

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: J.C.
ODR #18218 / 16-17-KE

Date of Birth:
[redacted]

Dates of Hearing:
November 15, 2016
December 5, 2016
January 9, 2017
January 11, 2017

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Representative:
Stephen Kelly, Esquire
Brutscher, Foley, Milliner & Land
213 East State Street
Kennett Square, PA 19348

Unionville-Chadds Ford School District
740 Unionville Road
Kennett Square, PA 19348

Anne Hendricks, Esquire
Levin Legal Group
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

Date of Decision:

April 9, 2017

Hearing Officer:

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

Background

Student¹ is a late-teen aged District resident who is currently completing a 13th year at a private school (Private School) unilaterally selected by the Parents. Student was previously identified as being eligible for special education under the classification of specific learning disability but with parental consent was exited from special education toward the end of the 10th grade (2013-2014). Student experienced academic difficulties in 11th grade (2014-2015), and academic achievement severely declined from the beginning of the 12th grade (2015-2016). The District's response in 12th grade was to initiate RTI in October 2015 and Student remained in RTI up to the time of a serious incident that occurred on February 25, 2016. Pursuant to the incident the District offered a placement (Proposed Placement) which the Parents rejected in favor of a private placement. After the incident the District conducted a reevaluation and found Student eligible for special education under the primary classification of emotional disturbance.

The Parents asked for this hearing, seeking tuition reimbursement for the Private School as well as compensatory education.² The District maintains that it offered Student FAPE at all times, that the Proposed Placement was appropriate, and that no remedy is due. For the reasons below I find for the Parents in part and for the District in part.

Issues³

¹ 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 identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² In consideration of a previous due process request, the parties agreed that for purposes of the instant hearing the Parents' filing date for their due process complaint/request for a hearing is July 5, 2016. On September 26, 2016 the District through counsel filed a Motion to Dismiss/Limit Claims. On October 6, 2016 the Parents through counsel filed a timely Response to the District's Motion. The hearing officer concluded that on or about February 7, 2014 the Parents knew of the action that formed the basis of a portion of their complaint, i.e. that the Student was exited from special education services. As the Parents' complaint was filed on July 5, 2016, the period from February 7, 2014 through July 4, 2014 is outside the statute of limitations, making the relevant time period for this hearing from July 5, 2014 onward. Counsel were advised however that the relevant period might not coincide with potential recovery should a denial of FAPE be found given the GL court's emphasis on "make whole" remedies.

³ The Parents also raised the issue of Expunging Records: Special education hearing officers do not have the authority to order that records be expunged. FERPA provides a process for alteration of records: The relevant federal regulations under the IDEA (34 CFR 300.618 through 34 CFR 300.621) prescribe a specific procedure for challenging alleged inaccuracies in a student's educational records. Upon the request of a parent, a district must render a decision and then provide an opportunity for a hearing to challenge information in a student's records. However, the IDEA regulations at 34 CFR 300.621 provide that such hearings are to be conducted in accordance with the procedures specified in 34 CFR 99.22, rather than the hearing procedures for other kinds of claims asserted under the IDEA, which are to be conducted pursuant to 34 CFR 300.506 through 34 CFR 300.510. If after a hearing a district declines to amend a student's records, the student's parents have the right to place a statement disagreeing with the decision in the student's records. 34 CFR 300.620 (b); and 34 CFR 99.21 (b)(2).

1. Did the District deny Student FAPE from the beginning of the 2014-2015 school year through the time when the Parents effected their unilateral placement?
2. Was the placement the District proposed following the February 2016 incident appropriate?
3. If the District's proposed placement was not appropriate, is the Parents' unilaterally selected placement appropriate?
4. If the District's proposed placement was not appropriate, and the Parents' unilaterally selected placement is appropriate, are there equitable considerations that would remove or limit the District's responsibility to reimburse the Parents the cost of tuition at their unilaterally selected placement?
5. Should the District be required to reimburse the Parents for an Independent Education Evaluation they procured for Student?

Findings of Fact

Exit from Special Education

1. Student was identified as an eligible student under the classification of learning disabled in the area of math. Because Student was showing mastery of IEP goals, for 10th grade the IEP goals were rewritten as self-reporting, monitoring goals to demonstrate that Student could work independently without the previous level of support. [NT 61, 92, 133, 142, 455, 935-936; P-5, P-9]
2. In 10th grade Algebra I Student was motivated and completed assignments. Student's IEP progress reports showed mastery of the math goals. Student's report cards indicated Student was increasing levels in math class. [NT 91, 95-96, 847; S-11, S-13, S-14]
3. Student engaged in self-monitoring and expressed being ready to be exited from special education. [NT 68-69, 92-93; P-8]
4. The District conducted a reevaluation before exiting Student from special education. In exiting Student from special education in February 2014, the IEP team considered mastery of IEP goals, progress in class, and Student's belief of being ready to exit special education after a year of self-monitoring. The latter was a consideration but was not determinative. [NT 69, 124, 133, 142, 434]
5. Student's mother approved the evaluation and Notice of Recommended Educational Placement (NOREP) exiting Student from special education. [NT 96, 468-469, 1011; S-5, S-7, P-38]

