

*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: T.Z.

Date of Birth: [redacted]

Dates of Hearing:

October 19, 2011

December 13, 2011

December 15, 2011

### CLOSED HEARING

ODR File No. 2079/1112AS

Parties to the Hearing:

Mr. and Mrs.

Wissahickon School District  
601 Knight Road  
Ambler, PA 19002

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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January 9, 2012

January 21, 2012

Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student<sup>1</sup> is a high school-aged student in the Wissahickon School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> by reason of a Specific Learning Disability, and Other Health Impairment, and a Speech/Language Impairment. Student's Parents filed a due process complaint against the District in July 2011, asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA.

The case proceeded to a due process hearing convening over three sessions, at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District failed to offer Student FAPE in the program it proposed for the 2011-12 school year and that they were entitled to reimbursement for private school tuition and related expenses, while the District maintained that its special education program, as offered, was appropriate for Student and that no remedy was due.

For the reasons set forth below, I find in favor of the District.

### **ISSUES**

1. Whether the District's proposed program for Student for the 2011-12 school year was appropriate; and
2. If it was not, are Student's Parents entitled to tuition reimbursement for Student's placement in a private school for that school year?

### **FINDINGS OF FACT**

1. Student is a high school-aged student who resides within the District and is eligible for special education by reason of Other Health Impairment (due to a neurological disorder, Attention Deficit Hyperactivity Disorder (ADHD), and Generalized Anxiety Disorder), a

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender and other potentially identifying information are not included in the body of this decision. This hearing officer did nonetheless consider the entire record, including Student's history and specific characteristics, in arriving at this decision.

<sup>2</sup> 20 U.S.C. §§ 1400 *et seq.*

Specific Learning Disability, and a Speech/Language impairment. (Notes of Testimony (N.T.) 36, 721, 725-26; Joint Exhibit (J)<sup>3</sup> 6, J 13)

2. Student's neurological disorder is a reason for Student's ADHD and anxiety. Student also presents with limitations in cognitive functioning as well as expressive and receptive language weaknesses and difficulty with executive functioning. (N.T. 721-25, 760-62; J 6, J 13)
3. Student's Parents became concerned with Student's development when Student was approximately eighteen months old, and Student was first identified as eligible for special education during kindergarten. (N.T. 43-45; J 6 p. 2)
4. Due to the neurological disorder, Student at times engages in repetitive motor movements which are aggravated by stress and anxiety. Student tries to control those motor movements in public places such as at school, but those efforts require concentration. (N.T. 66-67, 72-73, 84, 86, 91-92, 211-12, 723-24, 745-47)
5. The Parents had Student privately evaluated by a developmental neuropsychologist in 2008. (N.T. 68, 718)
6. Student has been provided with private counseling to address coping and organizational skills and anxiety through cognitive behavior therapy since early 2009. (N.T. 102-04, 160-63)
7. Student had difficulty during the 2009-10 school year associating with peers as well as with the academics in a religious class held after school hours. Those classes were approximately 12-15 students with 1 teacher. (N.T. 217, 219-23, 226-31)
8. Student attended private school for the fifth through eighth grade school years, 2007-08 through 2010-11. The District partially funded that placement for the 2009-10 and 2010-11 school years, and the Parents believed that Student was provided an appropriate education in the private school setting. (N.T. 45, 50-53, 125-27, 130-31; J 1 p. 4, J 3)
9. The parties executed a settlement agreement in 2010 which included agreement that the District would reevaluate Student in March and April 2011 and that an Individualized Education Program (IEP) would be developed for the 2011-12 school year. (J 3)
10. Student was reevaluated by the developmental neuropsychologist in the fall of 2010 to assess Student's level of functioning and assist in determining the next educational placement. The private neuropsychologist obtained information from Student's teachers, Student, and the Parents, and also administered a number of assessments. (N.T. 68-70, 732; J 6)

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<sup>3</sup> The exhibits were marked with an S, but were referenced throughout the hearing as Joint Exhibits and "J" will therefore be used in this decision. (See N.T. 12, 24) J 1 – J 27 and Hearing Officer Exhibit (HO) 1 were admitted into evidence. (N.T. 1168-69, 1172)

