

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: L.M.
ODR #2507/11-12-KE

Date of Birth:
[Redacted]

Dates of Hearing:
January 30, 2012
March 13, 2012
June 4, 2012
June 5, 2012

CLOSED HEARING

Parties to the Hearing:

Parents

Downingtown Area School District
126 Wallace Avenue
Downingtown, PA 19335

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Hollie John, Esquire
Connolly, Jacobson and John
188 North Main Street
Doylestown, PA 18901

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331 E. Butler Avenue PO Box 5069
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June 22, 2012

July 3, 2012

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

Background

The claims in this matter have been asserted pursuant to the Individuals with Disabilities Education Act [IDEA] 20 U.S.C. § 1400 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 [Section 504] 29 U.S.C. § 794. Student¹ is a teen-aged eligible student with Other Health Impairment and a Specific Learning Disability who resides in the Downingtown Area School District (hereinafter District). Although Student attended public school in the District from Kindergarten through 4th grade, for the past seven years Student has been attending a private school; for the first six years the District funded the private placement pursuant to a settlement agreement that was twice renewed without litigation.

For the 2011-2012 school year the District offered Student a program and placement within the District. The Parents did not approve the District's offer, unilaterally continued the private school placement without District funding, and filed for a due process hearing.

The first issue in this hearing, then, is whether or not the District is required to reimburse the Parents for Student's tuition at the private school for the school year just concluded. The Parents are also requesting reimbursement for an independent educational evaluation [IEE] that they procured for Student.

Issue

1. Are the Parents entitled to tuition reimbursement for Student's private school placement for academic year 2011-2012?
 - a. Was the program and placement the District offered to Student appropriate?
 - b. If the District's offer was inappropriate, was the placement unilaterally selected by the Parents appropriate under the Act?²
 - c. If the District's program was inappropriate and the Parents' unilateral placement appropriate, do equitable considerations remove or reduce the District's obligation to reimburse the Parents for tuition?
2. Must the District reimburse the Parents for the independent educational evaluation they procured for Student?

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

² The District has stipulated that the private school is appropriate under the Act. [NT 669]

Findings of Fact

1. Student is a teen-aged student who has just completed ninth grade. Student resides with the Parents within the boundaries of the District. [NT 44]
2. Student is an eligible student under the IDEA and a protected handicapped student under Section 504 of the Rehabilitation Act. Student began receiving special education services at twelve months of age. [NT 87]
3. Student has various health issues, including among others Juvenile Idiopathic Arthritis [also referenced in the record as Juvenile Rheumatoid Arthritis] diagnosed at age 8 months. Associated difficulties of this condition include rashes, joint pain, and morning stiffness. [NT 48-55]
4. Student's medical condition and/or side effects from medications that Student has been prescribed at various times include among others a compromised immune system, macrophage syndrome³, acid reflux, spiked fevers, and compromised bone strength. [NT 54-55]
5. Student acquired a brain injury [chronic static encephalopathy] secondary to oxygen deprivation during seizures at age 11 months. [NT 51]

³ http://www.the-rheumatologist.org/details/article/973181/Macrophage_Activation_Syndrome.html

The hearing officer takes notice of the following excerpt from the first part of an article in the journal The Rheumatologist, from December 2010: “In pediatric rheumatology, the term macrophage activation syndrome (MAS) refers to a condition caused by excessive activation and expansion of T lymphocytes and macrophagic histiocytes that exhibit hemophagocytic activity. Although the pathognomonic feature of MAS (i.e., histiocytes phagocytosing normal hematopoietic elements) is usually seen in bone marrow (see Figure 1, p. 23), such cells can infiltrate almost any organ in the body. The expansion of these cells also leads to a massive systemic inflammatory response associated with three cardinal features: cytopenias, liver dysfunction, and coagulopathy resembling disseminated intravascular coagulation (DIC). MAS is a life-threatening condition, and the reported mortality rates reach 20–30%.

Although MAS has been reported in association with almost any rheumatic disease, it is by far most common in systemic juvenile idiopathic arthritis (SJIA). Conversely, about 10% of patients with SJIA develop full-blown MAS, while mild “subclinical” MAS may be seen in as many as one-third of patients with active systemic disease. Besides SJIA, systemic lupus erythematosus (SLE), and Kawasaki disease are two other rheumatologic conditions in which MAS appears to occur somewhat more frequently than in other diseases. Although most patients develop this syndrome sometime during the course of their primary rheumatic disease following diagnosis, MAS occurring at the initial presentation of a rheumatic illness is rather common.”