Continuing Academic Difficulties and District's Response

6. In exiting Student from special education, the District did not consider providing Student with a §504 accommodation plan or other supports to monitor or address continuing attention, organizational and executive functioning deficits that could be expected to affect the 11th grade and 12 grade years. [P-41]
7. Student demonstrated academic difficulties in 11th grade, the 2014-2015 school year. In the spring Student was in danger of failing chemistry. The math teacher (who also taught Student math in 10th and 12th grades) indicated that Student struggled and failed to turn in homework, but she passed Student since no one has ever failed her pass/fail math class. Student was struggling in organization and assignment completion. [NT 851-853; 952-955; P-39, P-42).
8. Student's special education eligibility was related to a disability in math. Whereas in 10th grade (Algebra I) Student did so well that Student was exited from special education at year's end, the teacher who had Student for 10th, 11th, and 12th grades testified that in 12th grade (Algebra II) Student was different, asking to go to the restroom repeatedly, putting head down on the desk claiming not having slept well, not completing assignments and not coming for extra help before or after school. [NT 843-845]
9. Student struggled academically from the very beginning of 12th grade. When the teachers contacted her about Student's grades in October 2015 the Parent shared that Student had been diagnosed with depression over the summer and was seeing a psychologist and a psychiatrist. The guidance counselor referred Student to the Instructional Support Team (IST) process. [NT 99, 145-146, 855-856, 868, 953-954, 957-958; P-31, P-43]
10. The District psychologist testified that referring a student to IST instead of conducting a full evaluation/reevaluation was "dependent upon a student's individual situation and circumstance." When questioned about referring seniors for multidisciplinary evaluations, the school psychologist testified "...there is kind of a more elevated concern for a student that's a senior, because we tend to condense that process a bit, because we only have so much time left." [NT 451-454]
11. The guidance counselor provided contradictory information that belied the psychologist's emphasis on treating students, especially seniors, on an individual basis. Reminded that Student was a previously eligible senior, and teachers and the Parent had expressed concerns early in the year, the guidance counselor testified, "We would not consider doing a reevaluation immediately upon seeing concerns" and "We would always refer to the IST team first before jumping right into a reevaluation with a student...whether that student had prior needs or not" and "Our process would be to refer to IST". [NT 147-149]

12. The IST process includes collecting information from teachers and then setting goals for a student. Student's goals were academic. The IST process normally is from 30 to 60 days. [NT 149, 167, 452-453; S-12]
13. The IST team wanted to 'collect data' to see if Student would benefit from regular education intervention before conducting a reevaluation, and rostered Student for a regular education "learning to learn" class. Despite Student's being in senior year, and despite its initial belief that Student's difficulty was a short-term acute situation that could be handled through regular education, the IST team continued to meet between November 2015 and February 2016, to discuss how Student was doing and to revise the IST Action Plan. [NT 148, 162, 168-172, 470-471; SD-12]
14. Because Student's goal was to graduate in June 2016 the IST team, that included the math teacher, decided it would be best for Student to drop Algebra II because Student did not need the credit to graduate. [NT 171, 848-849, 869-870]
15. As part of the IST process, Student was seen by the guidance counselor for emotional support. The guidance counselor was concerned that Student was apathetic and, as she did not feel she was making progress with Student, made a referral to the school social worker. [NT 168-169; S-12]
16. The school social worker worked with Student on coping skills, stress management and self-advocacy. She was concerned about Student's mood and depression. [NT 774-775, 783, 811]
17. A February 9, 2016 email indicated that the teachers were increasingly concerned about Student's lack of academic and behavioral progress, and Student was in danger of not receiving the passing grades needed for graduation. [P-31]
18. Because the IST Coordinator and team recognized that Student did not improve sufficiently during the IST process, on February 9, 2016 the team recommended that Student be placed in an emotional support classroom for a higher level of support. [NT 149-159]
19. Although the District's psychologist testified that the process would be to issue a Permission to Reevaluate (PTRE) when the IST team decided to place Student in an emotional support classroom, the District social worker testified otherwise - that the plan going forward was for her to meet with Student four more times until the end of the school year to continue to provide support in applying adaptive coping skills, and to keep Student in IST until the end of the school year. [NT 775, 784; P-25]
20. The social worker testified that in February 2016 she had a discussion with the school psychologist to inquire about the need for possible referral of Student for a full multidisciplinary evaluation, and the psychologist's response was: "No, we are not going to do that at this time." [NT 779-782]