11. The private neuropsychologist issued an independent evaluation report. Information from Student's Mathematics and Reading and Writing Workshop teachers reflected below grade level performance in both classes. (J 6)
12. Student achieved a Full Scale IQ of 74 on the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), in the Borderline range, although the neuropsychologist opined that the variability across subtests limited the utility of that score. Student's IQ scores over time were noted to also be variable. (J 6)
13. Student's academic achievement using the Wechsler Individual Achievement Test – Third Edition (WIAT-III) reflected Low Average scores in Overall Reading and Overall Writing skills, and a Borderline score in Overall Mathematics skills. Weaknesses were noted on many subtests, and the private neuropsychologist concluded that Student demonstrated a specific learning disability in Mathematics and Reading Comprehension. (J 6)
14. Results of the Behavior Assessment System for Children – Second Edition (BASC-2) reported by the private neuropsychologist revealed clinically significant scores related to Anxiety (both Parents) and Social Withdrawal (one Parent); at-risk scores were reported relating to Atypicality, Activities of Daily Living, Functional Communication, Leadership, Anger Control (one or both Parents); Anxiety, Somatization, School Problems, and Functional Communication (Teacher); and Test Anxiety (Student). (J 6)
15. The private neuropsychologist included results of Behavior Rating Inventory of Executive Function (BRIEF), which revealed difficulties with executive function (Initiate, Working Memory, Plan/Organize, Organization of Materials, Shift, and Monitor Scales) by one or both teachers but not by the Parents. The scores by both teachers were in the clinically significant range on the Behavioral Regulation and Metacognition Indexes and the General Executive Composite. (J 6)
16. In other assessments, the private neuropsychologist found weaknesses with auditory attention, visual attention, and memory; expressive language; fine motor skills; and visual perceptual and visual-motor skills. Overall, Student required repetition of test directions throughout the evaluation. (J 6)
17. The private neuropsychologist's recommendations for Student included psychological counseling focused on Student's anxiety; intervention to address working memory skills; and instruction in a small class setting using direct instruction. He also made suggestions for addressing Student's needs in reading comprehension and mathematics. (J 6)
18. The Parents provided the private neuropsychologist's evaluation report to the District in January 2011. (N.T. 138-39; J 6)
19. Also in January 2011, the Parents contacted the District to arrange for a visit to the high school. One of the Parents and Student visited the high school in June 2011, and Student became anxious during the tour of the building. (N.T. 63-67, 74-75, 170-72; J 6 p. 1)

20. In addition to considering the District high school, Student's Parents explored several different private schools for Student for the 2011-12 school year because they were concerned that the then-current private school would not be appropriate at the next grade level. All of these private schools were for students with learning disabilities. (N.T. 58-62, 141-44, 214-15)
21. The Parents did not ask for assistance from or otherwise involve the District in their exploration of private schools for Student for the 2011-12 school year. (N.T. 143-45)
22. Student applied to the private school where Student currently attends in April 2011 and Student was accepted in May 2011. (N.T. 148-49, 213-14)
23. Student was reevaluated by the District in the spring of 2011, and a Reevaluation Report (RR) issued in May 2011.<sup>4</sup> The RR summarized Student's educational records, included input from the Parents and the private neuropsychological evaluation, and information from Student's teachers, as well as a classroom observation by the school psychologist. (J 7, J 8, J 13)
24. An administration of the WISC-IV by the District for the RR revealed results very similar to those obtained by the private neuropsychologist, including the variability across subtest scores. The school psychologist also administered select subtests of the Woodcock-Johnson Test of Cognitive Abilities – Third Edition, which revealed relative strengths in auditory processing, processing speed, and crystallized ability, and relative weaknesses in long-term storage and retrieval, visual processing, and short-term memory. The results suggested that Student is better able to understand new information which is concrete. (J 13)
25. The RR also reported the results of the Conners Rating Scales – Third Edition, which confirmed ADHD, Inattentive Type. Student's teachers also completed the BRIEF questionnaires, reflecting scores in the clinically significant range on the Initiate, Working Memory, Plan/Organize, Organization of Materials, and Monitor Scales, as well as on the Metacognition Index and the Global Executive Composite. BASC-2 results were somewhat similar to those obtained by the private neuropsychologist, with scores in the at-risk range on the areas of Adaptability, Aggression, Anxiety, Functional Communication, Hyperactivity, Leadership, Learning Problems, Social Skills, and Study Skills (one or both teachers); and in the clinically significant range for Anxiety (Parents). Student's Self-Report did not indicate any areas of concern. The BASC-2 scores suggested, among other things, a need for Student to improve self-advocacy skills and for counseling to address anxiety. (J 13)
26. On an administration of the WIAT-III for the RR, Student achieved scores in the Below Average or lower range on the Reading Comprehension, Oral Reading Fluency, Numerical Operations, Math Problem Solving, and Essay Composition subtests.