6. Student has asthma and allergies requiring shots, and side effects from the shots include welts on the arms and fatigue. [NT 56, 59]
7. Student's conditions change at various times and therefore Student's medications change as well, so the side effects from medication are present at some times and not at others. [NT 59-62, 65]
8. Although Student has virtually always lived with these conditions and Student's pain threshold is very high, occasionally [redacted]. [NT 56-57]
9. At the time of the first hearing session Student was not having spiked fevers, and as Student was properly medicated, the skin rash, the fevers and the joint pain were absent. Student was still having joint pain [redacted]. [NT 149-150, 153, 157]
10. Student has permanent residual damage [redacted]. [NT 153]
11. As Student had been arthritis-symptom-free for one year the physician began weaning Student from the medications for the arthritis during the summer of 2011. Because of a flare-up Student went back on one of the arthritis medications as of the first hearing session. [NT 152-154]
12. Student is immature for chronological age and lacks age-typical interest in grooming. [NT 78-81]
13. Student is very social when in a comfortable setting, is very outgoing, is pleasant, a hard worker and presents with a happy outlook on life. [NT 86-87]
14. Because Student does not have friendships with peers who live nearby Student gravitates more toward adults. [NT 87]
15. Since Student's friends do not live nearby, in order to spend time with peers, Student has to have "play dates", usually overnight at Student's home. [NT 80-81]
16. Student has provided childcare for the toddlers of a neighbor, rides a bike, swims on a team, walks the family dog, and participates in [a sport] either as a manager or a player. [NT 82-86, 913-915, 1007-1008]
17. Pursuant to a Settlement Agreement, the District funded Student's placement at the private school from the 2005-2006 school year up until the summer of 2011. [NT 88]
18. The first Agreement was for two years [2005-2006 and 2006-2007] including extended school year and transportation. [NT 88; J-1]

19. The first Agreement provided among other things that the District would begin a reevaluation of Student in January 2007 in preparation for developing an IEP for the 2007-2008 school year, and that the Parents and the District would fully cooperate in the reevaluation process. [J-1]
20. The reevaluation was completed in March 2007. [P-2]
21. For reasons not put forth in the record, in March 2007 the District issued a Settlement Agreement Extension providing for an extension of the previous Agreement through the 2007-2008 and the 2008-2009 school years including Extended School Year. [NT 89; P-3]
22. A provision of the original Agreement found at 3(g) regarding pendency was removed from the Settlement Agreement Extension, explained as follows: “Section ‘3g’ of Agreement has been removed. IEP is not necessary as the [private school] constitutes FAPE [Free Appropriate Public Education].” [P-3]
23. For reasons not put forth in the record, the parties entered into another Settlement Agreement in June/July 2009. This Agreement provided that the District would fund Student’s placement at the private school and provide Extended School Year services for the 2009-2010 and the 2010-2011 school years through summer 2011. The Settlement Agreement was characterized as “an extension of a previously made agreement (original in 2006)”. [J-4]
24. The District issued a Permission to Evaluate to the Parents on January 7, 2011. The District’s Supervisor of Special Education [a different individual from the person holding this position when the previous Agreements and the Settlement Agreement Extension were made] explained in response to Parents’ inquiry that the District wanted to do an evaluation to “make an offer of FAPE going forward” and that the evaluation was intended to be “as comprehensive as possible so that we can offer a program that would best meet [Student’s] needs”. [NT 96-99, 223-224, 226, 229-232; J-5, J-7, P10]
25. The Parents signed and returned the Permission to Evaluate on January 12, 2011. [NT 100; J-7]
26. In a January 12, 2011 email the Parents wrote that Student was receiving FAPE at the private school, acknowledged that tough economic times make it necessary for the District to evaluate expenses and make adjustments, but that this “will not be at the expense of [Student’s] education”. The Parents also noted that it was their intention “to see that [Student] continues to receive FAPE”. [J-7]
27. In a January 19, 2011 email the District’s Special Education Director responded to an inquiry by the District Psychologist assigned to reevaluate Student regarding the timeline for completing the reevaluation, and wrote that the March date “...has to do with the expiration of the current settlement agreement, and the

- timeline that we need to follow in order to offer an IEP if we're going to try and bring [Student] back into the District". [P-10]
28. The District Psychologist testified that she "knew that the District was looking to try to bring back a lot of students since we had programs available for Students; so that was brought to my attention". She was told in "not so many words" but received the understanding from the past or present Special Education Director that specifically the District was going to try to bring Student back to the District high school. [NT 224-225, 229-232]
29. In a Parent Information Form completed on January 17, 2011, the Parents noted among other things that "[Student's] needs are for [Student] to be in an environment where [Student's] learning needs and physical disabilities are understood". [NT 104; J-9]
30. As part of the reevaluation process,, the assigned District Psychologist⁴ reviewed Student's complete educational file at the District contacted the Parents to obtain current information about Student's medical needs and medications, as well as Student's needs and strengths at home, and provided the Behavior Assessment System for Children, Second Edition [BASC-II], the Behavior Rating Inventory of Executive Functioning [BRIEF], and the Adaptive Behavior Assessment System, Second Edition [ABAS-II], all of which are subjective inventories [as opposed to tests] which were then scored and interpreted. She spoke directly to two staff members from the private school, reviewed accommodations and specially designed instruction provided to Student at the private school, sought input from the teachers at the private school including providing and reviewing teacher response forms, reviewed Student's class schedule and attendance records for 2010-2011, reviewed daily and quarterly progress reports from the private school, as well as Student's G-MADE and STAR reading scores. She also interviewed Student regarding post-secondary goals and obtained input from the Parents regarding post-secondary goals. [N.T. 225-227, 243-245, 313-314, 316-318, ; J-6, J-8, J-9, J-11, J-12, J-13, P-32]
31. The Parents sent the District Psychologist a list of thirty-two "learning accommodations" that had been drafted by the Director of the middle school at the private school. Some of these recommendations were: repeated directions by teacher and repeated/paraphrased directions by Student, visual and auditory prompts, extended response time and extended time for tests and assignment completion, foreign language exemption, preferential seating, multimodal learning opportunities, computer and calculator use, graphic organizers, use of recorded materials, use of electronic software for reading and writing, alternative assessment, small group instruction, chunking of assignments, reader for test taking as required, quiet room for tests/quizzes. [J-8, J-12]