21. Despite continued academic struggles and the determination by the IST team that Student needed a higher level of support Student was never placed in the emotional support classroom. [NT 150, 153]

Behavior Incident and District's Response

22. Student engaged in very concerning internet behavior during the “learning to learn” class on February 25, 2016. Law enforcement on the West Coast discovered the behavior, deemed it an urgent concern involving possible danger, and alerted the Pennsylvania state police who contacted the District after school hours⁴. A subsequent investigation revealed that Student had previously engaged in similar concerning behavior. [NT 120, 153-154, 213, 248, 309-311, 329-330, 876-882, 885-886964; S-17, P-22]
23. The Parents were alerted to the situation immediately and on the next day the guidance counselor and the social worker met with Student and conducted a risk assessment to determine if Student posed an immediate danger to self. They determined that Student was not at that moment an active risk to self or others; they could however not determine what Student's thoughts or feelings were at the time of the behavior. [NT 173, 176-177, 244, 794-795, 800, 813, 815-816; S-4]
24. The school social worker believed that some troubling elements of the behavior and the similar incidents contradicted what Student was telling her and the guidance counselor at the risk assessment. She continued to have concerns about Student. [NT 798, 817-818]
25. Student visited Student's private therapist who reportedly determined that Student was not a threat to self or others; the therapist did not provide the District with documentation of this opinion. [NT 327-328]
26. Although Student did not deny engaging in the behaviors, the guidance counselor was concerned about Student's lack of understanding of the seriousness of the incident and the related behaviors. She was concerned about the change in Student from being a motivated and excited student to being directionless, apathetic, having a flat affect, and engaging in behaviors such as were demonstrated in the incident and the other similar occasions. [NT 177-179, 258]
27. The principal conducted an initial meeting with Student and the Parents and let them know that his immediate concern was for the Student's safety. Disciplinary consequences were not under consideration at that meeting. [NT 197-199, 243-244]
28. Further information the District learned about the behavioral incidents led to a 10-day suspension. After Student was suspended, the District held an informal

⁴ The time zone difference accounts for the delay.

- hearing with the Parents and explained the reasons for the suspension; the Parents had the opportunity to ask any questions they had. [NT 201-202, 886-888; P-15]
29. Although Student had not yet been reevaluated, the District considered Student “thought to be eligible” and on March 2, 2016 held a manifestation determination meeting at which the team determined, because of its awareness that Student had a diagnosis of depression, that Student’s conduct was a manifestation of a disability. Following the manifestation determination meeting the Parents were informed that Student would not be expelled. [NT 100, 103-104, 278, 335, 478-479; P-12]
 30. The assistant superintendent held a third meeting with the family on March 11, 2016 and they discussed some options that the District thought would offer Student the needed level of emotional support. One of the programs discussed was the Proposed Program. The assistant to the Superintendent also told the Parents that they could look at other placements and the District would be open to these and assume the expense.⁵ The assistant to the Superintendent also discussed that if Student could not graduate in June 2016 the District would fund the outside placement (a thirteenth year) for the 2016-2017 school year as well. [NT 203, 241, 246, 259-260, 335-341, 371]
 31. The District believed that an emotional support program which offered mental health and behavior management services would be the least restrictive environment appropriate for Student. [NT 375]
 32. The Parents’ response to each of the placement options was that they wanted Student to return to the high school. [NT 340]
 33. The nature of the incident itself and the discovered previous similar behavior caused District staff to be very concerned for Student’s ongoing safety, for the safety of the other 1300 students in the building and for the safety of the staff if Student returned to the building. [NT 103, 181, 191, 203, 210-211, 232, 248, 250-253, 307-309, 329, 368, 912; S-17]
 34. District staff believe that the high school cannot offer Student the appropriate level of emotional support and services required to address Student’s needs and that Student requires an emotional support program such as that offered by the Proposed Placement. [NT 108, 400, 894-895]

District’s Proposed Placement

35. The District determined that an emotional support program in a smaller school setting represented the least restrictive environment (LRE) appropriate for Student. [NT 87-88, 106]

⁵ Apparently this offer was no longer available once discussions between the parties did not resolve the dispute.

