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.R.
ODR #2226/11-12-KE

Date of Birth:
[redacted]

Dates of Hearing:
October 21, 2011
November 15 2011
January 17, 2012
January 31, 2012

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Tanya Alvarado, Esquire McAndrews Law Offices 30 Cassatt Avenue Berwyn, PA 19312
School District of Philadelphia 440 N. Broad Street Philadelphia, PA 19130	Heather Matejik, Esquire Levin Legal Group 1301 Masons Mill Business Park 1800 Byberry Road Huntingdon Valley, PA 19006
Date Record Closed:	February 27, 2012
Date of Decision:	March 21, 2012
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Procedural History and Background

Student[1] is an early teen aged eligible child classified as having a specific learning disability who resides in the School District of Philadelphia ["District"] and currently attends a private school ["private school"] for children with learning differences. Student has never attended public school, although Student's father and mother ["Parents"] obtained an evaluation from the District in 2010.

The Parents believe that since the District's evaluation completed in 2010 was based largely on an earlier 2010 private evaluation the Parents supplied, and/or that the District's evaluation was not appropriate, the District should reimburse them for the private evaluation. The Parents also believe that they are entitled to tuition reimbursement for the private school for part of the 2010-2011 school year [January 2011 through June 2011] and the entire 2011-2012 school year given their opinion that the IEP prepared for Student in February 2011 was not an appropriate offer of a free appropriate public education ["FAPE"].

This hearing was conducted in conjunction with a hearing for Student's sibling, such that each case had about half of each hearing day. Since there were two separate cases, the date for written closing arguments and the Decision Due Dates were scheduled accordingly.

Issues

1. Should the District be required to reimburse the Parents for the independent educational evaluation they obtained for Student in February 2010?

2. Should the District be required to reimburse the Parents for Student's private school tuition from January 2011 through June 2011 and for the 2011-2012 school year?

Findings of Fact

1. Student is a resident of the District who has attended private schools from prekindergarten through the present. [NT 114, 117, 130]

2. Student is eligible for special education under the classification of specific learning disabilities in the areas of reading and written expression. [S-11, S-17]

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

3. From sixth grade [2010-2011] until the present [2011-2012] Student has attended a private special education school in Pennsylvania for which the Parents[2] are seeking tuition reimbursement. [NT 130]

4. Student attended a general education private school from preschool through first grade. Having obtained a private evaluation[3] that indicated Student required an environment that would provide learning support, the Parents enrolled Student for second grade [2006-2007] in an out of state private school that Student's sibling was already attending. [NT 114-116, 122]

5. The Parents requested an evaluation for Student from the District in June 2006 "to see if the School District would be able to provide [Student] with subsequent services, what the School District had". On June 8, 2006 the District issued a Permission to Evaluate which the Parents signed on that same date. The evaluation was due to be completed on or before December 7, 2006. [NT 118; S-18]

6. When parents ask for an evaluation for a child who resides in the District but does not attend a District school the evaluation is considered to be providing Equitable Participation. [NT 51-52]

7. A child does not have to be enrolled in the District to receive an evaluation from the District. [NT 53]

8. In a July 2006 conversation with the District's psychologist, asked if the Parents were looking for tuition reimbursement, the mother's contemporaneous notes indicated she told the District psychologist she was "looking for anything that I can get but especially transportation to [private out-of-state] School". [P-8]

9. Testimony and contemporaneous notes establish that the District's psychologist left voicemail messages for the Parents regarding setting up the evaluation on November 2 and again on November 16, 2006. [NT 566-568; S-19]

10. The District psychologist's November 16, 2006 message offered November 30th or December 1st evaluation dates.[4] [S-19]

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[2] Although both Parents participated in the process, the mother often acted on behalf of both, and she testified at the hearing. The term "Parents" is used in this decision unless there is a specific reason to designate one or the other.

