student remained in the cyber charter school through the end of the 2013-14 school year. Student withdrew from the cyber charter school as of June 30, 2014. Throughout that time period, Student continued with mental health counseling, but by May 2014 Student demonstrated significant anxiety and depression, and rarely would leave the house. (N.T. 78, 280-82, 360-62; P-7 p. 2, P-9 p. 4, P-11; S-14 p. 1)

11. Student earned five credits upon completion of the 2014-15 school year (ninth grade) in the following classes: Algebra I, Biology, Health, Literature and Composition, U.S. History, and Physical Education. (P-11 p. 7)
12. The District was not notified until late November 2014 that Student was no longer attending the cyber charter school. That notification was by the cyber charter school. (N.T. 677-78, 681, 684; P-14; S-18 p. 1)
13. Student began attending a wilderness program in another state in July 2014, remaining there through mid-October of the same year. Student had a treatment plan at the wilderness program to address Student's diagnoses of Generalized Anxiety Disorder and Unspecified Depressive Disorder. (N.T. 285-88; P-12)
14. At the time of discharge from the wilderness program, Student's diagnoses included Generalized Anxiety Disorder and Persistent Depressive Disorder. Wilderness program staff recommended a residential treatment center or therapeutic boarding school for Student. (N.T. 288; P-12)
15. Student was privately evaluated in September 2014 by a psychologist in the state where the wilderness program was located. This evaluation included parental input, significant developmental, medical, and educational history, and interviews. (N.T. 288-89; P-13)
16. The private psychologist conducted assessments of cognitive ability (Wechsler Adult Intelligence Scale) and academic achievement (Woodcock-Johnson Tests of Achievement, Third Edition). Results of cognitive assessment were at the upper end of the average range (Full Scale IQ 109) with some variability among index and subtest scores; processing speed was relatively low compared to the other index scores. Achievement test scores were in the average to high average range for all subtests and domains. (P-13 pp. 6-9)
17. On various personality assessment measures, results were consistent with Student's diagnoses of anxiety and depression. The private psychologist maintained the diagnoses of Generalized Anxiety Disorder and Persistent Depressive Disorder. (P-13 pp. 10-13, 15)
18. Recommendations made by the private psychologist included a small, structured treatment environment; a low student to teacher ratio; cognitive challenges that would not overwhelm Student; continued individual and group therapy with coordination among providers; academic support including instruction in problem-solving skills; development of advocacy skills; and accommodations for Student's weak processing speed. (P-13 pp. 14-16)

#### Post-District Programming 2014-15: RTF

19. Student transitioned to a residential treatment facility (RTF) in the same state as the wilderness program beginning the day after discharge from the wilderness program. (N.T. 289-90)

20. The RTF serves youths ages thirteen to eighteen who are the same gender as Student. The approximately sixty resident youths are provided with therapeutic and academic components in the RTF program. (N.T. 371, 374-75; P-15)
21. The RTF is licensed by the National Association of Therapeutic Schools and Programs and the state agencies that license residential programs. Its academic curriculum meets those of the state department of education where it is located. (N.T. 375-76, 737; P-15 p. 27)
22. The academic program provides instruction to students in classes where the child exhibits a need for instruction or lacks credit. Students are placed into the same grade level that the child most recently attended. The ratio of students to adults is a maximum of 12:1 in academic classes. (N.T. 376, 736-38; P-15)
23. Some students at the RTF have IEPs or Section 504 Plans; at the time of the due process hearing, approximately half of the children at the RTF had one or the other. Most students also receive tutoring or other instructional assistance. (N.T. 737, 747-48)
24. The RTF assigns students to group homes. Each student is assigned specific chores, including participation in a program where the child is responsible for caring for young animals. Equine therapy is also a part of the RTF program. Children earn educational credit toward high school graduation for participating in equine therapy and animal husbandry. (N.T. 289-90, 380-81, 387, 740-41)
25. Students at the RTF have individual and group therapy, with the latter encompassing a number of specific topics and skills. Various therapeutic approaches and models are used depending on the child's needs, including traditional and experiential therapy. Traditional therapy may typically be provided in an office setting, whereas experiential therapy provides opportunities for the child to engage in activities where he or she would naturally become anxious or experience other symptoms, and the therapist works with the child to overcome negative feelings in a real situation. Experiential therapy permits the child to apply known techniques, or learn new approaches to managing emotional reactions, to real situations and events, promoting generalization of skills. (N.T. 289-90, 374-75, 377-80, 436-37, 553-54, 767-68; P-15)
26. Staff at the RTF participate in weekly treatment team meetings with therapeutic and academic professionals as well as residential supervisors. Each child is the subject of the meeting at least once each month, with a summary report written at that time. (N.T. 382-83, 739-40, 758; P-16 pp. 5-18)
27. At the time Student began the academic program at the RTF, staff determined that Student should be placed into tenth grade. The goal was for Student to complete tenth grade. (N.T. 740-41)
28. When Student began attending the RTF, Student experienced significant anxiety and depression, and had low self-esteem. Student struggled with academics as a result of those emotional difficulties, and worked with a tutor at times. The therapeutic