⁴ This individual coincidentally has had rheumatoid arthritis for seven years. [NT 316]

32. The District Psychologist observed Student at the private school for the purposes of, among others, seeing whether Student had trouble focusing and what accommodations if any were in place for physical limitations. The District Psychologist conducted two days of testing with Student. During the observation and the testing Student did not exhibit fatigue or other manifestations of physical discomfort, and when breaks in testing were offered Student indicated the breaks were not needed. [NT 266-267, 322-325, 359]
33. The private school's nurse testified that Student did not need more than the allotted three minutes in between classes at the private school to travel to Student's classes and that Student walked at a normal pace. [NT 484-485, 515, 521-523]
34. On the Wechsler Intelligence Scale for Children – Fourth Edition [WISC-IV]⁵ Student's Verbal Comprehension was at the bottom of the Borderline Range (Standard Score 71), and Processing Speed was at the top of the Extremely Low Range [Standard Score 68]. Perceptual Reasoning and Working Memory scores were within the Average Range [Standard Scores 98 and 94 respectively]. Due to the variability in the overall cognitive profile and the 27 point discrepancy between Student's Verbal Comprehension and Perceptual Reasoning Indexes, the District Psychologist utilized the Perceptual Reasoning Index score as the measure of cognitive ability for purposes of conducting an ability/achievement discrepancy analysis. [NT 277, 279-282, 284-286, 332; J15]
35. Although Working Memory was in the Average Range on the WISC-IV, and was listed as a strength in the reevaluation, Student's mother testified to Student's difficulties with memory and Student's teachers also referenced memory issues. Although the District Psychologist did not specifically assess memory skills, she agreed that by third party report Student has deficits in both long term and short term memory. [NT 248, 286-287; P-2, J-15]
36. Achievement testing with the Wechsler Individual Achievement Test – Third Edition [WIAT-III] revealed a significant discrepancy between cognitive ability and achievement in basic reading, reading comprehension, reading fluency, math fluency, math problem solving, and listening comprehension [NT 290, 296]
37. Student's independent reading comprehension was at the third grade level. Student struggled to use contextual clues within passages to answer implicit or inferential questions despite the opportunity to re-read passages upon the presentation of reading comprehension questions. [NT 290; J-15]

⁵ The WISC-IV reports Standard Scores on the "bell-shaped curve". A SS of 100 is exactly average, with the Average Range being 90-109; SS 80-89 is the Low Average Range; SS 70-79 is the Borderline Range; SS 69 and below is the Extremely Low Range.

38. In written expression, Student scored within the broad average range on all subtests of the WIAT-III⁶ and on the Composite. The Standard Score for the Sentence Building subtest was 88; the Standard Score for the Spelling subtest was 85. [NT 293, 295-296; J-15]
39. On the BASC-II, parent scales, Leadership, Functional Communication and Resiliency were in the At-Risk Range; all other scores were in the Average Range on both the parent and teacher scales, and on Student's self-report. On the BRIEF, parent scales, Working Memory was reported to be in the Clinically Significant Range. On the ABAS-II, teacher scales, scores in Communication Skills, Functional Academics, Leisure, and Self Care were observed as areas of significant weakness. [NT 101, 237, 298-300; J6, J15]
40. The reevaluation report identified Student's primary disability classification as Other Health Impairment [OHI] due to chronic static encephalopathy and other complex medical conditions, and the secondary disability classification was Specific Learning Disability [SLD] in the areas of basic reading skills, reading comprehension, reading fluency, math problem solving and listening comprehension. [J-15]
41. The reevaluation report was completed on February 15, 2011 and was emailed to the Parents on February 25, 2011. [J-15, J-16]
42. The Parent testified that upon review of the reevaluation report she had concerns about the medical piece but not about the educational piece. [NT 112]
43. On February 25, 2011, after receiving the reevaluation report, the Parents emailed the District Psychologist and asked, "Can you clarify....for [Student] to continue to accept [private school] as FAPE I will need to schedule a due process hearing?" [NT 113-116; J-16]
44. On February 28, 2011 the District's Director of Special Education responded to the Parents' inquiry in an email sent at 3:08 pm, noting that the process would be that after the Parents had a chance to review the reevaluation report the special education teacher assigned to develop a draft IEP would schedule an IEP team meeting to review the report and discuss program options, and at that time the District would construct an IEP that the team felt would meet Student's academic and transitional needs. [J-16]
45. In the February 28, 2011 email the Director of Special Education noted that the finalized [IEP] document would constitute the District's offer of FAPE, that the Parents would be issued a Notice of Recommended Educational Placement [NOREP] on which the Parents would indicate whether they approved of the plan or not, with options being a request for an informal meeting, approval of the plan,

⁶ The WIAT-III is reported in Standard Scores as explained above regarding the WISC-IV.