36. The Proposed Placement⁶ is an emotional support program that provides both a grade level academic curriculum and links with career and technical education options so as to address the needs of college-bound and vocationally-oriented students. It enrolls 10 to 15 students, including some students from Student's high school, and is staffed by a certified special education teacher and by a mental health worker who provides group and individual mental health sessions. [NT 378-379, 405, 408, 1041-1044]
37. Most of the students at the Proposed Placement are average to above average and many are high achievers. [NT 1047-1048]
38. The Proposed Placement assists students in developing coping skills through a supportive counseling model used in the group sessions to help the students discover the obstacles that are keeping them from being successful. Based on the students' needs, curricula such as PREPARE and PEERS are used to help them reengage with education. [NT 1049-1050]
39. The Proposed Placement staff communicate with the students' private mental health providers to ensure continuity of care. [NT 1045]
40. The Proposed Placement is not an alternative educational placement for disruptive youth. Students at the Proposed Placement may have anxiety, be school avoidant, or have social problems. The students at the program are not acting out; they tend to internalize rather than externalize their problems. [1049, 1044-1045, 1058, 1061]
41. The Proposed Placement works with Students with attendance issues through the Attend program which does a full clinical psychological evaluation as well as an FBA and supports students' attendance. [NT 1046]
42. The Proposed Placement provides a variety of transition services to post-secondary education such as access to career assessments, access to assessments for placement at the local community college, access to military recruiters, and access to exploration and shadowing of career and technical programs. The Proposed Placement helps students work through anxiety about transition issues. [NT 1050-1053]
43. If Student had attended and passed classes at the Proposed Placement, Student would have been able to graduate in June 2016 with a diploma from the District high school and/or taken some classes at the local community college. [NT 406, 408, 1053-1054]
44. Student could have attended the Proposed Placement for a 13th year, or attended until the end of the year in which Student turned 21. [NT 1069]

⁶ Other placement options were considered but the Proposed Program is the placement that was the offer under consideration at the hearing. [NT 411-424]

45. Student and Parents visited the Proposed Placement. [NT 107, 982]
46. School staff who know Student believe that the District's Proposed Placement is appropriate for Student. The District psychologist believes that the Proposed Placement is a "very good fit". [NT 107, 477-478, 501]

Home Instruction

47. While a placement was being discussed, starting in early March 2016 the District offered Student home instruction, including a cooking class to cover an elective credit needed for graduation. There were some scheduling difficulties between the teachers and the family. The home services of about 5 hours per week began on March 15, 2016. If Student had complied with the home instruction Student would have been able to graduate in June 2016. [NT 285, 287, 291, 343-344, 354, 993-994; S-20, P-21]
48. The District sent the Parents a letter regarding attendance because Student and Parents stopped making appointments for the instruction and had stopped communicating with the District for about ten days.⁷ [NT 279, 284, 295, 346-347; P-25]
49. The Parent sent an email asking the District to stop the home instruction, and on April 14, 2016 the Student sent an email indicating that Student no longer needed home instruction because Student was going to a new school. [NT 345-346, 1020-1021; SD-19, P-21]

Parentally-Chosen Private School

50. The Parents contacted the Private School on March 17, 2016 and applied to the school on April 6, 2016. Student started attending there on April 27, 2016. [NT 738, 741-743, 936, 1019-1020; S-21, S-22]
51. The Parents sent their 10-day notice of their unilateral placement on May 9, 2016; at the time of the May 24, 2016 IEP meeting Student was already attending the Private School. [NT 104-105, 383, 1023-1024, 1026-1027; S-19, P-28, P-32]
52. Private School is a small K-12 private school whose students are described as having anxiety, learning disabilities, ADHD and/or autism on the higher end of the spectrum. The school does not target emotionally disturbed students. [NT 502, 505, 532, 664, 659-660, 664, 710-711]

⁷ Because of the requirements of "child count", the basis upon which the federal and state governments calculate funding for school districts, districts must dis-enroll students who do not attend school after 10 days and districts may incur a penalty if their child counts are incorrect. [NT 314-315, 356-357]

53. As of December 5, 2016, Student was failing 3 of 6 subjects at the school this school year. The school did not put any additional supports or accommodations into place in response to Student's failing grades. [NT 728]
54. Although there is a learning specialist at the school who has her special education certification and works with students with learning differences she does not work with Student. [NT 666-667]
55. The only academic concern the school's clinical psychologist has about Student is missing time, but the school has not done an FBA to determine why Student can't get to school on time. Student is permitted to drive to school and generally does not attend first period class. Attendance is an ongoing problem for Student. [NT 515, 538, 728-730, 735, 1030, 1035-1036; P-61]
56. The school has no social workers or mental health/behavioral workers on staff. As of December 5, 2016 the school's clinical psychologist had not yet started meeting with Student about mental health issues this school year, and last school year only met with Student once from the time Student entered through the end of the school year. [NT 510-512, 518-519, 704]
57. Although the school's clinical psychologist has scheduled meetings with Student, Student has not kept all those appointments. [NT 696]
58. The clinical psychologist does not have a written treatment plan for Student. He does not intend to use a research-based treatment program with Student. He has not formulated goals for Student's coping skills because that "might mean more intensive work than [the clinical psychologist] is able to provide." [NT 533- 534, 712, 719-720]
59. The school does not collect data on Student's social and emotional skills. [NT 540]
60. Although one of the administrators/teachers at the school testified that Student has a number of accommodations, when he produced the accommodation list, there was nothing on it for Student. The Student Accommodation List reads, "No Recommended Accommodations" for Student. [NT 699; S-23]
61. Student is not receiving any direct instruction in organizational skills. [NT 722-723]
62. The administrator/teacher opined that Student is still overwhelmed with thinking about college and/or what Student may want to do after graduating from high school. He testified, Student is "like the ostrich," "just putting [Student's] head in the sand trying to avoid what's going to come." [NT 683, 689, 732]
63. Nevertheless, the administrator/teacher indicated that the school does not provide much in the way of transition support for its students. [NT 685]