[3] The private evaluator had also evaluated Student's older sibling. The record does not indicate the exact date on which Student's private evaluation was completed. It is reasonable to conclude that the evaluation was done close to the end or at the end of Student's first grade year. The mother's notes from a conversation on July 11, 2006 with the District psychologist indicated the private evaluation was done in June 2006. [P-8]

[4] The mother testified that she did not remember receiving phone contact from the District regarding evaluation dates. [NT 124]

11. The mother returned the District psychologist's call on or about November 28, 2006 and withdrew the evaluation request on November 29, 2006 .[5] [NT 566-568; S-19]

12. Given that the Parents had withdrawn their evaluation request, the District issued a Procedural Safeguards Waiver Request/ Waiver of Request for an Evaluation in December 2006. The Parents did not return that document signed. [NT 569; S-18]

13. From November of second grade [2006-2007] through fifth grade [2009-2010] Student attended an out-of-state private school for children with learning disabilities. [NT 115-117; S-23]

14. On December 2, 2009 the Parents sent a letter of inquiry regarding Student to the special education private school to which Student's older sibling had transferred the previous school year. In the spring of 2010 the Parents decided to move Student to that private school. The mother testified that it was difficult having two children in two different schools some distance apart, the older sibling would be obtaining a driver's license and Student could go to school with the sibling, "And then eventually, you know, [older sibling] would leave and ---so [Student] was going to high school there". [NT 126-127]

15. On February 24, 2010 the Parents completed an Application Questionnaire for the private school; the Application was received by the private school on March 1, 2010. On March 5, 2010 the Parents received a letter from the private school confirming Student's admissions interview date and time. On March 16, 2010 the Parents and the Student were interviewed regarding Student's admission to the private school. The Parent indicated in the interview that they were also looking at another private school for Student. [S-26]

16. On March 16, 2010 the out of state private school sent information regarding Student to the current private school. [S-23]

17. On April 5, 2010 Student received an acceptance letter from the private school. On April 16, 2010 the Parents signed Student's enrollment contract for the new private school for academic year 2010-2011. The contract stipulates that an Enrollment Fee of $3200 had to be sent to the private school by April 23rd, and that monthly payments of $3200 had to be sent to HES[6] by the 1st of each month from April 1, 2010 through January 1, 2011. [S-24, S-26]

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[5] The District psychologist recalls, and contemporaneous notes made by the school counselor document, that the mother withdrew the request for an evaluation; the mother does not recall calling the District psychologist and does not recall withdrawing the request. [NT 122, 124, 568-569]

[6] HES is similar to AMS, described in *P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009) as "a program that fronts the entire year's tuition to a private school and requires that parents repay the bank on a monthly basis, with limited opportunity for parents to opt out of full payment if their child does not attend the private school."

18. The enrollment contract stipulates that parents were unconditionally obligated to pay the fees for the full coming academic year [2010-2011] after May 1, 2010 even if the child is absent, withdrawn or dismissed. There is a tuition refund plan [brochure not in the record] that covers very specific circumstances arising in the event of unanticipated separation from the private school after the first 14 consecutive calendar days beginning with a child's first day in the school year. [S-24]

19. On August 26, 2010 the Parents by letter requested "a special education evaluation and IEP[7] from the District as soon as possible". The Parents further stated that Student was enrolled at the private school, and that the Parents were asking "the District to provide transportation and support for this program at least until an appropriate IEP is completed and a proper program is offered". [NT 571; S-16]

20. Regarding the letter of August 26th, the mother testified that she did not know at the time she testified what she meant by "support", but did say that it was about money, and later testified that the letter was a request for tuition.[8] [NT 289-290]

21. Despite having signed an Enrollment Agreement in April 2010, and having already incurred six payments of $3200 each [Enrollment Fee and monthly fees the 1st of April, May, June, July and August] the mother testified that it was the Parents' original intention to send Student to school in the District for the 2010-2011 school year, "if something would be provided". [NT 290]

22. The District issued a Permission to Evaluate [PTE] on September 22, 2010 and the Parents signed it on October 6, 2010, but mother testified that she "probably" did not read it. The District received the signed PTE on October 7, 2010. [NT 291; S-15]