- or disapproval of the plan with a request for mediation or a due process hearing. [J-16]
46. On February 28, 2011 at 5:42 pm Student's mother emailed a response stating "...it is my intention that [Student] continues to receive FAPE thru the [private school]. Please except [sic] this as my written authorization for Due Process." [NT 116-117; J-16]
 47. The Special Education Teacher developed a Draft IEP ⁷ with input for revision from unnamed person(s) and sent it to the Director of Special Education on April 9, 2011. This Draft was sent to the Parents on April 11, 2011⁸ so they could review it prior to the IEP meeting. [NT 1005-1006; J-15, P-17]
 48. In preparation for the IEP meeting the District also prepared a draft class schedule for Student for grades nine through twelve for graduation planning purposes. The 9th grade schedule had not been finalized yet so the sample schedule was tentative, with finalization at a later time. [J-21]
 49. Student's tentatively proposed courses for 2011-2012 were Reading Foundations [regular education]⁹ with up to 15 students with one teacher; English II [regular education] with up to 20 students with one teacher; Algebra IA [regular education] with up to 20 students with one special education teacher and in one section a support staff as well; Math Plus Lab [now called Algebra IA Curriculum Lab] [special education] with up to 5 students with one teacher; Earth Space and Science] regular education] with over 26 students but alternatively Earth and Space Science Assist which is a smaller supported class; Freshman Orientation [special education] with up to 15 students with one special education teacher; Wellness/Fitness [regular education] with up to 30 students; Structured Study Hall [special education] with between 5 and 15 students with one teacher and a support staff. [NT 888-895, 903-904, 936]
 50. The Assistant Principal testified that if the team met again, they would have considered a special education English class, [Writing Foundation], and that Student could be placed in the alternative special education Science class [Earth and Space Science Assist] which could eliminate the need for a Structured Study Hall. [NT 920-921, 937-938, 941-942, 944]

⁷ The Draft IEP's Identifying Information listed an incorrect birth date and age for Student, making Student one year younger than Student's actual chronological age. The correct age was given below that in Section I-1. [J-15]

⁸ For reasons not explained in the record the Draft IEP carried an IEP meeting date of March 2, 2011.

⁹ Although the Reading Foundations class is a regular education class the majority of the pupils in that class are special education students. [180, 840-841, 868, 885, 934]

51. The reading program methodology selected for Student is Read 180®¹⁰, which would be delivered to Student in a 90-minute block daily in a group of fifteen students. Read 180® has three components: whole group instruction; small group rotations of instruction, independent reading, and computer work¹¹; whole group wrap-up. The teacher is a Certified Reading Specialist who has completed Read 180® training. [NT 124, 215, 840, 842-844, 872-876, 887; J34]
52. As described by the What Works Clearinghouse:
<http://ies.ed.gov/ncee/wwc/interventionreport.aspx?sid=406> “*READ 180*® is a reading program designed for students in grades 3–12 whose reading achievement is below the proficient level. *READ 180*® aims to address gaps in individual students’ skills through 90-minute sessions, during which students receive several different types of instruction. These sessions can be completed in multiple class periods and begin and end with whole-group, teacher-directed instruction. The sessions also include a period of small group activities where students rotate among direct instruction from the teacher, independent computer work, and modeled and independent reading. The *READ 180*® program includes workbooks designed to address reading comprehension skills, paperback books for independent reading, audio books with corresponding CDs for modeled reading, and software designed to track each student’s progress.”
53. On April 11, 2011 the District sent a draft IEP to the Parents for them to review in advance of the IEP team meeting, and a mutually agreeable date was selected for convening the IEP team to review and revise the draft IEP as appropriate. [NT 1005-1006; P-17]
54. The IEP meeting was held on May 4, 2011 with Student in attendance. The Parent participated in discussions about which grade level Student would be assigned, and which gym class Student would take. [NT 121, 123-125]
55. At the IEP meeting, neither Student nor Student’s mother raised a concern regarding Student’s having to walk too far at the high school or any other concern regarding Student’s physical condition, except in the context of whether Student would take one or the other gym class. [NT 325-328, 755]
56. At Student’s request Student spent a full day at the high school a few days after the IEP meeting, shadowing another student in order to see what a typical day would be like. When asked in the school after the visit, Student raised no concerns regarding the visit and no one reported seeing Student have any trouble navigating the building. The only concern raised by the Parents at the time was

¹⁰ I take notice that although Read 180® is used in many schools in PA, the “What Works Clearinghouse” reports that as of July 2010 there were no studies of the Read 180® program as used with pupils with SLD and therefore the Clearinghouse cannot draw any conclusions about the program’s effectiveness or ineffectiveness with students with SLD.

¹¹ Student’s mother recalled being told at the IEP meeting that the speed of the computer could not be adjusted to accommodate Student’s reading fluency rate, however the speed of the computer can be adjusted.