64. A private psychologist who evaluated Student stated in her report that the school was a better fit for Student based only upon what the family told her. [NT 630-634; S-3, P-38⁸]
65. The private psychologist did not speak with anyone at the District about Student as part of her evaluation. [NT 606-608]
66. The private psychologist does not know if the school is implementing any of her recommendations. [NT 632]

District's Reevaluation and IEE

67. At the time of the March 2, 2016 manifestation determination meeting the District requested, and the Parents provided consent for the District to expedite an evaluation which was to be completed and provided to the parents on or before April 18, 2016. The evaluation was issued on April 28, 2016. Student was found to be struggling with depression, low self-esteem, and difficulties in academic self-motivation. Student was engaging in excessive video-gaming and felt alienated from the high school. Student was also anxious about what Student was going to do after high school. [NT 473-475; [P-26]
68. The District's psychologist concluded that Student met the criteria for a special education primary classification of emotional disturbance and a secondary classification of other health impairment because of a previous ADHD diagnosis and deficits in executive functioning. [NT 475-476]
69. The District's Evaluation Report did not include standardized assessments or updated information pertaining to Student's current levels of academic achievement, functioning and performance. [NT 592; P-26]
70. The Parents engaged an educational advocate who after reviewing the District's April 28, 2016 evaluation report recommended that the Parents have an independent educational evaluation to identify Student's current levels of academic functioning. [NT 938-939, 997; P-26]
71. The Parents obtained an independent educational evaluation by a certified school psychologist; the report was dated, November 18, 2016. Neither the District, the Parents nor the Private School had the benefit of the private evaluator's findings when the District proposed its placement, when the Parents effected their unilateral placement, and when the Private School began programming for Student. [P-37, P-38]
72. The report recounted Student's educational history, including previous participation in IST programming, and subsequent evaluations by the district which led to Student's identification as an eligible student with a specific learning disability in math. [NT 559-563]

⁸ There are two different versions of the report. Compare S-3 and P-38.

73. The private evaluator opined that not receiving a consistent level of appropriate special education services after being exited from special education in 10th grade, and receiving no extra academic support in 11th grade, likely contributed to Student's continuing academic and emotional difficulties at the start of senior year. [NT 569-570]
74. The private evaluator found that Student continued to exhibit a specific learning disability in math computation and fluency skills, as well as math reasoning deficits. She also found Student to have a specific learning disability in spelling with impairment in punctuation accuracy and sentence composition, as well as impairment in word reading. [P-37]

Legal Basis

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

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); see also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). I found most of the witnesses to be generally credible, and was particularly impressed with the high school principal's concern for his staff and students and with the mother's candor and clear devotion to her child.

There were a few credibility concerns with other witnesses, however. Although the private evaluator who saw Student has extensive experience and I have often found her reports and opinions helpful, it is unfortunate that on her website, in giving parents information about IEEs she reveals a bias against districts as follows, "Although schools can test children for learning difficulties and other conditions that may adversely affect

learning, recommendations are often geared to what the school has available, rather than what the student needs.” [NT 602-603] I do not accept her professional opinion that the Private Program is appropriate for Student as I did not hear evidence that she was familiar with what the Private Program was actually offering Student by way of academics or emotional support, but I do accept her conclusions about Student’s academic needs and her findings of a specific learning disability in math and spelling, as well as a deficit in word reading accuracy. Likewise I agree with and adopt her opinion that inadequate supports in 11th grade following Student’s exit from special education contributed significantly to Student’s poor functioning in 12th grade.

Important testimony about the District’s utilization of IST for Student revealed conflicting views presented by the District’s psychologist and the guidance counselor. Because the guidance counselor made the referral for IST and was involved in implementing IST strategies with Student, I find her testimony more reliable and conclude that the District was pursuing a one-size-fits-all approach to Student in initiating IST rather than a reevaluation, even though previous history and being a senior strongly suggested that this was not the individualized action plan Student required to graduate successfully [FF 10 and 11]. On another important point the District psychologist’s testimony differed with another District staff person, this time the school social worker. The psychologist maintained that the District intended to seek permission to evaluate Student, the social worker testified that the plan was to keep Student in IST until the end of the year and not pursue an evaluation [FF 19 and 20]. Again, because the social worker was directly involved with implementing Student’s IST program, I find her point of view on the District’s intent more reliable than the psychologist’s. I do not find that the psychologist was not truthful, rather it appears that in this case she was explaining how things should work but was out of touch with the actual practices of the high school with regard to IST.