23. The Parents provided the District psychologist with a private evaluation dated February 5, 2010 that they had obtained for Student in anticipation of Student's moving to the Pennsylvania private school from the out of state private school. The Parents had obtained a private evaluation of Student from the same evaluator

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[7] The mother told the District psychologist that the private school wanted an IEP for Student. The District psychologist noted that private schools do not ordinarily request that a district provide an IEP for a child attending a private school. [NT 571; S-11]

[8] (Q) What kind of support were you looking for the school district to provide to [private school] prior to…? (A) Any support. It says here transportation…they could provide. (Q) [In addition to transportation] what did you mean "and support for this program"? (A) I guess I wrote that I wanted them to support this program. I'm really not quite sure. I don't know. I wish I would have spelled it out better. (Q) Were you or were you not talking about tuition? (A) Looking at it, I mean, if you could say that I was by saying the support, but at that point I'm not quite sure. I was hoping that I could, you know, receive anything that would help us in our – you know, we were having difficulties with finances and I was – so yes. (Q) So you were talking about money? (A) Yes. If they could provide us with anything that would help.

in 2006. The Parents try to have an evaluation done about every two years on their children, but Student did not receive an evaluation in 2008. [NT 126; S-17]

24. The private evaluator employed a test of general cognitive ability [WISC-IV[9]], and tests of academic achievement [WJ-III], memory [Rey Auditory Verbal Learning Test], nonverbal visual-motor functioning [Bender Visual Motor Test], attention and self-regulation [Conners Continuous Performance Test], and behavior [Conners Comprehensive Behavior Rating Scale]. [S-17]

25. The private evaluator concluded that Student had a reading disorder and a disorder of written expression, and made a number of recommendations to address Student's deficits. [S-17]

26. In addition to considering and incorporating the private evaluation done eight/nine months previously, for purposes of the October/November 2010 District evaluation the District psychologist received and reviewed input from the Parents [10-13-10], received and reviewed a teacher report from the private school Student was attending [10-14-10], and received and reviewed a report card from Student's previous private school[10]. The District psychologist also had a telephone conversation with the mother [10-26-10]. [NT 575-576; S-11, S-14, S-15, S-23]

27. The District psychologist relied on the recent private testing rather than conducting new testing. The District psychologist concurred with the private evaluator that Student displayed specific weaknesses in reading and in written expression, generated recommendations to address the weaknesses, and determined that Student met IDEA eligibility criteria for special education. [NT 575-577; S-11]

28. The District psychologist dated the record review October 26 & 27, 2010, and produced the Evaluation Report [ER] on November 18, 2010. The Parents were sent a copy of the District's evaluation report. [11] [12] [NT 299, 478; S-11, S-12, S-27]

29. On January 6, 2011 the District issued the Parents an Invitation to Participate in an Evaluation Review [Multi-Disciplinary Team] meeting on January 19, 2011. [S-10]

30. On January 19, 2011 the District convened the MDT meeting to discuss its ER. [NT 43; S-9, S-11]

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[9] Mis-identified as the WAIS-IV] on the evaluation report. [S-17]

[10] The records from the previous private school, which are found at S-23, were not in the District's possession at the time of the District's evaluation.

[11] Although the mother believes she first received the ER at the MDT meeting in January, she also testified that she received "something" before that but "was not sure what it was".

[12] The copy of the ER in the record is dated January 5, 2011 because that was the date the EZ system printed out the copy. [S-11]

31. The District psychologist who completed the ER went over the results with the Parents. [NT 44, 303]

32. The Parents indicated that prior to the MDT meeting they had reviewed the ER "a little bit". [NT 44-45, 375; S-9]

33. At the MDT meeting the Parents did not express any concerns about the ER. [NT 44, 584]

34. At the time of the January 2011 MDT meeting it was unclear whether Student might begin attending school in the District in mid-academic year 2010-2011, or in September 2011. The District psychologist and the school counselor received the impression that Student might begin in the District's school in March after the PSSA testing as this was discussed at the meeting; the special education case manager thought Student was entering no later than September at the beginning of the 2011-2012 school year. [NT 46, 305, 379, 586]