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<sup>4</sup> An initial RR issued in April 2011 (J 12) was amended after additional assessments were completed. (N.T. 136-37)

Student's WIAT-III scores improved from the administration by the private neuropsychologist in Reading Comprehension but were otherwise similar. (J 13)

27. Also as part of the RR, a Functional Behavioral Assessment (FBA) was conducted by a District Board Certified Behavior Analyst (BCBA) in the school where Student was attending for the 2010-11 school year. The BCBA observed Student for two hours in several different settings and also obtained information from Student's teachers. The BCBA observed several repetitive motor movements and took data on five specific behaviors. She did not conclude that they interfered with Student's ability to function at school; Student's teachers similarly did not report that those movements interfered with Student's learning. (N.T. 998-1003, 1004-05, 1007-10, 1014, 1032-35, 1040, 1071-73; J 13 pp. 27-31)
28. In a speech/language evaluation for the RR, Student demonstrated weaknesses in all areas assessed. Occupational therapy assessment revealed weakness with visual motor integration but otherwise Student demonstrated appropriate fine and gross motor function. (J 13)
29. The RR concluded that Student remained eligible for special education by reason of a Specific Learning Disability in Reading and Mathematics, as well as a Speech/Language Impairment. Educational strengths (including reading decoding, mathematics fluency, listening comprehension) and needs (including reading comprehension, mathematics computation and problem solving, written expression, social-emotional coping skills, and self-advocacy skills) were summarized. Educational recommendations related to a highly structured program of direct instruction for reading comprehension and mathematics operations and problem solving), school-based counseling support, study skills support, specially designed instruction to address weaknesses in executive functioning, speech/language services, occupational therapy services to address visual motor processing, and a number of suggested items of specially designed instruction. It was also noted that Student's behaviors were not interfering with Student's education but that programming should include small group instruction, preferential seating, and physical proximity and cuing to limit inattention and distractions. Student's behavior would be monitored for changes. (J 13)
30. The Parents signed their agreement with the RR. (N.T. 154-55, 156-57; J 13 p. 37)
31. A meeting of Student's IEP team convened in May 2011. The Parents stated at the meeting that they believed that Student exhibited more repetitive motor movements at home than in the school setting. The team concluded that Student's behaviors could be addressed through specially designed instructional strategies and that a behavior support plan was not necessary at that time. (N.T. 87-88, 1014-16, 1029, 1039; J 14)
32. The Parents did not approve the May 2011 IEP and signed their disagreement with the accompanying Notice of Recommended Educational Placement (NOREP). They stated their concerns with the goals, class size, participation in an Algebra class, and the extent to which Student engaged in repetitive physical movements and Student's consequent

embarrassment. The Parents decided at that time to enroll Student in the private school. (N.T. 87-88, 182; J 16, J 17)