Child Find and FAPE: Students with disabilities are entitled to a free, appropriate, public education (FAPE). Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), which took effect on July 1, 2005, and amended the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). ‘Special education’ is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26.

Under the IDEA “child find” requirement, 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a), (c), a local education agency has a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability." *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012)(citing *P.P. v. West Chester Area School District*, 585 F.3d 727, 738 (3d Cir. 2009)); *Perrin v. Warrior Run Sch. Dist.*, 2015 U.S. Dist. LEXIS 149623 (M.D. Pa. 2015). Section 504 imposes a similar obligation. *See P.P. v. West Chester Area School District*)

Local educational agencies are required to fulfill their child find obligation within a reasonable time after notice of behavior that is likely to indicate a disability. *Ridley*. The courts will assess the reasonableness of an agency's response to such information on a case-by-case basis, in light of the information and resources possessed by the agency at a given point of time. *Ibid*.

A Parent's failure to request an evaluation does not absolve the local education agency of its "child find" duties. Because child find is an affirmative obligation of a school district, a parent is not required to request that a district identify and evaluate his or her child, and more importantly, a parent's failure to make such a request does not relieve the district of its child find obligations. *M.C. v. Central Reg. Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996)(child's right to FAPE not dependent upon vigilance of parents). See also *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999); *Matthew D. v. Avon Grove School Dist.*, 2015 WL 4243471 (E.D.Pa. July 13, 2015)

RTI: Although RTI interventions may help students who need additional academic support, districts may not use the RTI process to delay comprehensive evaluations for students with suspected disabilities. A case in another circuit is instructive for its similarities to the instant matter. In *Greenwich Bd. of Educ. v. G.M. and J.M. ex rel. K.M.*, [116 LRP 27276](#) (D. Conn. 06/22/16) the court found that delaying an evaluation in favor of RTI denied a student FAPE. The court also rejected the district's contention that its decision to enroll the student in its RTI program addressed the student's needs, because progress reports and report cards demonstrated that the student made insufficient progress and the district decided to increase the level of the student's RTI interventions because "the initial phases of [RTI] were not sufficiently corrective."

Additionally, the Office of Special Education Programs has cautioned against delaying special education evaluations through implementation of Response to Intervention programs when a disability is suspected. *Memorandum to State Directors of Special Education* 11-07, 56 IDELR 50 (OSEP 2011).

Placement: A placement decision is a determination of where a student's IEP will be implemented. Placement decisions for children with disabilities must be made consistently with 34 CFR 300.116. The IEP team, including parents, makes placement decisions. Like the formulation of an IEP, a placement decision is not a unilateral matter for school district determination. 34 CFR 300.116(a)(1) however, is also clear that parental preference cannot have been the sole nor predominant factor in a placement decision. The IDEA merely mandates parental participation in the placement decision, 34 CFR 300.116(a)(1), but does not suggest the degree of weight parental preference should be given.

Least Restrictive Environment: There is a strong and specific preference in the IDEA that (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of

supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.114(a)(2).

The IDEA regulations also recognize, however, that there are circumstances where “the nature and severity” of an eligible student’s disability makes education in a regular school setting unsatisfactory because the district does not have access to supports and services that allow it to address the effects of a severe disability. For those situations, the IDEA regulations require an LEA to provide “a continuum of alternative placements,” such as “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” 34 C.F.R. §300.115(a), (b).

Tuition Reimbursement: Parents who believe that a district’s proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement, but they place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE, otherwise acted appropriately, or that the parents’ selected placement is inappropriate.

Before becoming a matter of statute, the right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985). “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” Then, in 1997, a dozen years after *Burlington*, the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i) In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(ii) Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii).

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court’s test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district’s proposed program was appropriate; 2) if not, whether the parents’ unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement. This three-part test is referenced as the “Burlington-Carter”

test for tuition reimbursement claims under the IDEA. The second and third tests need be determined only if the first is resolved against the school district.

A parent's decision to unilaterally place a child in a private placement is proper if the placement “is appropriate, i.e., it provides significant learning and confers meaningful benefit...” *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The “parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA.” *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir.1999). See also *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d.