- Student's father's remarking when he picked Student up at the end of the day that the high school was larger and had more pupils than the private school. [NT 130, 915-917, 1025-1026]
57. A final IEP was produced and the District issued a NOREP dated May 4, 2011. On May 13, 2011 the Parents indicated that they did not approve the recommendation. [NT 132-133; J-20, J-22]
 58. The Parents' explanation was that the multisensory approach, and the classroom size of eight to twelve students with two learning support teachers, made the private school the least restrictive appropriate environment for Student. In rejecting the NOREP the Parents did not make any reference to the first of the two principal concerns they raised throughout the hearing¹², i.e. that they believed the District failed to address Student's medical needs. [NT 325-327, 755, 1006-1007; J-21]
 59. On May 17, 2011 the District sent a letter to the Parents denying their request for tuition for the private school for the 2011-2012 school year. [J-23]
 60. By email dated May 19th the Parents indicated their intent to re-enroll Student at the private school for 2011-2012 and again requested that the District fund the placement. On May 24 the Parents renewed their request that the District fund the private placement. [NT 134-135; J-22, J-23]
 61. On June 20, 2011 the private school sent the District the tuition bill for the 2011-2012 school year, and the District informed the private school that it would not be funding the Parents' unilateral placement. [J-25]
 62. About two months after receiving the District's reevaluation, the Parents procured a neuropsychological evaluation at a local hospital for children. The evaluation was performed on April 27, 2011, but the report was not signed, dated and sent to the Parents until June 26, 2011; the Parents promptly forwarded it to the District. [J-18]
 63. The hospital evaluator, who is a licensed psychologist but not a certified school psychologist, agreed with the District's classification of Student as OHI due to static encephalopathy, but did not diagnose a learning disability in any area as she used Student's Full Scale IQ of 88 as measured by the Wechsler Adult Intelligence Scale – Third Edition [WAIS-III] rather than the Perceptual Reasoning IQ for purposes of discrepancy comparison with academic achievement. [J-18]
 64. Although the hospital evaluator opined that ordinary activities such as walking through hallways in a large school building can be stressful for a person with JRA at certain times, and that due to "lags in developing social maturity," Student

¹² Student's medical issues and perceived problems with the proposed IEP.

- lacks the emotional resources for coping effectively with the social demands of a school setting where most students are at a higher level of maturity, she also noted that Student is seen by the private school teachers as “well able to meet demands of everyday situations age-appropriately” as evidenced by the BASC-2, “did not appear to be affected by [redacted]” [in the sense of being self-conscious], was physically capable of remaining “invested in [Student’s] performance throughout a five-hour test session”, “denied pain,” and “walked unassisted...displaying grossly normal gait.” [J-18]
65. The hospital evaluator made recommendations for addressing Student’s medical needs at school: Determine a plan for homebound instruction should absenteeism for illness be expected to include a period of at least two weeks; provide counseling assistance with regard to how Student should inform peers and others when a [redacted] may provoke concern; provide psychosocial counseling around the issue of assertive communication at school regarding medical and other needs, such as needing to take a break due to fatigue or pain; and, provide a gym program which is coordinated with Student’s outpatient Physical Therapy program, with regard to addressing related goals. [J-18]
 66. The Parents then procured an independent educational evaluation from a certified school psychologist, and the report was issued on October 21, 2011. The IEE included a record review, testing of Student, observations of Student during a summer program and at the private school and providing an opinion on the appropriateness of the District’s proffered IEP for the 2011-2012 school year. [P-26]
 67. The independent evaluator noted that standardized assessment was completed over three sessions, [Student]’s ability to maintain attention/focus and remain engaged in tasks presented was remarkable, Student was observed to be a diligent worker consistently across all sessions, and, while breaks were offered and ultimately taken, [Student] often denied needing a break and seemed highly motivated to finish what was required. [P-26]
 68. The independent evaluator also reported that “[s]ocial/emotional/behavioral assessment has been conducted over time with no information presented that suggested any difficulties for [Student] with regard to social/emotional concerns.” [P-26]
 69. The independent evaluator disagreed with both the District’s and the hospital evaluator’s conclusions that OHI should be the Student’s primary disability category; rather, the independent evaluator vigorously opined in testimony that OHI should be the Student’s secondary disability category, while SLD should be the primary disability category. The independent evaluator noted that the OHI disability category was adversely affecting the Student’s educational performance “at times” depending on the presentation of symptomology. [NT 621-634; P-26]
 70. The independent evaluator explained that the SLD disability category was based upon deficits in reading, mathematics and written expression according to a severe discrepancy model. However, the only score upon which she relied for finding an SLD in written expression was one single score: Student’s subtest