33. The Parents filed their request for Due Process in July 2011, and an amended complaint was filed in August 2011. (J 1, J 21)
34. A second IEP meeting convened in August 2011. Student attended that meeting. (N.T. 107, 175-78, 1049-51; J 20)
35. The August 2011 IEP included information on Student's most recent grades as well as input from the previous teachers. Additionally, information from the RR was summarized in detail, including the FBA. (J 20)
36. The August 2011 IEP included postsecondary transition goals and listed services to address them. Academic goals addressed reading comprehension, written expression, mathematics, organizational skills, coping strategies, and speech/language and communication needs including self-advocacy. All goals stated that the baselines would be determined within thirty days of the date of implementation of the IEP. (NT. 343-44, 349-51, 397-98; J 20)
37. Pursuant to the August 2011 IEP, the District proposed that Student would be in learning support for English, Mathematics (Basic Algebra), Social Studies, and two Study Skills classes each day; Student would be in general education classes for Physical Science, Health and Wellness, and an elective. (N.T. 250-51)
38. As it did in May, the IEP team concluded that Student's behavior did not impede Student's learning but would be addressed through specially designed instruction and would be monitored. The program modifications and specially designed instruction addressing behavior in this IEP included chunking of tasks, small group instruction for English and Mathematics, reteaching of concepts, teacher modeling, frequent checks of understanding the expectations of all classroom teachers, preferential seating, materials in alternative formats, accommodations for Mathematics, extended time for tests and other accommodations, use of an agenda and folders for organization, study guides and partial notes, and counseling. (N.T. 1043-44, 1082; J 20)
39. Under the District's proposed program, Student would have a one-to-one assistant throughout the day who would greet Student in the morning and attend to Student during physical transitions and in class as needed. This assistant would also be responsible for prompting and directing Student, restating directions, helping with organization, communicating with the case manager, and prompting social interactions with peers as needed. This person could also assist with data collection on Student's goals, as well as circulate throughout the classroom when Student did not need that individual attention, serving similar to a classroom assistant. (N.T. 252-54, 278-780, 281-83, 287-88, 317-18, 335-36, 378-79, 381-83, 623, 628-31, 661; J 20 p. 35)
40. Under the District's proposed program, Student would meet with the case manager first thing in the morning to review Student's schedule that day and address any concerns over assignments before moving on to first period. This daily check-in would address

Student's anxiety, and could be faded and made discretionary as the school year progressed if appropriate. (N.T. 254-56; J 20 p. 35)

41. Under the District's proposed program, Student would have the opportunity to be dismissed from classes five minutes early to navigate the hallways for Student's safety. The one-to-one assistant would also assist with Student's safety in the hallways as necessary. (N.T. 260-61; J 20 p. 35)
42. The IEP team did discuss Student's schedule in the District's proposed program, and the maximum student to teacher ratio for each class Student would attend would be as follows:

Physical Science	23 students:3 adults (including Student's 1:1)
Study Skills	11 students:3 adults (including Student's 1:1)
Music History (elective)	10 students:2 adults (including Student's 1:1)
Health and Wellness	29 students:2 adults (including Student's 1:1)
Study Skills	11 students:3 adults (including Student's 1:1)
Social Studies	7 students:2 adults (including Student's 1:1)
English	12 students:4 adults (including Student's 1:1)
Basic Algebra	8 students:3 adults (including Student's 1:1)

(N.T. 197-98, 223-24, 248-50, 261-62, 286-88, 289-94, 315-17, 322-23, 379-80, 403-04, 615-17, 627-28, 675; J 24)

43. Under the District's proposed program, Student's case manager would be in continuous communication with classroom teachers and classroom assistants, one-to-one assistants, related service providers, and other personnel throughout the school day. Ninth grade students and teachers are also assigned to one of four teams, and team personnel meet twice each six-day cycle as well as other times when needed. (N.T. 237-38, 268-73, 276, 306-07, 316-17, 376-77, 603, 621-22, 698-99)
44. Under the District's proposed program, Student would have two Study Skills classes each day. Both classes are held in the learning support classroom and focus on organizational skills, reinforcement and reteaching of content materials, and independent work on assignments with assistance from the special education teacher and classroom assistant. The special education teacher also meets with students individually to conference with them and address specific concerns. Additionally, social skills instruction is provided in small groups to some students. (N.T. 294-302, 304-07, 336-37, 397-99, 407-08, 618-20, 623-25, 677-80)
45. Under the District's proposed program, the case manager would see Student a minimum of three times each school day: during the morning check-in, and as the instructor of the second Study Skills class and Basic Algebra class. (N.T. 322-23)
46. Under the District's proposed program, Student would have weekly social skills training to learn and practice coping strategies. (N.T. 1047-48; J 20 p. 35)