35. Notably, as of January 1, 2011 the Parents would have already paid the entire 2010-2011 non-refundable tuition as per the Enrollment Agreement. [S-24]

36. The mother testified that she never inquired as to whether or not the private school would release the Parents from this contract and speculated that the private school would probably require them to pay the full tuition for the 2010-2011 school year. However, the mother said that she was willing to remove Student from the private school and enroll Student in public school as the family would save tuition for the following school year. However, two months later, on March 14, 2011 the Parents entered into a second binding, non-refundable, Enrollment Agreement for the following [2011-2012] school year. [NT 284-285; S-25]

37. Since the members of the MDT at the elementary school where Student would be assigned had not met Student and since the District wanted updated reading and math achievement scores to use in developing the IEP, the MDT meeting participants agreed that Student would come to the school and receive additional academic testing. [NT 43-45, 379]

38. The school-based members of the MDT talked with the Parents at the meeting about a research-based intervention program for reading that would be used with Student. The program, Corrective Reading, is an SRA program that addresses the needs identified for Student. [NT 47-48, 376-377]

39. The Parents did not raise any concerns about the Corrective Reading program at the MDT meeting. [NT 49]

40. Math interventions were not discussed since results of the Key Math were yet to be obtained and Student had not been identified with a disability in math. [NT 49]

41. The MDT planned to hold an IEP meeting to design Student's program once the additional achievement testing was completed. [NT 51]

42. After delays for snow days, on February 3, 2011 Student was seen for updated academic testing at the school Student would attend if enrolled in the District. Tests administered were the Woodcock Reading Mastery Tests Revised [Norm Update] and the KeyMath 3. [S-8, S-20]

43. On February 7, 2011 the District convened an IEP meeting. The father was ill and not present. [NT 54, 395; S-4]

44. The IEP team worked from a draft IEP for Student based upon all the District's evaluation information, with the special education liaison modifying the draft on her computer as the meeting progressed. [NT 163; S-5, S-6[13]]

45. The mother did not raise any questions about how the achievement testing was administered. [NT 386]

46. The school counselor and the principal made handwritten notes/changes to their copies of the draft IEP during the meeting regarding written expression needs, increased time in learning support, math skills, and use of concrete materials [manipulatives] in math. [S-5, S-6]

47. The District offered Student an itinerant learning support program, addressing literacy goals and specially designed instruction. [S-5, S-6]

48. At the end of the IEP meeting the mother was given the Procedural Safeguards Notice, but she refused to sign an acknowledgement that she had received them. She wanted her husband, who was not at the meeting, to review them first. [NT 60-61]

49. At the end of the IEP meeting the mother received a draft copy of the IEP[14] and a NOREP. The mother wanted her husband to review them and intended to get back to the District in a week or so. The District's understanding was that the Parents would get back to them with any additional changes and with a decision on enrollment before the IEP would be finalized. Until a child is enrolled in the District the computerized E-Z System program will not drop the "Draft"

[13] Neither party produced a "clean" copy of the proposed IEP for the hearing. The two copies in the exhibits were used at the IEP meeting by the school counselor and the school principal to make notes, while the special education liaison typed changes into the final draft copy for the EZ system.

