

*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: C.N.  
ODR #3317/11-12-AS

Date of Birth:  
[redacted]

Dates of Hearing:  
September 18, 2012  
December 17, 2012

CLOSED HEARING

Parties to the Hearing:  
Parents

Wilson Area School District  
2040 Washington Boulevard  
Easton, PA 18042

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:  
Angela Uliana-Murphy, Esquire  
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Pen Argyl, PA 18072

John Comegno II, Esquire  
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January 10, 2013

January 19, 2013

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

## Background

Student<sup>1</sup> is a resident of the Wilson Area School District [District] who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the primary classification of emotional disturbance with a secondary classification of specific learning disability, and a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504], as well as the federal and state regulations implementing those statutes.

The current matter addresses the Parents'<sup>2</sup> assertion that during the 2011-2012 school year the District denied Student a free appropriate public education [FAPE] in the least restrictive environment through placement in emotional support programming. They are seeking compensatory education for that year.

Although only the 2011-2012 school year is at issue, previous school years are referenced in some detail in this decision to provide an essential understanding of the extent of Student's emotional disturbance and behavioral presentation for which the District needed to program.

## Issue

Did the District offer Student an appropriate program/placement for the 2011-2012 school year?

## Findings of Fact

### Background

1. Student is a late-teen aged resident of the District who is eligible under the IDEA for special education services, having been classified as having an emotional disturbance and a specific learning disability. [S-9]
2. Student transferred into the District on October 17, 2006. [NT 180; S-9]
3. Student's history of child welfare agency involvement and mental health issues is substantial. Student has received mental health treatment since the age of nine. [NT 30-34, NT 124-129; S-1, P-3]
4. Student has a history of demonstrating behaviors [redacted]. [NT 30; S-1, S-9]

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<sup>1</sup> 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.

<sup>2</sup> The plural Parents/Parents' is used throughout except when an action or statement is directly attributed to the Student's mother; the mother was the couple's primary contact with the District and acted on behalf of herself and her spouse.

5. Student has received at various times the DSM-IV<sup>3</sup> diagnoses of Mood Disorder, NOS, Oppositional Defiant Disorder, Parent-Child Relational Problem, Intermittent Explosive Disorder, and Bipolar Disorder. [S-10, S-11, P-3]
6. At the beginning of Student's 3<sup>rd</sup> grade year behavior rating scales completed by a teacher were clinically significant for aggression, conduct problems and attention problems. [S-9]

2008-2009 School Year – 8<sup>th</sup> grade

7. During the first two months of the 2008-2009 school year, when still a pre-teen, Student had been involved in several aggressive encounters with peers and school administrators, leading to suspensions. Student's behavioral episodes were reported as being in response to teacher directives or redirection. [S-12]
8. In November 2008 Student's Parents took Student to an emergency room for an evaluation, following which Student was placed through the mental health system at [Redacted], an inpatient mental health facility, to address aggressive behaviors predominantly demonstrated in the home. [NT 181, 249-250; S-12]
9. Student was then placed through the mental health system at [Redacted] acute partial hospitalization program from December 1, 2008 to December 10, 2008. [NT 181]
10. An IEP of January 8, 2009 notes Student's placement through the District in cooperation with the mental health system in a school-based partial hospitalization program under the auspices of [Redacted] Intermediate Unit, for the treatment of issues related to aggression, frustration and "harmful thoughts". Student remained in this placement for several months but finished the school year in a youth shelter-based placement. [NT 181, 251-253; S-12]
11. Placement in a school-based partial psychiatric hospitalization program is appropriate if there is a medical need documented by a psychiatrist, agreement from the mental health funding source, along with IEP team agreement that the primary educational need for a student at that time is related to mental health concerns. [NT 254]
12. Input from the Parents for a July 2009 ER included a report of continuing significant behavioral and mental health concerns for Student. [S-9]
13. In July 2009 the IEP team [District staff and Parents acting in agreement] determined that Student's "behavioral difficulties have become more pressing than [Student's] academic needs. [Student's] behavioral difficulties, hospitalizations, and mental health needs are impacting [Student's] educational performance. [Student] exhibits inappropriate behaviors under normal circumstances and these concerns have been present for a long period of time to a significant degree". [S-9]
14. In July 2009 the IEP team agreed to change Student's primary disability classification to Emotional Disturbance, with Specific Learning Disability as a secondary disability category. [S-9]

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<sup>3</sup> Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association.