- score in Story Composition from the Test of Written Language – 4th Edition, which indicated below average performance. The independent evaluator admitted that none of the other written expression scores from the evaluation she conducted, nor any of the scores from the District’s reevaluation, support an SLD in written expression using a discrepancy model. [NT 621-634]
71. The independent evaluator opined that Student’s IEP should include written expression goals, that interventions are needed to address Student’s memory and processing speed deficits, and that Student required a transition plan to address emotional needs arising from switching schools. The independent evaluator reached the conclusion that Student must need what the private school is providing since Student is making progress there. [P-26]
 72. After issuing her evaluation report, the independent evaluator observed 32 minutes of the District’s proposed reading program, Read 180®, [information about which had been provided to the Parents at the IEP meeting]. She also observed one period of an English class at the District. After her observation she issued a supplemental report of her observations at the District and at the private school. This report was filed subsequent to the Parents’ formal request for a due process hearing. [NT 811-840; P-30, J-34]
 73. On November 22, 2011 Student’s rheumatologist submitted a letter addressed “To Whom it may concern.” The physician opined that Student needs a smaller educational setting in order to minimize exposure to infections and decrease stress on joints from walking long distances. The letter also opined that the Student should avoid steps, running, excessive walking and prolonged sitting. [P-31]
 74. The physician also recommended two sets of books, use of an elevator, a laptop for writing assignments, no timed tests, no grades for handwriting and extended time in between classes. [P-31]
 75. The private school¹³ is housed in an old elementary school building. At the private school in 9th grade Student walked 1227 to 1378 feet on a given day. The longest distance between classes, 242 feet, is from the last class to the bus. At the private school in 9th grade, Student ascended or descended stairs at least six times. There is no elevator. Student was also required to go outdoors to access a mobile classroom. [NT 432-434, 962; P38, P39, P40, P41]

¹³ After hearing Student’s mother testify about the Parents’ belief that the private school was the appropriate placement in part because of the physical layout, but then hearing testimony that Student’s 9th grade private school roster required ascending and descending flights of stairs quite a few times daily, I determined that I would need to see the locations themselves. However, as further testimony evolved about the actual day to day participation of Student in the program at the private school, the factor of physical layout became less salient, although still a consideration. Therefore, when the date in late May scheduled for observation had to be canceled due to an emergency in District counsel’s family I decided not to reschedule the site visits and instead asked for photographs, maps, etc. that would be entered into evidence. Exhibit S-36; Exhibit S-37; Exhibit P-38 through P-42. Parent counsel placed an objection to my deciding against the site visits on the record and that objection was and is duly noted. Parents’ counsel asked that two pertinent emails be included in the record and these are entered as “Supplementary Parent Exhibit”.

76. The proposed public school building¹⁴ for Student's 9th grade is a two-story high school building. Using Student's sample schedule, Student would travel about 2035 feet, not including returning to the main entrance of the building to return home. [S36, S37]
77. At the proposed public high school following the sample class roster, Student would have the option of ascending or descending stairs or using the elevator, with some additional feet required to access the elevator. [NT 909]

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*, and in this matter the Parents accepted the burden of production even though case law does not clearly assign same to either party.

CREDIBILITY

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹⁵ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. 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). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

¹⁴ See footnote above

¹⁵ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Although all witnesses seemed to be testifying honestly, there are some whose testimony was deemed less reliable. For example, the head of the upper school at the private school testified in some detail about Student's schedule there and the physical layout, but it was only on cross examination that she mentioned that getting from one class to another involved Student's ascending and descending stairs about five times per day as well as needing to go outdoors to a mobile classroom. The school psychologist who performed the IEE went well beyond the bounds of her data set and the data sets she had available to her from the two psychologists whose reports predated hers [District Psychologist and Hospital Psychologist] in trying to establish that Student had a specific learning disability in written expression and therefore that the IEP was inadequate for not addressing this area in a goal. Additionally, her efforts to establish that SLD and not OHI was Student's primary disability did not help the Parents' case and obscured the issues. The District's witnesses were not all reliable however, The learning support teacher who wrote the IEP did not present as secure in her professional knowledge and did not do well on cross examination; this appeared to be possibly a function of lack of confidence and scant experience. Nevertheless the IEP that she produced, albeit with consultation, was appropriate. On the other hand, the District's reading teacher explained the Read 180® program in a lucid and engaging manner that persuasively established that the District was offering an excellent reading program that has a good likelihood of being successful in helping Student make meaningful progress in literacy.

SPECIAL EDUCATION

Special education issues are governed by the federal law, Individuals with Disabilities Education Improvement Act of 2004 [IDEA] which took effect on July 1, 2005, and amended the Individuals with Disabilities Education Act. 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Once disabled children are identified as being eligible for special education services the IDEA requires the State to provide them with a "free appropriate public education" [FAPE]. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9).

An "appropriate" education "is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 C.F.R. § 104.33(b)(1).

Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26.

TUITION REIMBURSEMENT

Although parents have an absolute right to decide upon the program and placement that they believe will best meet their child's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court established a

three part test to determine whether or not a school district is obligated to fund a private placement. *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program legally adequate? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. *See also, Florence County School District v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

School districts and other LEAs provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefit", a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist.*, WL 2682741 (E.D. PA. July 8, 2011)

An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk*.

The Third Circuit explains that while an "appropriate" education must "provide 'significant learning' and confer 'meaningful benefit,'" it "need not maximize the potential of a disabled student." *Ridgewood*, 172 F.3d at 247 (3d Cir. 1999); *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002). An IEP must provide a "basic floor of opportunity". There is no requirement to provide the "optimal level of services." *Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania's federal court in the Eastern District noted, [LEAs] "need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit at the time it was created.

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from

the child's disability to enable the child to be involved in and progress in the general curriculum and meeting the child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

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. Implementation of an appropriate IEP does not guarantee that the student will make progress.