components of Student's program occurred throughout the day, allowing Student to benefit from instruction. (N.T. 393-95, 743-44, 750-51, 756-57)

29. Student had a treatment plan developed by the assigned therapist at the RTF that focused on Student's anxiety and depression. The treatment plan contained goals, and staff monitored Student's progress toward the goals and overall level of functioning. Student met individually with an assigned therapist once or twice each week, and also participated in group therapy sessions several times each week to address various areas such as social skills and to engage in different types of cognitive behavior therapy. Student participated in ongoing individual and group therapy, in addition to family therapy, throughout the RTF placement. (N.T. 378, 383-91, 393-94; P-16; S-24)
30. The Parents participated in weekly family therapy sessions with Student and the RTF therapist via telephone conference call. (N.T. 299-300, 363-64, 385)
31. Children at the RTF progress through specific functioning levels on a scale of one through five that may or may not follow an orientation stage. In order to reach the next level, the child must obtain approval from residential staff and peers in the group home before making a presentation to the treatment team. The treatment team makes the decision on whether a child would move to the next level. Children's levels can vary, going up or down depending on the child's behavior. (N.T. 389-90, 403-04, 428, 757)
32. A typical day for Student at the RTF began with chores, and moved on to times for breakfast, physical education, additional chores, study time/sports/therapy, lunch, chores, free time, and study time; then five hours of school with a break for dinner. One day each week, the academic component was outside of the classroom for experiential learning activities. Chores ended the day before the bedtime routine. (N.T. 391-93, 741; P-15 pp. 22-23)
33. Student progressed from the lowest (first) level to the highest (fifth) level of functioning, with one instance of regression to a lower level before returning to an upward trend, between Student's admission to and discharge from the RTF. Upon discharge, Student was successfully managing anxiety and depression. Student completed tenth grade by the time of discharge, taking over a year to do so; and had a cumulative total of 15.75 credits toward graduation. Student earned A and B grades and credits for English 10, World History, Geometry, Physics, Physical Education, Spanish I, Fine Arts, Career (equine therapy and animal husbandry), and several electives. (N.T. 394-96, 402-05, 744, 751; P-16 p. 4; S-24 p. 1)
34. Student's therapist at the RTF recommended that Student transition to a placement close to home that offered therapeutic services with a residential component. (N.T. 398)
35. In early November 2014, the Parents wrote a letter to the District asking for an IEP meeting and a discussion of reevaluation. The District responded by summarizing its understanding that Student was enrolled in a cyber charter school, but that the District would conduct a reevaluation and develop an IEP upon Student's return to Pennsylvania

and re-enrollment in the District. The next day, the Parents, through an advocate, notified the District that Student was in an RTF. (N.T. 291-92, 676-77; S-15, S-16)

36. The Parents sent another letter to the District on November 10, 2014, stating their intention to register Student in the District and explaining their understanding that Student could be evaluated even though not present in Pennsylvania. The Parents again contacted the District regarding re-enrollment of Student in the District in December 2014/January 2015, and asked that it conduct a new evaluation, with the hope that Student would be able to return. (N.T. 292, 294-95; S-20)
37. The District arranged for a meeting with the Parents in April 2015. District representatives advised the Parents that while Student was in a residential facility in a different state, it could not evaluate Student and that it had no obligations toward Student until Student returned to Pennsylvania. (N.T. 298-99, 679, 692-93; S-21 p. 1)
38. Student returned to Pennsylvania for home visits in April and September 2015. The April visit was over a weekend while the September visit was approximately one week. (N.T. 320)