[14] It is unclear in the record whether the mother was given a printout of the draft IEP the special education liaison had been typing during the meeting, or a copy of the draft IEP used at the outset of the meeting.

designation on the IEP, and after 120 days the program deletes the draft IEP. [NT 59-62, 322-325, 395, 481, 519]

50. The mother testified that she did recall telling the school members of the IEP team that she would follow up with them after the IEP meeting, but responded "I don't recall-no" and "I don't believe so" and "I don't recall---that I'm not sure" to the question of whether she made any attempts to contact the District after the IEP meeting, [NT 326-327]

51. In response to whether or not she notified the IEP team about any issues and/or concerns she and her husband had with the IEP, the mother testified that she didn't discuss anything with anyone at the District elementary school. Although she had never raised the concern before her testimony at the hearing, the mother testified that the primary reason why she did not find the IEP appropriate was that she believed the special education liaison had inappropriately prompted Student on the Key Math and/or the Woodcock Reading testing, a perception that was inaccurate[15]. [NT 322, 329]

52. The Parents did not return the NOREP as approved or disapproved, and did not contact the District for follow up regarding concerns about or changes to the IEP. The mother testified that she did not return the NOREP because she "was not happy with what had happened, what had taken place [regarding the achievement testing she observed]." The first time the Parents raised this concern was during the due process hearing. [NT 321-322, 382-385]

53. The District made attempts to contact the Parents and left messages which the Parents did not return. Both the special education liaison and the school counselor testified that they made several attempts in March and/or April of 2011 to contact the Parents but their calls went unreturned. [NT 57-60, 62, 397-400, 482-483, 519-521; S-3])

54. The case manager and the principal corroborated the testimony that messages were left for the Parents, as they recalled having discussions with the special education liaison and the school counselor about the non-responsiveness of the Parents after the IEP meeting was held. [NT 59-60, 519-521]

55. The special education liaison made attempts to contact the Parents as late as June 2011. She recalled having to update the IEP so that it would not be dropped from the E-Z System and noted that she made efforts to reach the Parents around that time as well. [NT 59-60, 403-404]

56. The mother testified she didn't have any notes as to whether the District attempted to contact her after the IEP meeting. When questioned as to whether she had any independent recollection of receiving a voicemail and/or other

[15] Examiners are instructed in all test manuals of all testing instruments regarding whether, when and exactly how to prompt the test-taker.

contact from the District, she testified "no." However, when asked to confirm that it was her testimony that she never was contacted by anyone at the District, the mother replied, "I don't know." [NT 329]

57. Meanwhile, on March 14, 2011 the Parents signed an Enrollment Agreement with the private school for the 2011-2012 school year. The contract stipulates that an Enrollment Fee of $3300 had to be sent to the private school by March 1, 2011, and that ten payments of $3300 had to be sent to HES by the 1st of each month from April 1, 2011 through January 1, 2012. [S-25]

58. The Enrollment Agreement stipulates that Parents are unconditionally obligated to pay the fees for the full coming academic year after May 1, 2011 even if the child is absent, withdrawn or dismissed. There is a tuition refund plan [brochure not in the record] that covers very specific circumstances arising in the event of unanticipated separation from the private school after the first 14 consecutive calendar days beginning with a child's first day in the school year. [S-25]

59. When questioned the mother testified that she, "didn't know why" she signed the 2011-2012 Enrollment Agreement without first following up with the District regarding the proposed IEP and admitted that she did not tell the District that the Parents were entering into the second Enrollment Agreement. [NT 330]

60. On August 16, 2011 the Parents through counsel filed for this due process hearing, and on August 18, 2011 the Parents contacted the principal of the elementary school by letter, stating that the District "has not offered an appropriate program to meet [Student's] educational needs" and asking the District "to fund tuition" at the private school. The Parents did not state in this letter any issues and/or concerns with the evaluation or IEP. This was the first time the Parents indicated that they were seeking tuition reimbursement. [P-1]

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in "equipoise," as otherwise one party's evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District,* 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer*.

Upon very careful consideration of the testimony and documents, and evaluating the credibility of the witnesses, this hearing officer has determined that the Parents failed to provide a preponderance of the evidence, the District's evidence was more persuasive, and, the parties' evidence not being equally balanced, determining the outcome under *Schaffer* was not necessary.

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).