47. In the learning support English class that Student would have attended in the District, the students read the same novels as other students in that grade level but materials and assignments are modified and adapted as needed. The students also read other novels of their choosing, many of which are available on compact disk. The English teacher uses strategies such as visualization, previewing and making predictions, and multisensory presentation. The class also works on writing activities using a modification of the District curricular approach to written work. Students frequently work individually with the teacher or in small groups in this English class. (N.T. 631-52, 684-87)
48. The high school guidance counselor would be available to meet with Student as needed to address academic and social concerns. A counseling schedule could be developed if Student demonstrated that need. (N.T. 308-09, 387-90; J 20 p. 34)
49. Under the District's proposed program, Student would have speech/language once per week during one of the Study Skills classes. (N.T. 302-03; J 20 p. 35)
50. The special education case manager modifies materials, including assessments, and adapts the general education curriculum for special education students in general education classes. She also discusses teaching strategies with other personnel. (N.T. 273-76, 319-21, 352-53)
51. The August 2011 IEP is the program at issue. The accompanying NOREP proposed special education and related services at the District high school in a program of supplemental learning support with a one-to-one assistant, speech/language support, and social skills instruction. IEP team did not consider placement outside of the District high school for Student. (N.T. 32-24, 375-76; J 20 pp. 44-45)
52. The Parents' amended complaint of August 30, 2011 provided notice to the District that they were enrolling Student in the private school. (J 21)
53. The private school is for children with language-based learning disabilities and can accommodate up to 40 students in grades one through twelve. The majority of the students at the school are in high school. (N.T. 428, 525-26, 905)
54. The private school serves a student population of 33 and is located in a single building. Academic classes have a maximum 4:1 student to teacher ratio. (N.T. 113, 428-29, 473, 494, 583, 905)
55. The private school implements a specific program (Program) with many of its students which uses methodology of cognitive exercises designed to strengthen cognitive weaknesses based upon the concept of neuroplasticity, targeting specific areas of the brain for repair. The Program was developed in [Redacted], Canada and is available to public and private schools in Canada and the United States. No public schools in the United States implement the Program, and the private school Student attends is the only school in Pennsylvania that was implementing the Program as of the time of the due process hearing. The goal of the program is to return a student to a regular school without any need for special education or accommodations. (N.T. 429, 437, 470-71, 477-78, 488-91, 571; J 27)

56. After Student's acceptance into the private school but before the 2011-12 school year began, Student was assessed for participation in the Program. The assessment was sent to the [Redacted] location and Student's performance was evaluated. This assessment identified a number of cognitive areas in which Student exhibited weaknesses and formed a profile of Student for the Program. (N.T. 440-43, 506-07, 548-53; J 23 pp. 2-4)
57. Also before the start of the 2011-12 school year, Student's Program teacher reviewed the District's proposed IEP, but the private school does not implement it and has not developed a specific individualized special education program for Student. (N.T. 501-04, 505-06, 578-79)
58. The maximum student to teacher ratio in Program classes at the private school as of the date of the due process hearing was 6:1, although there may be as many as ten students. (N.T. 429, 473, 561-62)
59. Student is involved in the Program for six periods each day and also has Mathematics and Language Arts classes for ninety minutes per day in addition to a physical education period. The Mathematics class has a number of different programs available for the students. (N.T. 430-31, 476-77, 537, 907, 947-48)
60. For the six Program periods each day, Student has worked on memory skills, mental arithmetic, copying skills including handwriting, symbolic thinking, and symbolic relationships. Some work is computer-based and others are auditory or written exercises. Individual students are assessed on specific skills every day, and the skills become increasingly more difficult as he or she progresses to higher levels. (N.T. 431-35, 443-48, 453-69, 560-61, 597-99; J 23)
61. Teachers must provide the Program exactly as it has been developed and may not vary from the dictated procedures. (N.T. 573-74)
62. Students in the Program are tested every year in all areas and, once the student scores in the average range in all areas, the student is considered to have completed the Program. (N.T. 480-82)
63. Students in the Program at the private school participate in social skills training once a week with a behaviorist. During that period, all 15-17 students in the Program and the three Program teachers meet with the behaviorist to work on self-esteem and the student's experiences with their learning disabilities. Social skills training is not part of the Program but the private school provides it to all of its students in the Program. (N.T. 510-11, 517-20, 582-83, 596, 599-600)
64. For the first semester of the 2011-12 school year, Student's Language Arts class at the private school focused on the English language, communication skills, and vocabulary, as well as writing skills. Reading instruction, including reading comprehension, is also addressed but is not an emphasis for students in the private school. Students at the private school do not have individual goals in Language Arts. (N.T. 920-23, 932-33, 935-38, 962-66)