#### Independent Educational Evaluation

39. The Parents obtained an Independent Educational Evaluation (IEE) in the fall of 2015, as one reason for the September home visit. The Parents arranged for the IEE in order to provide information on Student's transition from the RTF. The Parents' first contact with the evaluator was in July 2015, and a report of the IEE issued in December of that year. (N.T. 302-03, 321, 323-24, 340, 540-41, 582-83, 585)
40. The independent evaluator has a graduate degree in school psychology and is a certified school psychologist in Pennsylvania and nationally. She has twenty five years' experience with children experiencing anxiety and/or depression. (N.T. 535-36)
41. The independent evaluator sought information from the Parents and from the RTF. She did not request information from the District but did review its 2013 ER and November 2013 IEP, as well as records from the cyber charter school and wilderness program and the 2014 IEE. (N.T. 541-45, 587)
42. The independent evaluator conducted assessments of Student during the September home visit. She believed those assessments provided an accurate representation of Student. (N.T. 547-48, 550-51)
43. Student's cognitive performance (Woodcock-Johnson Tests of Cognitive Abilities, Fourth Edition) was in the average to high average range, with a relative strength in fluid reasoning. (N.T. 562-63; P-10 pp. 14-15 and Appendix A)
44. Student's performance on academic achievement measures (Woodcock-Johnson Tests of Achievement, Fourth Edition) was in the average to high average range, with relative weaknesses in mathematics skills and vocabulary. The independent evaluator



recommended further assessment of Student's mathematical skills to identify any gaps in mathematics knowledge, particularly mathematics calculation. (N.T. 564-65, 591-96, 624; P-10 pp. 15-16, 24, and Appendix A)

45. Social/emotional and behavioral functioning were assessed by the independent evaluator primarily through rating scales completed by one of the Parents, Student's RTF therapist, and Student (Multidimensional Anxiety Scale for Children, Second Edition; Children's Depression Inventory, Second Edition; and Conners Comprehensive Behavior Rating Scales) and interviews. The scales from Student's therapist were overall more in the average range than those from the Parents, likely due to the supportive environment at the RTF; whereas Student's self-reports reflected no concerns. Anxiety and depression in addition to other emotional problems, particularly from the Parents' perspective, were indicated. (P-10 pp. 16-22)
46. The independent evaluator concluded that Student met criteria for an emotional disturbance under the IDEA, and made recommendations including counseling and transition from the RTF to a program with only slightly less structure and support. (P-10 pp. 22-25)

#### Post-District Programming: 2015-16

47. In August 2015, the Parents wrote a letter to the District and asked for its financial support of Student at the RTF. (N.T. 304, 713-14; S-21)
48. The District responded with an August 2015 NOREP denying the request for tuition for the RTF, and proposing an evaluation when Student returned to Pennsylvania. The Parents did not approve the NOREP regarding tuition, but expressly approved "the districts [sic] request to evaluate [Student when Student] returns to Pennsylvania." (P-17 p. 3) (N.T. 714-15; P-17; S-22)
49. Student was discharged from the RTF in December 2015. Prior to the discharge, the Parents had had ongoing discussions with Student's therapists about when Student would be ready to leave. (NT. 307, 321-22, 326-27, 348-49, 407-09, 417-18, 429-31)
50. The IEE was not provided to the District until December 2015 when the Due Process Complaint was filed. The Parents never provided any information from the RTF or Private School to the District until the hearing, and the District did not ask the Parents for any records from outside placements. (N.T. 343-47, 587; S-23)
51. Beginning in January 2016, Student attended a private school (Private School) in Pennsylvania. Private School is licensed by the Commonwealth of Pennsylvania and provides a day program that does have boarding students. Student resided at Private School. (N.T. 307, 454, 476, 505-06)
52. Student was enrolled in Private School as a tenth grade student because it was the middle of the school year when Student entered that placement. Private School staff were concerned about Student's ability to successfully make the transition to eleventh grade in

the middle of the school year in light of Student's anxiety. The rigorous college-preparatory curriculum at Private School was also a consideration. (N.T. 358, 457-60, 483-84, 490, 492-93; P-18 p. 19)