The mother testified on behalf of both Parents. She appeared to be sincere and was pleasant and courteous, and clearly conveyed that she and her husband wanted the best education they could possibly provide for their children. Unfortunately, her testimony could be credited with little weight when issues of fact and intent were examined. On numerous occasions, the mother answered that she couldn't remember, could not recall, didn't think so, or was confused between the two siblings. On a few occasions she retracted previous statements. Her frequent lapses in recollection led to her testimony being given less weight when a finding of fact rested on an issue of credibility. Additionally, this hearing officer simply could not accept certain aspects of the mother's reasoning, for example her thinking that perhaps the private school would release the family from the Enrollment Agreements and her claim that the Parents were considering moving Student to public school even though the family had already paid a substantial portion or all of the year's tuition. The mother's claim that the Parents were interested in a public school program and placement for Student was incompatible with many of their actions - not returning messages to set up an evaluation appointment in 2006, and particularly not getting back to the District with concerns, questions and/or disagreements regarding the 2011 draft IEP and the NOREP, and on both occasions just dropping out of the entire process without notice. If the Parents indeed intended to send Student to school in the District because of financial concerns, it is illogical that they would let days or weeks go by without contacting the District or responding to the District's attempts to contact them. The evidence strongly points to the conclusion that although the Parents may have periodically entertained the idea of sending Student to public school, they were at best strongly ambivalent about, and at worst no more than tepidly interested in, a free appropriate public education for Student.

The District psychologist, who is no longer with the District, presented as an exceptionally difficult witness. Although to the individual's credit the witness appeared without requiring a subpoena, the witness displayed barely concealed contempt for the hearing process. Given the witness' attitude during the hearing, and concluding that the individual's manner may be in some part how that person interfaces with others at times, it is entirely understandable that the mother was put off by her interactions with the

individual. Nevertheless, as the witness' recollections were clear, as the witness wrote scant but convincing contemporaneous notes, and as the witness understood the parameters of a District psychologist's obligations under the IDEA, the content of the witness' testimony was given due weight and was persuasive.

Much of the Parents' closing argument details the District psychologist's attitude and conduct toward the family. Although this individual might in fact have said and done all that the Parents allege given the individual's demeanor in the hearing, the person's interpersonal conduct is not a matter within a hearing officer's authority to remedy.

The testimony of the District witnesses regarding the evaluation, including administration of achievement testing, and the events surrounding the IEP meeting, the modifications to the IEP, and the anticipated follow-up to the IEP meeting, was credible as was their testimony about efforts to reach the Parents to finalize the IEP.

The witnesses from the private school were not helpful in establishing that the Parents' unilateral placement was proper under the Act for this Student specifically, since they knew very little about Student specifically or Student's individual educational program. Had it been necessary to reach the second prong of the Burlington-Carter analysis it is questionable whether the Parents would have established that, in Student's regard, their unilateral placement was proper under the Act.

Evaluation – Legal Basis and Discussion

The IDEA requires States to provide a "free appropriate public education" (FAPE) to all children who qualify for special education services. 20 U.S.C. §1412. Special education must begin with an evaluation. The purpose of an evaluation is to determine whether the child meets any of the criteria for identification as a "child with a disability" as that term is defined in 34 C.F.R. §300.8, as well as to provide a basis for the contents of an eligible child's IEP, including a determination of the extent to which the child can make appropriate progress "in the general education curriculum." C.F.R. §§300.8, 300.304(b)(1)(i), (ii). The general standards for an appropriate evaluation are found at 34 C.F.R. §§300.304—300.306. The District is required to 1) "use a variety of assessment tools"; 2) "gather relevant functional, developmental and academic information about the child, including information from the parent"; 3) "Use technically sound instruments" to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using "any single measure or assessment as the sole criterion" for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1-3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be "sufficiently comprehensive to identify all of the child's special education and related service needs" and provide "relevant information that directly assists" in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7).