65. Student made progress in the private school Mathematics and Language Arts classes, as well as in social skills, as of the time of the due process hearing. (N.T. 450-51, 563-65, 943; J 23 pp. 10-12, J 25)
66. Student's repetitive motor movements have subsided since Student began attending the current private school, and they do not interfere with Student's learning in that setting. (N.T. 72, 211-12, 479-80, 483-84, 520, 588-90, 915-17)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Legal Principles

Broadly stated, 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);<sup>5</sup> *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. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles 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 are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole on matters important to deciding the issues in this case was essentially consistent. Credibility of particular witnesses is discussed further as necessary.

### IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free

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<sup>5</sup> The burden of production, "i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

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, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). Most critically, the IEP must be appropriately responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, it has long been recognized that “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

The IDEA further requires that eligible students be educated in the “least restrictive environment” which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the school has included the child with non-exceptional children to the maximum extent possible. *Id.*

### The District’s Proposed Program

The Parents’ claim in this case is for reimbursement for tuition and related expenses for the private school placement for this 2011-12 school year. Under the IDEA, parents who believe that a public school is not providing FAPE may unilaterally remove their child from that school and place him or her in a private school, and also seek tuition reimbursement for the cost of the alternate placement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); *Mary Courtney T.*, 575 F.3d at 242. Tuition reimbursement is an available remedy for parents to receive the costs associated with a 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). Consideration of equitable principles is also relevant in deciding whether reimbursement for tuition is warranted. *Carter, supra*; see also. *See Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that tuition reimbursement award may be reduced where equities warrant, such as where parents failed to provide notice).

In considering the three prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not controlling in evaluating parents' unilateral placements. *Ridgewood, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

The first issue is whether the program proposed by the District in August 2011 for the 2011-12 school year was appropriate for Student. This IEP followed a comprehensive re-evaluation which included information from the most recent private neuropsychological evaluation, a summary of Student's educational records, a classroom observation, and input from Student's then-current teachers and the Parents. (Finding of Fact (FF) 23) In addition, the school psychologist administered cognitive and achievement testing and obtained BRIEF and BASC-2 questionnaires, and results of an FBA, a speech/language evaluation, and an occupational therapy evaluation were also included. (FF 24, 25, 26, 27, 28) A number of recommendations were made in the RR which were consistent with the majority of recommendations made by the private neuropsychologist. (FF 17, 29; J 6, J 13)

The August IEP contained goals addressing Student's specific needs as identified in the RR. Specifically, the IEP included goals addressing postsecondary transition as well as needs in reading comprehension, written expression, mathematics, organizational skills, coping strategies, and speech/language and communication. (FF 36) Program modifications and specially designed instruction were directly responsive to the needs identified in the RR. (FF 38, 39, 40, 43, 44, 46, 47, 48, 49, 50; J 13, J 20) This IEP included counseling and social skills instruction in addition to two study skills classes to address needs related to organizational skills, reinforcement and reteaching of content materials, and individual and small group activities based upon student needs. (FF 44, 46, 48) It is noteworthy that there was little if any challenge to the substance of the IEP itself, and even the Parents' private neuropsychologist agreed that this document was appropriate for Student; it was the high school setting that was the concern. (N.T. 770)

The Parents' disagreement with the District's proposal similarly focused on placement at the high school. Specifically, they expressed concerns over the one-to-one assistant (as obviously present specifically for Student); Student's ability to use a combination locker; the recommendation for an Algebra class; and the size of the classes and the school itself, including student to teacher ratios and Student's ability to navigate the hallways; as well as their belief that the District did not adequately consider Student's anxiety and repetitive motor movements. (N.T. 80-81, 88, 90-93, 96-100, 109, 186-88, 191-95, 215-16, 373; J 13 p. 3) The Parents' private neuropsychologist echoed many of these concerns, opining that placing Student in a class of 22 students with one teacher, a classroom assistant, and a one-to-one assistant "might exacerbate" Student's anxiety and repetitive motor movements (N.T. 744), because Student would feel singled out by the one-to-one assistant; the class setting would be distracting; and navigating through a large school would be difficult. (N.T. 743-44, 749-51, 752, 768, 775) The Parents' concerns are clearly genuine and, to this hearing officer, are certainly understandable.