53. On a typical day at Private School, the students meet for a homeroom period. Classes are scheduled on a rotating basis, with each student attending four or five academic classes on any given day. (N.T. 511)
54. The student to teacher ratio at Private School is approximately 7:1. Private School provides an academic support class at the end of the school day; students are able to meet individually with teachers during a conference period. Students have access to a writing center for support. (N.T. 460-62, 507; P-18 pp. 14-15)
55. Private School has a learning center for students with learning differences. Students needing that support are scheduled to attend the learning center as any other class, meeting four days per week in small groups of four. Student has a learning center class at Private School where Student is individually monitored by a special education teacher with emotional support experience for academic and non-academic needs. (N.T. 445, 455-56, 462-64, 465-67; P-18)
56. Student had content area classes in World Literature, Algebra I, Physics, Modern World History, and Spanish I at Private School. Academically, Student performed well in all content classes, earning A grades in a majority of subjects with an occasional B grade. Weekly teacher reports were positive overall for Student's effort, behavior, productivity, and participation. Student was also successful socially and emotionally at Private School. (N.T. 470-72, 513-15; P-18)
57. Student's content area teachers provided weekly reports to the learning center teacher on Student's progress; the learning center teacher in turn provided a summary to the family and Student, and communicated with Student's adviser on at least a weekly basis. Student checked in with the advisor daily and they met weekly. Student was also provided weekly counseling at Private School that had been arranged privately. (N.T. 308, 467-68, 472-73, 508-12, 517-18; P-18 pp. 25-78)
58. Student did not have any written plan similar to an IEP at Private School. Student required monitoring but no accommodations that would warrant a written plan. (N.T. 474-75)
59. The Parents did not inform the District that Student returned to Pennsylvania in December 2015, or of the home visits earlier in the year. The District learned of Student's attendance at Private School at the due process hearing, and immediately issued a new PTE form to the Parents. (N.T. 328-29, 342, 715-17)
60. Student has a tendency to minimize anxiety and emotional concerns, and Student's ability to manage emotions has varied. Over time, however, Student has learned skills to manage emotions such that the periods when Student has difficulty doing so are less frequent and shorter in duration. However, Student continues to require a therapeutic

component to educational programming because they are directly related, and Student still has school-related anxiety. (N.T. 555-56, 557-58, 561-62, 570-71)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses to be credible, testifying to the best of their recollections and ability. To the extent that discrepancies exist in the testimony, such as the content of the discussions at the April 2015 meeting, those may be attributed to variances in memory and perspective rather than any intent to deceive. The testimony of the independent evaluator who conducted the fall 2015 IEE, as well as her IEE, were accorded heavy weight due to the persuasive value and impartial presentation of her assessment results and recommendations. The bulk of the historical

information in the IEE, however, was not credited as substantive evidence particularly with respect to the District information because it was not given any opportunity to make any contribution to the document.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' closing arguments.

#### GENERAL IDEA PRINCIPLES

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. For children who are eligible for special education services, states are mandated to provide a “free appropriate public education” (FAPE). 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, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Local education agencies (LEAs) 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).

## SECTION 504 PRINCIPLES

Section 504 specifically prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In the context of education, Section 504 and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood, supra*, at 253 (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a). Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b).

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *Lower Merion, supra*, at 931. In this matter, the Section 504 and IDEA claims are the same, challenging the obligation to provide FAPE, and will be addressed together.

## DISTRICT’S FAPE OBLIGATION TO STUDENT

In Pennsylvania, the school district of residence is generally responsible for educating students residing within its boundaries, including children with disabilities. 24 P.S. §§ 13-1302, 13-1372; 22 Pa. Code § 11.11. The resident status of the parent or guardian of the child is

controlling. 24 P.S. §§ 13-1302(a). In a case such as this, where an eligible child is not currently enrolled in the school district of residence, but the parents ask that school district to develop a special education program for him or her, it is incumbent upon the district to comply. *James v. Upper Arlington City School District*, 228 F.3d 764 (6<sup>th</sup> Cir. 2000) (holding that a school district's obligation toward a child with a disability arises from his or her residence within the district and not on enrollment); *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011) (concluding that a parent's request for an evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop an IEP). *See also I.H. v. Cumberland Valley School District*, 842 F. Supp. 762 (E.D. Pa. 2012) (denying the school district's motion to dismiss the claims relating to its obligations to develop an IEP for a resident student no longer enrolled in the district).