Once the assessments are completed, the qualified District professionals and the child's parents determine whether he/she is a "child with a disability" and his/her educational

needs. 34 C.F.R.§300.306(a). In making such determinations, the District is required to: 1) "Draw upon information from a variety of sources," including those required to be part of the assessments, assure that all such information is "documented and carefully considered." 34 C.F.R. §300.306 (c)(1). The District must also provide a copy of the evaluation report and documentation of the eligibility determination to the Parents at no cost. 34 C.F.R. §300.306(a)(2). If it is determined that the child meets the criteria for IDEA eligibility *i.e.,* is a child with a disability and is in need of specially designed instruction, an IEP must be developed. 34 C.F.R. §§300.306(c)(2).

In the instant matter, the Student had not previously been found eligible by the District or by any certified school psychologist, and had not attended public schools. The focus of the District evaluation, then, was to determine Student's eligibility for special education under the IDEA and to provide a foundation for planning an educational program and placement. The Parents provided the District psychologist with a private evaluation completed six months previously. The private evaluator had used a variety of assessment tools; had gathered relevant functional, developmental and academic information about the child, including information from the parent; had used technically sound instruments to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; and had refrained from using any single measure or assessment as the sole criterion for a determination of a diagnostic impression In addition, the measures used by the private psychologist were valid, reliable and administered by a trained person in accordance with the instructions provided for the assessments; had assessed the child in all areas of suspected disability; were sufficiently comprehensive to identify all of the child's needs; and provided relevant information to directly assist in determining the child's educational needs.

Having been presented with a private evaluation that met the IDEA's requirements for an appropriate evaluation, the District psychologist was not required to repeat the testing done so recently. OSEP policy letter, 23 IDELR 563 (1995), provides that the law neither prohibits nor requires an LEA to substitute a parent's IEE for specific components of the LEA's evaluation and the LEA should determine whether testing need be conducted or repeated. The District psychologist did gather additional relevant information from the parents and from the private school Student had just begun attending, and reviewed a report card from the former school. The District administered additional achievement testing so that Student's present levels would be up to date when the IEP team designed the Student's program. The District was not required to conduct its own separate complete retesting of Student as there was no need to do so. Had the Parents not provided the private evaluation the District would have had the obligation to administer all the types of tests the private evaluator used. This however does not demand the conclusion that since the Parents had the evaluation done first, the District should be required to pay for it. The District was entitled to conduct the requested evaluation; once provided with an appropriate private evaluation the District was not required to repeat testing. In its evaluation the District was required to determine that Student met eligibility criteria for special education and to provide the foundation for an appropriate IEP. This the District did, using all available information. The District is not required to

reimburse the Parents for the evaluation they obtained privately prior to asking the District to evaluate Student.

Tuition – Legal Basis and Discussion

The IDEA defines a "child with a disability" as a child who has been evaluated and identified with one of a number of specific classifications and who, "by reason thereof, needs special education and related services." 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. "Special education" means specially designed instruction which is designed to meet the child's individual learning needs. 34 C.F.R. § 300.39(a). Further, "specially designed instruction" means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to address 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 the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.39(b)(3).
In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034. 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits."

Special education and related services must be designed to ensure meaningful academic, social, emotional, and behavioral progress. *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484, 2491 (2009); *Breanne C. v. Southern York Cty. Sch. Dist.*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (referencing *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 394 (3d Cir. 1996) (finding that to confer meaningful educational benefit, an IEP must be designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social, and emotional domains); *See also*, *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Benefits to the child must be 'meaningful'. Meaningful educational benefit must relate to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark,* 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit). However, the statute guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

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. In *Forest Grove School District v. T.A.*, U.S, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009), the Supreme Court held that tuition reimbursement can be awarded to a parent whose child has never attended a public school.

Although the IDEA provides that a hearing officer can order tuition reimbursement when a parent places a child in a private facility the IDEA's implementing regulations at 34 C.F.R. §300.148 (c), make it clear that tuition reimbursement can be considered only under specific conditions:

> "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 a 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 had not made FAPE available to the child in a timely manner prior to that enrollment…"

Even before becoming a matter of statute, the right to consideration of tuition reimbursement for students placed unilaterally by their parents was clearly established by the United States Supreme Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985). *Florence County Sch. Dist. Four V. Carter*, 114 S. Ct. 361 (1993) later 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 amount. Consideration of these three elements is referenced as the "Burlington-Carter analysis".