Finally, the IDEA requires that disabled students be placed in the least restrictive environment that will provide meaningful educational benefit. Congress has expressed a clear intent and preference that disabled children be placed in regular education classes, and that removal of a child from regular education classrooms is permissible "only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C.A. § 1412(a)(5)(A); 34 CFR §300.550. Pennsylvania State regulations adopted by reference from the IDEA state verbatim what an IEP shall contain. 22 Pa. Code § 14.131(b) and 22 Pa. Code § 14.102 (a)(2) adopt all federal regulatory requirements, including the requirement that a student be educated in the least restrictive environment.

IEE

The IDEA provides, at Section 614(b)(2) that in conducting the evaluation the local educational agency shall:

- Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--
 - Whether the child is a child with a disability; and
 - The content of the child's individualized education program...

- Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

- Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Further, the IDEA at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that

Assessments and other evaluation materials used to assess a child under this section--

- Are selected and administered so as not to be discriminatory on a racial or cultural basis;-
- Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;
- Are used for purposes for which the assessments or measures are valid and reliable;
- Are administered by trained and knowledgeable personnel; and
- Are administered in accordance with any instructions provided by the producer of such assessments;

The child is assessed in all areas of suspected disability;

Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must either initiate a hearing and at that hearing show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).

I found that the District's reevaluation was appropriate, and therefore the Parents are not entitled to reimbursement for the IEE they obtained.

Discussion

TUITION REIMBURSEMENT

It is understandable that after Student's having spent so many years in the small private school the Parents may be reluctant to have Student leave that environment. However, once a school district can demonstrate that it has offered an appropriate program for a student it is no longer required to expend public funds to maintain a student in a private school regardless of the reasons a student may have originally been placed out-of-district. It is not clear why the District in this case renewed the settlement agreement twice for a total of six years rather than bringing Student back to public school after the term of the

first agreement expired, and indeed it would have been less difficult for the Student and the family had Student not spent so long in the private school that returning to public education now seems daunting.

The Parents believe that the District predetermined Student's placement. Rather, the District's stated intent was to "try" to bring Student back to the District's high school, and this effort was not unreasonable given considerations of LRE coupled with fiscal responsibility in expending public funds. On the other hand, the Parents' clearly stated intent from the beginning of the reevaluation process was to keep Student at the private school. In this regard, although the concept of "predetermination" applies only to Districts and is not a two-way street, I do find that the Parents behaved inequitably albeit in a manner that they believed with conviction was protecting their child's best interest. I find that the Parents' request for a Due Process Hearing just days after their receipt of the reevaluation report, before an IEP was created and a NOREP offered, was unreasonable. Although the Parents ultimately participated in an IEP meeting, and Student visited the high school, I find no credible evidence that the family seriously entertained the prospect of accepting the District's proposed program and placement. Special Education Appeals Opinions offer reflections that are consistent with my thoughts in this regard: "When [t]he parents have become so singularly focused on the [private school in which they have already enrolled their child] that they appear unwilling to consider the District's proposals in good faith," tuition reimbursement should be denied. Special Educ. Opinion No. 1271 (2002). Similarly, "Where the parents have predetermined that they will place their child in a private school regardless of the district's ability to program for the child, the equities favor the district". Special Educ. Opinion No. 1658 (2005).

Although Student's primary disability was OHI based on chronic static encephalopathy and other complex medical conditions, the District's IEP was devoted to the educational needs Student displayed, likely in large part to the absence of information from the Parents or the private school that Student's medical condition significantly interfered with the learning process. At the IEP meeting, in contrast to a large portion of their case at the hearing, the family did not emphasize Student's physical disabilities even though the IEP meeting would have been the place to clearly articulate their concerns in this regard.

Although the Parents raised concerns about the IEP itself at the hearing, [memory issues not directly addressed except in the SDI, transition to public school from private school, measurability of a goal] these were not fatal to the IEP. I find that the IEP provided Student with the basic "floor of opportunity" articulated by our 3rd Circuit Court in *Carlisle*, a case that has been cited in later Federal District Court decisions. See, e.g. *Wissahickon*. I apply the reasoning of the Federal Court in Pennsylvania's Eastern District which noted regarding another matter, "This is not to say that the District's IEPs were without flaws.... However ... flaws in this regard did not render the IEPs inadequate.... Plaintiffs have not demonstrated that the weaknesses in the IEP ... are ... so serious that they prevented [the Student] from receiving FAPE. In fact, the IEPs do not appear vague, nor do they seem to exclude necessary goals. On the contrary, they are relatively detailed, although not as detailed as [an expert's reports] and appear to have

been thoughtfully designed to benefit [the Student]. It is entirely possible that an IEP written by [the expert] would have been better than the School District's . . . , [but] the IDEA does not ask the public schools to guarantee the very best.¹⁶ Further, in *Sinan L, et al. v. School District of Philadelphia*, 2007 U.S. Dist. LEXIS 47665 (E.D. Pa. 2007), the court, in denying a parent's tuition reimbursement claim, described the standard as a "minimum baseline standard," concluding: "As any good parent, Sinan's parents understandably want the very best for their son. Unfortunately, given financial and practical constraints, Congress and the legislature have not imposed the obligation on our public school systems to satisfy the desires of every child and parent who seeks their services. Instead, schools are held to a minimum baseline standard, a standard that may fail to meet the expectations of the parents of disabled and non-disabled children alike. Whatever the substantive merits of this standard may be, it is the standard that the Court is bound to enforce."