2009-2010 School Year – 9<sup>th</sup> grade

15. In October 2009 Student was placed through a children and youth agency<sup>4</sup> at [Redacted], a residential facility [redacted]. [NT 30-31]
16. Student was shortly thereafter placed at [Redacted], a residential treatment facility, and remained there until discharge in June 2010. [NT 31; P-3]

2010-2011 School Year – 10<sup>th</sup> grade

17. Student began the 2010-2011 school year in the District and as of September 16, 2010 Student had been suspended for three days for violation of school policies. [S-15]
18. An IEP meeting with Student and Student's mother participating was held on September 16, 2010. The IEP provided for academic support in the form of Itinerant Learning Support and behavior support in the form of a Positive Behavior Support Plan [PBSP]. [S-15]
19. The PBSP addressed off-task behavior, inappropriate actions, use of profanity/negative comments, and noncompliance with rules/redirection. [S-15]
20. On November 17, 2010 Student was admitted, upon referral from the children and youth agency, to [Redacted] residential diagnostic treatment program. [S-10]
21. [The residential diagnostic treatment program] noted a history of two psychiatric hospitalizations for physical aggression [redacted], and reports that Student had been "defiant of all authority figures in [Student's] environment". [S-10]
22. Student's [residential diagnostic treatment program] admission Diagnostic Impression was Mood Disorder, Not Otherwise Specified; Oppositional Defiant Disorder; Parent-Child Relational Problem..The diagnosis included on Axis IV<sup>5</sup>, among other factors "Educational Problems: Not functioning well in school due to extensive behavior problems". [S-10]
23. In the [Redacted] diagnostic treatment program Student was "verbally disrespectful to peers and staff and displayed severe oppositional and defiant behaviors. [Student] displayed a low frustration tolerance and became easily irritated." [S-10]
24. On January 26, 2011, because of continuing significant behavior problems, [the residential diagnostic treatment program] transferred Student from its diagnostic treatment program to its intensive residential program where Student initially continued to be disrespectful and verbally abusive. Student engaged in a mutual physical altercation with a peer in early April 2011 and required being placed in a hold in order to stop the fighting and prevent injury to self or the peer. [S-10]

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<sup>4</sup> The record is unclear as to whether this placement was through the court system.

<sup>55</sup> The DSM-IV's diagnostic classification system provides for a Five-Axis Diagnosis. Axis IV describes Psychosocial Stressors.

25. After this fighting incident Student then began to display some progress in utilizing behavioral self-control and in communicating more effectively with others. [S-10]
26. In preparation for drafting an IEP [the residential diagnostic treatment program] conducted a Functional Behavioral Analysis [FBA], noting behaviors of concern in structured and unstructured settings to be making inappropriate comments to staff and peers [argues, threatens, calls names, curses, makes rude comments, uses obscenities]. The perceived function of these behaviors was to gain attention from others and to avoid, escape or postpone required activities. [S-16]
27. [The residential diagnostic treatment program] developed a PBSP for the IEP to address the behaviors identified in the FBA and also to address additional behaviors including responding inappropriately to redirection in academic and social situations [getting angry when told about errors on assignments, refusing to return to seat when told to do so, indicating not caring or not being concerned about consequences of behavior, performance, grades, report cards]. [S-16]
28. The May 20, 2011 IEP was written to be implemented at the [Redacted] intensive residential treatment center. It included among other things a structured classroom with small group instruction; positive, immediate feedback; small teacher/student ratio; crisis counseling/intervention services; weekly rewards for desired behaviors; frequent feedback/praise for specific behavior and use of coping skills; and providing an opportunity to be a staff/peer helper. [S-16]
29. However, Student was discharged from [the residential diagnostic treatment program] on June 22, 2011 with a discharge diagnostic impression that added Intermittent Explosive Disorder to Student's other diagnoses. [S-10]
30. Student's prognosis on discharge was "guarded" and Student was seen to be "lack[ing] insight into [Student's] behavior and the motivation to alter [Student's] behavior or way of responding to others". Student was also described as lacking empathy for others and tending to be reactive to other people. [S-10]
31. The [residential diagnostic treatment program] psychiatrist found medical necessity for a residential placement at the [redacted facility] upon discharge from [the residential diagnostic treatment program]. Student remained at the [Redacted facility] until late August, 2011, shortly before the beginning of the 2011-2012 school year." [NT 33-34; S-10]