In this matter, the Parents contacted the District in the fall of 2014, asking for a meeting to consider an evaluation of Student for use in developing a new IEP. At that point in time, the District was as yet unaware that Student had withdrawn from the charter school and had been placed in an RTF following discharge from the wilderness program. Nevertheless, the District was the school district of residence, understood that Student was a child with a disability, and had an obligation to begin the process of assessing what information it had and what information it needed to obtain in order to comply with its IDEA mandates, regardless of Student's enrollment status.

The District ostensibly accepted its obligation to meet Student's special education needs as a resident pupil, but appeared to condition that responsibility on Student's local availability for a new evaluation. While certainly a reevaluation in the fall of 2014 was permissible and would have been useful, and perhaps necessary given all of the changes in Student's

programming and mental health needs, a reevaluation does not necessarily require new assessments. 20 U.S.C. § 1414(c); 34 C.F.R. § 300.305. The geographic distance between the District and the RTF certainly would have provided some impediment to promptly arranging for new assessments if any were needed, but the District was already in possession of an ER that was not yet a year old, with the mandated reevaluation not set to occur for another two years. 20 U.S.C. 1414(a)(2); 34 C.F.R. § 300.303. For these reasons, the District's reliance on *Great Valley School District v. Douglas M.*, 807 A.2d 315 (Pa. Cmwlth 2002) (refusing to require a school district to assume responsibility for an evaluation of a student in a unilateral out of state placement), is unavailing. The Parents continued to take the steps that appeared necessary for the District to move forward, registering Student on the District's rolls and agreeing to facilitate the evaluation the District deemed necessary. While some delay in late 2014 was perhaps understandable on the District's part, with Student at an RTF out of state for an indefinite period of time, nothing further occurred until the Parents' late summer 2015 request for tuition reimbursement. This hearing officer concludes that the District's failure to take even an incremental step toward development of a program for Student based on available information amounted to a denial of FAPE from November 2014 forward, and into the 2015-16 school year when the Parents continued to seek District response to its IDEA obligations by creating and offering FAPE to Student.

#### TUITION REIMBURSEMENT

Parents who believe that a public school is not providing FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement for tuition. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Tuition reimbursement is an available remedy for parents to receive the costs associated with their child's placement in a private school

where it is determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T.*, *supra*, 575 F.3d at 242. Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice); *Carter*, *supra*. In considering the three prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not controlling in evaluating a parent's unilateral placement. *Ridgewood*, *supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter*, *supra*.

Having concluded that the District denied Student FAPE by failing to propose a program for the 2014-15 and 2015-16 school years, the next questions are whether each of the private placements was reasonably calculated to provide an appropriate education to Student, and whether equitable principles should apply to reduce or deny the Parents' claim. The two placements will be addressed in turn.

#### THE RTF

In addition to the foregoing, the residential nature of the placement requires an examination of its necessity in the tuition reimbursement analysis. The federal regulations implementing the IDEA provide for residential placement if it "is necessary to provide special education and related services to a child with a disability." 34 C.F.R. § 30.104. The question of whether a residential placement must be at public expense requires an examination of whether that full-time placement is "necessary for educational purposes, or whether the residential



placement is a response to medical, social or emotional problems that are segregable from the learning process.” *Mary Courtney T., supra*, 575 F.3d at 243-44 (quoting *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981)). In other words, if the medical, social, and emotional components of the residential program are “part and parcel of a specially designed instruction to meet the unique needs of a handicapped child,” the local education agency is responsible for that placement. *Id.* at 244 (quoting *Kruelle* at 694).