The IDEA authorizes hearing officers and courts to award "such relief as the Court determines is appropriate" 20 U.S.C. § 1415(h)(2)(B). The IDEIA 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. 20 U.S.C. § 1412(a)(10)(C)(ii).

With regard to the first prong of the Burlington-Carter analysis, I find that the evaluation that the District provided and the subsequent program the District was offering for the 2010-2011 school year as articulated in the February 2010 IEP with modifications made during the IEP meeting was appropriate. An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. The proffered IEP was reasonably calculated to enable Student to receive educational benefits.

The Parents opted out of the IEP process prior to finalization. The District seems to have been hesitant to finalize the IEP without further input from the Parents. Having not heard from the Parents, despite trying to make contact, the best approach for the District would have been to send another copy of the IEP including all changes with a NOREP and a cover letter indicating that in the absence of further discussion with the Parents this was the IEP on offer. However, I find that the District's not taking this final step does not negate the fact that the Parents were in possession of an appropriate IEP. At the time of

the IEP meeting Student was attending the private school under an Enrollment Agreement that mandated that over a month before the IEP meeting was convened the Parents would have had to pay the entire year's tuition. Student did not suffer educational harm even though the District did not re-send a copy of the IEP and NOREP to the Parents. Accordingly the District prevails on the first prong of the Burlington-Carter analysis.

Although it is not necessary to reach the second prong of the Burlington-Carter analysis, it is noteworthy that the witnesses from the private school had very little direct specific familiarity with Student and how Student was doing in the private school program. As such, it would have been difficult to conclude that the Parents' unilaterally selected placement was proper under the Act.

Finally, although not necessary, this hearing officer chooses to address the third prong of the Burlington-Carter analysis and examine the equities. The IDEA allows a hearing officer to deny a tuition reimbursement award if: 1) Parents did not inform the IEP Team (at the most recent IEP Team meeting) that "they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and intent to enroll their child in a private school at public expense"; or 2) "at least 10 business days prior to the removal of the child from the public school…" the parents did not give the public agency notice that they were seeking the public funding of private school tuition; and 3) The claim for tuition reimbursement also may denied upon a finding of unreasonableness with respect to the action taken by the parents. 34 C.F.R. 300.148 (d) (1) (i-ii) and (d) (3); 20 U.S.C. 1412 (a)(10)(C).

The Parents entered into an Enrollment Agreement with the private school for the entire 2010-2011 school year on April 16, 2010, four months prior to their August 26, 2010 request for an evaluation and an IEP for Student. During the evaluation and the IEP process the Parents did not declare their possible intent to seek tuition reimbursement for a portion of 2010-2011. Furthermore, as concerns the next school year, on March 14, 2011 [the same day on which they signed the older sibling's Enrollment Agreement] while the District was awaiting their response to the proposed IEP and NOREP the Parents entered into another binding Enrollment Agreement for Student with the private school. They failed to notify the District that they were rejecting the proposed program and placement, failed to give reasons for said rejection and failed to notify the District of their intent to seek tuition reimbursement. In fact the Parents first notified the District that they were seeking tuition reimbursement on August 18, 2011, two days after they had filed for due process.

Finally, when the Parents suddenly dropped out of the IEP/NOREP process in February 2011 and did not return the District's calls they were acting unreasonably and signaled that they were not genuinely interested in placing Student in public school in the spring of 2011 or for the 2011-2012 school year.

In light of the findings above related to credibility and the fact pattern, the Parents' request for reimbursement for the independent evaluation and tuition must be denied.

Order

It is hereby ordered that:

1. The Parents' request for reimbursement for the private evaluation they obtained for Student in February 2010 is denied.

2. The Parents' request for tuition reimbursement for the private school in which they unilaterally placed Student is denied.

3. The District is not required to take any further action.

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

March 21, 2012 *Linda M. Valentini, Psy.D., CHO*

Date

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