Nevertheless, the District's witnesses provided credible testimony that logically and thoroughly addressed each of these matters. The one-to-one assistant was identified and was

experienced, would be trained specifically on providing necessary services for Student including strategies for discretely providing support, would provide prompts and redirection as necessary for Student while also working with other students in the classroom, and could be faded as appropriate depending on Student's demonstrated needs in that program and placement. (N.T. 253-54, 258-59, 282-83, 383, 1046-47, 1131-33) The District also offered two options to allow Student to avoid difficulty with a combination lock (N.T. 256-57), and the combined strategies of permitting Student to leave classes five minutes early and having the one-to-one assistant available to shadow Student from an appropriate distance are reasonably designed to limit difficulties navigating the high school hallways. (FF 39, 41; N.T. 258-59) The Parents' private neuropsychologist agreed that allowing Student to leave classes five minutes earlier than the bell would be helpful for Student. (N.T. 752) An elevator is also available for students to use. (N.T. 257-58) Additionally, Student would be offered options for having lunch in a location other than the crowded cafeteria. (N.T. 311-13) All of these interventions are, in this hearing officer's estimation, reasonably calculated to assist Student in successfully making the transition from the small private school setting to the District high school.

With respect to class size and student to teacher ratios, the District proposed smaller classes for English and Mathematics, which are areas of weakness for Student. (FF 7, 42) The student to adult ratios ranged from approximately 2.5 to 7 students to 1 adult, with the exception of Health and Wellness and Physical Education which was approximately 15 students to 1 adult. (FF 42) Although these class sizes are not as small as those at the private school (FF 54, 58), this hearing officer concludes that the District's proposed student to adult ratios, which included a dedicated one-to-one assistant, are reasonably calculated to provide Student with the individualized attention necessary throughout the school day. It is noteworthy that the Parents' private neuropsychologist similarly opined that a 7 students to 1 adult ratio was not inappropriate for Student. (N.T. 750-51) Moreover, the District demonstrated, throughout the testimony of each of its witnesses, its intention and willingness to adjust Student's program as necessary as Student acclimated to the environment of the public high school.

The Basic Algebra class was described as a bridge to Algebra I which is based on individual needs as determined through preassessments, and basic arithmetic skills are part of the course; the special education teacher provides direct instruction with modeling and other effective teaching strategies such as using manipulatives, review and drill, and a sequence of instruction from concrete to abstract. (N.T. 324-26, 329-34, 396-97) Students participate in guided practice, then work in small groups before completing assignments independently, and peer-assisted learning strategies are also employed in addition to use of calculators and graphic organizers. (N.T. 333-34, 338-41) Student's specific needs including addressing problem solving weaknesses and basic arithmetic skills would be targeted and assessed on a regular basis. (N.T. 337-38, 342-47, 391-92, 396-97; J 20) Thus, the Basic Algebra class would clearly be individualized to Student's specific weaknesses in mathematics skills while providing Student with the necessary foundation for moving on to an Algebra I class.

With respect to Student's repetitive motor movements and behaviors, the Parents are most concerned that the District failed to adequately consider this aspect of Student including how Student's educational program would be impacted. It is apparent that Student has historically exhibited those behaviors more frequently at home than in the school setting. (FF 4,

31) There was credible testimony presented that Student attempts to control those movements and behaviors in public places such as the school environment, and that those efforts require concentration. (FF 4) Nevertheless, there was also evidence that Student's exhibition of those movements and behaviors during the FBA did not impede Student's learning or that of others. (FF 27) District personnel also did not observe Student engage in any repetitive motor movements during the August 2011 IEP meeting. (N.T. 354, 357-58, 1049-52) The District's BCBA explained credibly that while school personnel may not be able to notice whether Student was concentrating to suppress behaviors and motor movements, they would nonetheless be able to observe when Student was not following directions or engaging in lessons during class. (N.T. 1058, 1086) The District also planned to monitor Student's behaviors, including any repetitive motor movements, and reconvene the IEP team if any changes to Student's program to address behaviors were warranted after the school year began. (FF 29)