Student was placed into tenth grade upon entry into the RTF, the same grade Student would have been in had Student remained at the District or cyber charter school. As recommended by the then-most recent private evaluation, Student was provided an environment with a low student to teacher ratio that included academic support, as well as individual and group therapy. The structured program included both therapeutic and academic components that were intertwined and scheduled throughout the entire day in addressing Student’s complex needs. The therapy aspects for Student at the RTF were ongoing and quite significant, and Student initially was focused on the intensely therapeutic aspects of the residential program in order to benefit from the academics. Even accepting the District’s argument that some of Student’s emotional difficulties were related to family and home factors, the connection between Student’s anxiety and depression and Student’s ability to learn while attending the RTF is unequivocal; and the independent evaluator who conducted the IEE in the fall of 2015 provided persuasive testimony that Student required a residential program in order to function in the school setting and that the residential aspect of the placement could not be separated from the academics for Student. (N.T. 560-62) As such, this hearing officer concludes that the residential component of the RTF program was directly related to, and necessary for, Student’s educational needs.

Ultimately, Student learned to manage Student's emotions successfully so that Student was discharged in slightly over one year's time. Academically, the RTF met the requirements of that state's board of education; and, Student earned credit toward graduation upon completion of tenth grade. *Cf. Mary Courtney T., supra*, 575 F.3d at 245 (concluding, among other things, that the lack of a link between the placement and any provision of educational services in the residential placement was contrary to *Kruelle*). Upon discharge, and in accordance with recommendations of Student's therapist and the independent evaluator, Student was able to successfully transition to a somewhat less intensive level of support in Pennsylvania. The evidence fully supports a conclusion that the RTF was an appropriate placement for Student from Student's admission in the fall of 2014 to discharge in December 2015.

With respect to the equities, only one factor gives a moment's pause to this hearing officer, and that is the Parents' failure to notify the District in October 2014 of Student's then-current placement. Nevertheless, there was no reason for them to doubt that the cyber charter school would keep the District apprised of Student's withdrawal from its rolls; and, once the parties began to engage in active communication in November 2014 about Student's potential return to the home school district, the Parents did notify the District that Student was in the RTF. The Parents continued to comply with the District's requests regarding enrollment and attempted to convene a meeting that was ultimately not held until April 2015. Given Student's geographic location and the District's responses throughout that time period, there was nothing to be gained by continuing to ask the District to develop a program for Student, and the August 2015 request for tuition reimbursement at the RTF certainly put the District on notice of their position. Taken as a whole, the equities do not warrant a reduction in the remedy for the RTF placement, and reimbursement for its tuition and related expenses will be ordered.

## PRIVATE SCHOOL

Private School, similar to the RTF, provided small class sizes and included academic support. Private School is licensed in Pennsylvania and provides boarding to some of its students. The program as a whole met the recommendations of the independent evaluator for a program with slightly less support than the RTF but continuing to provide a residential component. Student was assigned to a learning center class with close monitoring by a special education teacher who was experienced in emotional support, for both academic and non-academic needs. Student did not need a written plan of accommodations in order to be successful at Private School, where communication among staff and with the Parents and Student was continuous. Student succeeded academically at Private School, earning A and B grades in a college-preparatory curriculum and garnering largely positive comments from all of Student's teachers. Although there was no therapeutic component provided directly by Private School, the special education teacher and advisor were available to Student on an ongoing basis; in addition, the Parents were able to ensure that Student continued with necessary weekly counseling while residing at Private School. The record as a whole reflects that Student's emotional needs have been met at Private School for the second half of the 2015-16 school year, and that residential aspect of the placement continued to be necessary to and unsegregable from Student's educational needs.

The determination for Student to resume tenth grade at Private School, after having completed that very grade at the RTF, was the subject of significant testimony at the hearing. On balance, that decision was soundly based upon Student's emotional status, and there was a genuine and realistic concern that Student would not be successful, from an emotional standpoint, if Student should begin eleventh grade in a rigorous curriculum halfway through the

school year even in light of Student's cognitive strengths. Thus, this hearing officer is satisfied that this particular factor does not render Private School inappropriate for Student.