#### 2011-2012 School Year – 11<sup>th</sup> grade

32. Student re-enrolled in the District in September 2011 and the Student, Student's mother, the District's guidance counselor, an emotional support teacher, other teachers, and/or the assistant principal in various combinations had discussions in person and/or over the phone about Student's program/placement. [NT 192-193, 340]
33. Student's past records from the District and available records from outside placements were reviewed during discussions between/among the various participants. [NT 278, 340]

34. Although she was not present during discussions with the Student or the Parents, the former Director of Special Services consulted with District staff who were working on the offered program/placement for Student. [NT 340]
35. The District considered the fact that Student had not been in a District school for any length of time since 7<sup>th</sup> grade, and also paid particular attention to the fact that Student's placement history and records consistently indicated that Student took a significant amount of time to establish some trust in staff with regard to taking direction from them. [NT 280]
36. The former Director of Special Services testified that the District looked at what "the previous IEP Team had determined to be an appropriate program for [Student] as well what [Student's] progress was in that program and how [Student] was presenting upon discharge from that program, so that a program could be developed at the [School District] to match as close as possible within our structure at a public school." [NT 277-278]
37. The District noted that the impression of the [residential diagnostic treatment program] psychiatrist upon both Student's admission to and discharge from residential treatment was congruent with the District's RR of July 14, 2009 in that Student's "emotional difficulty was predominant with regard to [Student's] special needs." [NT 278]
38. At the beginning of the 2011-2012 school year the District implemented Student's May 20, 2011 IEP developed by [the residential diagnostic treatment program], placing Student in the Emotional Support Program and implementing supports and services, including the PBSP, that as closely as possible mirrored what was provided in that IEP which had been written to be implemented in a residential treatment facility. Student's Parents were aware that the District was using the [residential diagnostic treatment program] IEP until a new one could be developed and did not object. [NT 147, 279-280, 282, 399-402]
39. The Parents did not express any concerns related to Student's placement in the Emotional Support Program in August or September 2011. [NT 282]
40. At the hearing, when asked what her "biggest concern" was during the fall of 2011, Student's mother answered that it was "[t]he fact that [Student] was so upset with where [Student] was at school." [NT 143]
41. The [residential diagnostic treatment program] IEP provided for a structured classroom with small group instruction and a small teacher/student ratio. The District's Emotional Support Program had two emotional support teachers and two aides for between four and eight students. [NT 281; S-16]
42. The emotional support teachers instruct differently than learning support teachers in that they are specifically targeting and explicitly addressing appropriate learning behaviors that would help the child to be successful in all settings. [NT 282]

43. The aides in the Emotional Support Program provide frequent feedback to the students, whether it be encouraging or corrective in nature, another modification that was listed in the [residential diagnostic treatment program] Positive Behavior Support Plan. [NT 282; S-16]
44. Already as of September 9, 2011 Student was “giving the teacher attitude” and seemed to be “the same” as when leaving the District the previous year. The family’s caseworker was in contact with the District about scheduling an IEP meeting in September. On September 16, 2011, Student began a three day out-of-school suspension for using profanity towards staff, truancy, disrespect towards staff, and failure to attend detention. Once the family’s caseworker reported the suspension to Student’s Guardian Ad Litem the court placed Student in [Redacted] for thirty days and the caseworker informed the District that an IEP team meeting was unnecessary at that time. Student remained at the court-ordered placement from September 20, 2011 through October 20, 2011 [NT 42, 278; S-20, S-49, P-1]
45. On October 27, 2011, the former Director of Special Services and the family’s caseworker joined other participants at a Children and Adolescent Service System Program (“CASSP”) meeting to consider whether placement in a therapeutic foster home would be appropriate for Student. However such a placement did not occur, and on November 2, 2011, responding to the Parents’ verbal notification, the District issued an Invitation to Participate in an IEP meeting. [NT 145, 192, 283-285; S-17]
46. The IEP meeting was held on November 10, 2011 with Student, Student’s mother, the family’s caseworker, the guidance counselor, an emotional support teacher and a regular education teacher in attendance. Although present, Student refused to participate in the meeting. [NT 285-286]
47. After considering placement in general education programming with supports, as well as placement in supplemental emotional support programming with supports, the IEP team decided to continue Student’s placement in the Emotional Support Program. The other options were not selected because Student’s “identified needs in the areas of self-regulatory behaviors” would prevent meaningful participation given the “social, sensory, and emotional stressors of the regular classroom setting during regular classroom instruction” and Student’s needs for ongoing behavioral monitoring, high rates of reinforcement, frequent opportunities for practicing learned behaviors/skills, and close supervision could not be accomplished in a less structured setting without impairing the educational setting and impairing Student’s peer relationships. [NT 378; S-17]
48. The Emotional Support Program was designed to provide Student with a highly structured program with ongoing behavioral monitoring. Under this placement Student would receive instruction in emotional support classes for biology and English, and attend learning support classes for math and world cultures. Student’s mother consented to and signed the IEP, approving the District’s program and placement. The Parents did not say that they did not want the IEP implemented, nor did they raise concerns regarding the number of emotional support classes versus the number of learning support classes. [NT 287, 307; S-17]