Viewed as a whole, this hearing officer concludes that the preponderant evidence supports the District. Although it would not be unexpected that Student would experience some difficulty and discomfort in transitioning to the public high school after four years in a small private school setting, the foregoing discussion demonstrates that each of the Parent's concerns was addressed by the District through appropriate strategies and interventions which could be modified if necessary as Student began to attend District classes. The Parents are certainly entitled to disagree with the District's proposed IEP and NOREP and place Student in a private school which they believe is a much better environment for Student, and there is nothing unreasonable about their decision to do so. However, the District's August 2011 proposed program was reasonably calculated to provide an appropriate educational program for Student at the time it was offered, complies with its responsibilities under the IDEA, and is consistent with its obligation to educate Student, to the maximum extent possible, in the least restrictive environment. For all of these reasons, this hearing officer concludes that the Parents' claim must be denied.

### The Private School Placement

Although this hearing officer has concluded that the District's program was appropriate and it is therefore not necessary to consider the remaining prongs of the test for tuition reimbursement, in an effort to be thorough I will briefly discuss the appropriateness of the private school and the equities.

Student participates in the Program at the private school which focuses on cognitive exercises based upon the concept of neuroplasticity. The Parents' private neuropsychologist defined neuroplasticity as "the ability of the brain to change itself [and] adapt to new circumstances." (N.T. 715) He further explained that an area of the brain can assume a function ordinarily assumed by a different part of the brain, although the adapting part of the brain is generally not as efficient. (N.T. 715-16) Despite this explanation that suggested that the Program is beneficial to Student, this witness, who appeared to be quite familiar with the concepts on which the Program was based, stated that he was "not sure" that the Program provided by the private school is *appropriate* for Student. (N.T. 811) Further, while the fact that the Program is not implemented in any other school in the Commonwealth of Pennsylvania (FF 55) is not necessarily determinative, the descriptions of the Program (where Student spends three

quarters of the school day (FF 59, 60)) and how it was provided did not convince this hearing officer that it was truly educational in nature. *Cf. Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 276 (3d Cir.2007) (noting that a parental placement may be appropriate if, among other things, it provides “significant learning.”) The goal of the Program to return students to regular education settings without any need for support or special education services (FF 55), while certainly a laudable objective for any student in special education, is puzzling, ignoring the purpose of special education and the IDEA and appearing to serve as nothing more than a justification for keeping students in the Program on a long term basis.

At the private school, Student attends only two educational classes each day, neither of which is individualized for Student. (FF 57, 59, 60, 64) The Program portion of Student’s day is also not individualized and, indeed, the teacher is not permitted to deviate from the program as it was developed. (FF 60, 61, 62) Thus, the Program cannot include any specially designed instruction. The social skills class is the same for every student who participates in the Program. (FF 63) No individual counseling is provided, and Student does not work on organizational or study skills which are identified needs. (FF 17, 25, 29, 59, 60) It was also uncontradicted that speech/language and occupational therapy, which no one disputes are needs for Student, were not provided to Student at the beginning of the school year. (N.T. 165-68, 532, 535-36)

“A unilateral private placement is only appropriate if it provides ‘education instruction specifically designed to meet the *unique* needs of a handicapped child.’” *Gagliardo v. Arlington Central School District*, 489 F.3d 105, 115 (2d Cir. 2007) (citation omitted) (emphasis in original). The fact that a child may appear to be successful and make progress in a private school is not sufficient to establish that it is appropriate. *Id.* While the private school teachers do attempt to provide some of the strategies set forth in the specially designed instruction section of the District’s proposed IEP (N.T. 950-55), and the school itself and class sizes are small (FF 54, 58), the private school program simply cannot be viewed as an individualized program that meets Student’s special education needs. For these reasons, this hearing officer would find in favor of the District on the second prong of the test for tuition reimbursement.

Finally, with respect to the third prong, there is nothing in the record which would suggest that the conduct of the parties was unreasonable or improper on either side. Accordingly, this hearing officer would conclude that the equities weigh equally in favor of both parties.

## **CONCLUSION**

Having determined that the District’s program proposed for Student in August 2011 was appropriate for Student, the Parents are entitled to no relief.

## **ORDER**

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

1. The District’s proposed August 2011 IEP was appropriate for Student.



2. The District is not required to take any action.

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

*Cathy A. Skidmore* Cathy A. Skidmore  
HEARING OFFICER

Dated: January 21, 2012