Nevertheless, consideration of the equities must include reflection on Student's repeat of a semester of tenth grade, in addition to other factors, which taken together compel denial of tuition reimbursement for Private School. As set forth above, the District will be responsible for reimbursing the Parents for tuition for completing tenth grade at the RTF. It would be inherently unsound to also require the District to fund a second semester of tenth grade at Private School where Student took many of the same classes that Student had successfully completed at the RTF or previously. In addition, the parties had explicitly assented through a partially approved NOREP that the Parents would make Student available to the District for an evaluation when Student was present in Pennsylvania; yet, the District was never informed of Student's return for the week-long September 2015 home visit or the permanent move back to the Commonwealth in December 2015 so that the agreed reevaluation could be conducted. Moreover, the IDEA permits denial of reimbursement for failure of a parent to provide ten-day notice of a private placement. 20 U.S.C. §§ 1412(a)(10)(C)(iii)-(iv). In this matter, while the Parents did provide formal notice of their claims for tuition reimbursement in August and December 2015, their subsequent silence on Student's return to Pennsylvania and placement at Private School, for which they seek a remedy, until well after the first session of the due process hearing in February 2016 is disconcerting, particularly since the Parents are challenging the District's ongoing failure to offer FAPE to Student. In this hearing officer's estimation, the lack of notice to the District of Student's return to Pennsylvania and subsequent entry into Private School, coupled with the duplicative nature of additional reimbursement for tenth grade educational programming, fatally weigh against the Parents on their claim for reimbursement for Private School.

## INDEPENDENT EDUCATIONAL EVALUATION

The final issue is the Parents' request for reimbursement for the IEE. When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Following a parental request for an IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). In this case, the Parents did not make a request of the District for an IEE; indeed, they arranged for the IEE to be completed during a home visit from the RTF with an awareness that the District remained prepared to conduct a reevaluation under those very circumstances. Furthermore, the Parents' request for the IEE made in their Due Process Complaint was not based upon a disagreement with a District evaluation; and, the IEE report was not shared with the District for the IEP team to carefully consider upon its completion for drafting a program during the 2015-16 school year. *See L.M. ex rel. M.M. v. Downingtown Area School District*, 2015 U.S. Dist. LEXIS 49336 \*75, 2015 WL 1725091 (E.D. Pa. 2015) (denying reimbursement of an IEE that was not pursued as part of the collaborative IEP process). Rather, at the time the IEE was provided to the District, Student was already slated to begin attending Private School in January 2016 pursuant to the Parents' unilateral arrangements. While the IEE is comprehensive and would unquestionably be helpful to the IEP team, which must consider the document at any meeting convened by the parties in the future, it may not be reimbursed under the applicable regulation.

Moreover, the District's ER conducted in the fall of 2013 met all of the elements of an appropriate evaluation. In conducting a special education evaluation, the law imposes certain requirements on local education agencies to ensure that sufficient and accurate information about

the child is obtained. Specifically, a variety of forms of assessments must be conducted to “gather relevant functional, developmental, and academic information about the child,” so that the child’s eligibility may be determined and to inform the development of an IEP.

34 C.F.R. §§ 300.304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

The Parents have pointed to nothing in the District’s ER that render it inappropriate. Although they contend that the District did not conduct a new evaluation with which they could disagree, they also maintain that a reevaluation by the District was not necessary to its ability to develop a program, and as discussed above this hearing officer has agreed with that position. Finally, there is no compelling equitable reason to order reimbursement for the IEE by the District. Accordingly, this claim must fail.

#### DICTA

By way of observation, it should be noted that the parties are now in a position to begin the process of collaborating together to develop an appropriate special education program for Student. The District has already taken the first step of seeking permission to re-evaluate, and there appears to be no obstacle to the parties’ ability to now set aside their differences and work

together to plan for Student's final years of high school in the least restrictive setting that is appropriate for Student.

### **CONCLUSION**

Based on the foregoing, this hearing officer concludes that the District denied Student FAPE by failing to develop and propose a program for Student in the fall of 2014 forward; and that the Parents are entitled to reimbursement for tuition and related expenses for one of the private placements. Reimbursement for the IEE is not warranted.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District failed in its obligation to offer FAPE beginning in the fall of 2014 through the date of this decision.
2. The Parents are entitled to, and the District is ordered to provide, reimbursement for Student's tuition and associated expenses, including residential expense, for the RTF for the time that Student was enrolled there during the 2014-15 and 2015-16 school years. Within thirty calendar days of receipt of an itemized invoice(s) for those expenses, the District shall issue reimbursement in full to the Parents.
3. The Parents are not entitled to reimbursement for Student's tuition to Private School, and the District is not required to take any further action with respect to that expense.
4. The Parents are not entitled to reimbursement for the fall 2015 IEE, and the District is not required to take any further action with respect to that expense.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: July 1, 2016