As noted by the court in *Gagliardo v. Arlington Central School District*, 489 F.3d 105, 115 (2nd Cir. 2007), denying tuition reimbursement based upon the appropriateness of the private school is justified where, “[T]he chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not. A unilateral private placement is only appropriate if it provides “education instruction *specifically* designed to meet the *unique* needs of a handicapped child.” *Frank G.*, 459 F.3d at 365 (quoting *Rowley*, 458 U.S. at 188-89, 102 S.Ct. 3034) (emphasis added). Similarly, in *Matrejek v. Brewster Central School District*, 293 Fed. Appx. 20 (2d Cir. 2008), a panel of the Second Circuit Court of Appeals affirmed the district court’s determination that the administrative hearing officer correctly concluded that tuition reimbursement should be denied where the private school selected by parents did not provide all of the services deemed necessary by parents’ own expert witnesses.

Reimbursement for IEE: 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). Under specific circumstances a hearing officer may otherwise award reimbursement for an IEE for equitable purposes, for example if the IEE provided new and important information to assist the IEP team in developing an appropriate plan for a student.

Compensatory Education: Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child’s educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d. Cir. 1999). *Ridgewood* provides that a school district has a reasonable period of time to rectify a known issue. Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the “hour-for-hour” method. Under this method, students

receive one hour of compensatory education for each hour that FAPE was denied. Some courts have rejected the hour-for-hour method outright and conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position in which the student would be but for the denial of FAPE. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005) This approach was endorsed by the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). The Third Circuit has encouraged this approach in *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015).

Discussion

In this matter, each party holds an untenable position.

The District maintains that it was reasonable to put a previously eligible senior who showed signs of academic and organizational struggles in junior year, whose early scores in 12th grade were cascading, and who was being treated for depression, into an IST program in October and keep that Student there for months without an evaluation. I find that from the beginning of 12th grade Student was denied FAPE, and that the District's decision to place this high school senior, recently exited from special education and struggling the previous school year, in its IST program "because always referring to the IST team first" was "our process" contradicts common sense. Further, keeping this high school senior in IST from October to early February absent evidence of the process being helpful eliminates any possible grounds on which the District could be seen as acting responsibly. Finally, proposing to place the failing high school senior in an emotional support setting in early February, absent an accompanying proposal to evaluate Student, and then not following through with that placement completely collapses any argument the District could make that it was providing Student with FAPE.

For their part, the Parents' contention that the District should have allowed this depressed Student whose internet behavior caused law enforcement and school administrators to be concerned for the safety of the Student, other students and staff to remain at the high school even though that location did not have the level of emotional support that the Student needed is equally unreasonable. The Parents' arguments that Student's behavior did not constitute a "terroristic threat" by legal definition, and that, but for law enforcement surveillance of the internet, Student's behavior would have been anonymous and the recipients of the behavior were anonymous to each other and to Student, and the location of Student's actions was anonymous, are misplaced. The fact is that Student was having thoughts, albeit characterized after the fact as "joking", that went along with Student's formal diagnosis of depression and that mirrored the apathy and the disconnectedness that the school staff was seeing. It is important to view the Student's behavior not as that of a "stupid teenager"⁹ making jokes in very poor taste and with bad judgment but otherwise being a happy, well-adjusted, academically successful and socially adept high schooler, but as expressions of the thoughts of a teen suffering from

⁹ See Parents' written closing statement on page 21 quoting Chief Justice Roberts in *Elonis v. U.S.*, — U.S. —, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015).

depression, failing senior year, very anxious about the looming future after high school, and relying on a circle of anonymous fellow online gamers for social peer interaction.

What the parties may eventually bring themselves to agree upon is that had the situation taken another turn, the outcome would have been much more serious and painful and litigation would have taken place in a very different forum than this due process hearing. Although it may not presently seem so to the District or the Parents, I believe that the discovery of Student's behavior was the very best outcome for Student because it focused a laser beam upon how troubled Student was and alerted the family to Student's need for intensive therapeutic help.

Compensatory Education: Student is entitled to compensatory education for having been denied FAPE. I do not find the recommendation to exit Student from special education in February of 10th grade based on various factors including the reevaluation to be inappropriate. I do find however, in light of Student's school history, that when in 11th grade Student again experienced academic and organizational difficulty by spring 2015 at the latest the District should have considered whether Student was eligible for a 504 accommodation plan and/or for another reevaluation for special education eligibility. Nothing was in place to support Student entering 12th grade with graduation at stake. From the beginning of senior year when Student was in academic freefall the District did not initiate a rapid and multifaceted plan of action to address Student's academic decline, but instead relied on a slow, inefficient and ineffectual process as per its one-size-fits-all "process" articulated by the guidance counselor in her testimony.

Compensatory education begins to accrue not at the moment a child stops receiving a FAPE, but at the moment that the LEA should have discovered the denial, and the time reasonably required for an LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996) I conclude that the time the District had to rectify the problem was the spring of 2015, and that therefore the District's responsibility for its denial of FAPE accrued from the first day of school in the 2015-2016 school year and continued through February 25, 2016.