A 6th Circuit opinion, [by which we are not bound], *Doe v. Board of Education of Tullahoma City Schools*, 20 IDELR 617 (6th Cir. 1993) stated in an oft-quoted phrase that FAPE does not require a "Cadillac," but it does require a "Chevrolet." In the instant matter the District offered a Buick, albeit one that needed a minor tune-up. While I can clearly understand why the Parents and Student are loath to leave the sheltered environment of the private school in which Student has spent over half Student's educational career, [and the District certainly bears a large portion of the responsibility for this having twice renewed the original Agreement], I find the District's offer for 2011-2012 more than met the standard of appropriateness. I do not find that the District's program as articulated in the IEP is inappropriate.

I wish to address one specific point before leaving the program offered through the IEP. The Parents' Closing Statement drew attention to the fact that the Read 180 program is described by the What Works Clearinghouse as not having been researched on children with specific learning disabilities such that the Clearinghouse can report on its effectiveness or ineffectiveness with that population. In a very recent decision the Third Circuit [*Ridley School Dist. v. M.R.*, 680 F.3d 260 (3d Cir. 2012)] discussed an issue of first impression in the Circuit - the concept of peer reviewed research in the IDEA - noting that

The U.S. Department of Education ("DOE") issued an Analysis of Comments and Changes to the 2006 IDEA Regulations ("Analysis of IDEA Regulations"), 71 Fed. Reg. 46,540 (2006)" and responding to a request for "clear guidance on the responsibilities of States, school districts, and school personnel to provide special education and related services . . . that are based on peer-reviewed research," the DOE stated that "States, school districts, and school personnel must . . . select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available." 71 Fed. Reg. at 46,665."

¹⁶ *Derek B. v. Donegal Sch. Dist.*, 47 IDELR ¶ 34, at *142 (E.D. Pa. 2007).

The Third Circuit went on to state that

The agency made clear, however, that a student's IEP team retains flexibility in devising an appropriate program. The Analysis of IDEA Regulations explained that the changes implemented by the 2004 IDEA amendments and the 2006 updated regulations 32 "do[] not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services . . . that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs."

Likewise, with regard to placement, although the Parent testified in detail to her and her child's having experienced frightening and critical medical issues when Student was in infancy, neither she nor the rheumatologist nor the private school representatives [nurse and administrators] who testified offered compelling evidence of such current severe physical impairment that the size of the high school in comparison to the private school, and the greater distances at the high school in comparison to the private school, should be a determining factor. Although I carefully studied the pictures and pored over the floor plans, there simply was not enough evidence that a teenager who climbs stairs five times a day in school, who babysits toddlers, who rides a bike, who walks a dog, who goes to the mall, who swims on a team and who even occasionally plays softball is so impaired as to be restricted from attending the high school. Parents did not meet their burden of proof that the degree of Student's current Health Impairment should be the determining factor even if the IEP is appropriate.

The District's proposed program for Student and the District's proposed placement for Student for the 2011-2012 school year were appropriate. The proffered IEP contained all the elements required by the IDEA, and these elements were elaborated in quite sufficient detail. The proposed school building placement for Student likewise appropriately met Student's needs. The issue in this case is not whether or not the private school was *more* appropriate for Student than the program proposed by the District, but rather whether the District offered Student an appropriate program.

REIMBURSEMENT FOR IEE

The requested reimbursement for the independent educational evaluation must be denied as the District produced a very complete and thorough reevaluation of Student in all areas of suspected exceptionality, and each segment of its evaluation met every criterion set forth by the IDEA as quoted above.

§504 CLAIMS

The Parents suggested that they are asserting a claim that the District violated §504 of the Rehabilitation Act of 1973, 29 U.S.C. §793 *et seq.* Parents, however, adduced no explicit evidence of discrimination on the basis of disability, and did not argue that the evidence established a separate and distinct claim under §504 in addition to the District's alleged denial of FAPE. When parents assert identical claims under IDEA and under Section 504, the findings in favor of a district or the remedies assessed against a district are satisfied under the IDEA. *See West Chester Area School Dist. v. Bruce C., et al.*, 194 F.Supp.2d 417, 422 n.5 (E.D.Pa. 2002) (court found issue of whether student was entitled to Section 504 Service Plan to be moot because court found student eligible for IDEA services). To the extent that Parents intended to pursue a §504 claim, it is deemed abandoned or waived based upon the lack of evidence/argument.

Order

It is hereby ORDERED that:

1. The Parents are not entitled to tuition reimbursement for Student's private school placement for academic year 2011-2012, as the program and placement the District offered to Student was appropriate.
2. The District is not required to reimburse the Parents for the independent educational evaluation they procured for Student as the District's reevaluation was appropriate.

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

July 3, 2012

Date

Linda M. Valentini, Psy.D., CHO

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