Student is therefore entitled to compensatory education for the 2015-2016 school year. As the Parents did not provide specific evidence as to what services are necessary to make the child whole, I will take an hour-for-hour default approach. As the denial of FAPE permeated the Student's entire school day Student is entitled to whole days of compensatory education, meaning one hour of compensatory education for each hour that school was in session. The regulatory school day for a high school student is a minimum of 5.5 hours per day. 22 PA Code §11.3. As such, Student will be awarded 5.5 hours per day for every day or part-day that Student was present in school from the first day school was in session for the 2015-2016 school year through February 25, 2016, the last day Student was present in the high school. The compensatory education hours are to be used exclusively for educational, developmental and therapeutic services, products or devices that address Student's academic, emotional and transitional needs. The value of these hours shall be based upon the usual and customary rate charged by the providers of

educational, developmental, therapeutic and transitional services in the county where the District is located and geographically adjacent Pennsylvania counties. The compensatory services may be used until Student's 22nd birthday.

To be clear, I do not reach the conclusion that the District's denial of FAPE led to Student's engaging in the types of behaviors that were involved in the incident leading to this hearing. Student's emotional decline seems to have been well underway prior to Student's senior year, and its possible origins were not addressed in this record. Academic struggles were but one factor among others, including depression and excessive online gaming and lack of sleep, that were in play in Student's life, and it may well have been that the former were in fact a function of the latter. Whatever the underlying reason, however, I find that the District did not exercise due diligence in providing appropriate educational supports to a Student who was failing.

The District's Proposed Placement: The District's proposal to educate Student in a program outside the high school was correct. I hold that it was entirely reasonable for the District to be concerned for the safety and security of the high school and the students and staff therein given the nature of Student's internet behavior. I also find that the District's determination that Student's behaviors of concern required a higher level of emotional support than that available at the high school was supported by the evidence, not only about the internet behavior but also by the fact that Student remained apathetic, depressed and continued to fail in spite of IST intervention by the guidance counselor, the social worker and by the intervention of Student's own private psychologist and psychiatrist.

The District's Proposed Placement was the least restrictive appropriate environment in which to address Student's evident needs for a small emotional support setting that combined grade-level academic instruction by a certified special education teacher and ongoing emotional/behavioral intervention by a mental health worker. The Proposed Placement was in a position to address Student's needs for improved coping skills, and to explore and address Student's chronic attendance issues. In addition, given Student's anxiety about Student's post-secondary life choices, the Proposed Placement would benefit Student by providing a variety of transition services including courses at the local community college and access to exploration and shadowing of career and technical programs. If Student had attended and passed classes at the Proposed Placement, Student would have been able to graduate in June 2016 with a diploma from the District high school or, alternatively attend the Proposed Placement for a 13th year in which to improve academics and prepare for life after high school.

Tuition Reimbursement: The Parents' request for tuition reimbursement will be denied. Given that the District's offered placement is determined to be appropriate it is not necessary to examine the Parents' unilateral placement. However, briefly, I was disturbed by the minimal mental health services being offered to Student, by the absence of instruction by a learning support teacher, and by the fact that Student continues to fail classes and accrue frequent lateness and absence. It is also unfortunate that the

placement is not addressing Student's transition needs given that transition is one of Student's salient sources of depression and concern.

Home Instruction: I find that both parties were responsible for the lack of consistent home instruction, and as the evidence was in equipoise the Parents cannot prevail on claims for compensatory services from February 26th through the date they notified the District they were discontinuing the services.

Reimbursement for IEE: Although I find that the independent educational evaluation provided new information about Student's academic achievement and continuing specific learning disabilities, the evaluation report was not available to the District, the Parents, the IEP team, the District's Proposed Placement and/or the Private School in time for it to be useful and the Parents adduced no evidence that the Private School was implementing recommendations gleaned from the IEE. Reimbursement for the IEE is denied.

With respect to any Section 504 claims, I note that the obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm. 2005). Because all of the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

Order

It is hereby ordered that:

1. The District denied Student FAPE during the entirety of the time Student was present at the high school for the 2015-2016 school year.
2. Student is awarded 5.5 hours per day for every day or part-day that Student was present in school from the first day school was in session for the 2015-2016 school year through February 25, 2016. The compensatory education hours are to be used for the purposes and for the duration described in the discussion above.
3. The placement the District proposed for Student was appropriate.
4. The Parents' unilateral placement is inappropriate. The District is not required to reimburse the Parents for the costs of tuition for the unilateral placement.
5. The District is not required to reimburse the Parents for the Independent Educational Evaluation they procured for Student.
6. The District shall complete an Assurance Form in accord with the directions concerning timelines that have been transmitted along with this Order.

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

Linda M. Valentini, Psy.D., CHO

April 9, 2017

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