49. The November 2011 IEP provided for the use of the TALID, a structured behavior management system including data collection and progress monitoring. The TALID system addresses Task [student completing his/her task and participating appropriately in instruction]; Area [student is staying in his/her area and is ready for instruction]; Language [student is using appropriate language and interacting well]; Interactions [student is displaying appropriate interactions that are physically and verbally appropriate for the school setting towards both staff and peers]; Direction [the student is following directions and responding to teacher direction appropriately]. If a student exhibits the “TALID” behaviors, he/she is likely to be successful in a classroom setting. [NT 290-29; S-38]
50. Student’s IEP goal was to earn an average of 85% of possible points on the TALID sheets for 18 consecutive weeks. At the IEP meeting the District explained to Student that if the required percentages were met on the TALID sheets, the IEP team would consider program changes. [S-17, P-1]
51. Student’s IEP of November 2011 also included an individualized PBSP addressing Student’s specific observed classroom behaviors of using excessive inappropriate language; refusing to do work; sleeping during class time; and being rude to staff. [NT 402; S-17]
52. Strategies of the PBSP included allowing Student to return to an emotional support class, if necessary, or a support study hall if Student was getting upset; reminding Student that graduation was dependent on work completion; making directives clear regarding expectations in class and in the school. [S-17]
53. The Transition section of the IEP noted the goal of preparation for competitive employment upon completion of high school and of living independently. Although Student had expressed some interest in child care, it was difficult for District staff to “[pull] some of that information from [Student]”. Student was not willing to participate in a Career Cruising program to help identify interests, strengths and needs as they relate to future employment. [NT 296; S-17]
54. Although Student did continue to engage in aggressive and defiant behaviors that resulted in disciplinary actions including in and out of school suspensions [descriptions redacted] Student remained able to stay in the community and to attend public school rather than again being placed in a specialized facility. [S-22, S-23, S-24]
55. On March 6, 2012, the IEP Team met to discuss the Parents’ request that Student be removed from the emotional support classes. The IEP Team concluded that Student had demonstrated meaningful progress while participating in the two learning support classes, although still demonstrating behaviors that impeded progress in other classes. The IEP Team agreed to implement a revised schedule and monitor the level of behavioral/emotional support that Student required to be successful. Under the revised schedule, two emotional support classes, biology and English, were changed on a trial basis to learning support classes. Student’s mother signed the Notice of Recommended Educational Placement [NOREP] approving this modification of Student’s program. These modifications were able to be kept in place for the remainder of the 2011-2012 school year. [S-18]



56. As part of an agreed-upon Reevaluation, a psychiatric assessment was completed on April 13, 2012 and Student was diagnosed with Bipolar Disorder. The Reevaluation resulted in the finding that Student continued to be eligible for special education under the classifications of Emotional Disturbance and Learning Disability. [NT 313-324; S-11, P-3]
57. During the entire 2011-2012 school year Student remained in the District public school except for the early 30-day court-ordered placement. This, according to the former Director of Special Services, was possibly “the longest time Student had been in a public school setting in duration since 7<sup>th</sup> grade.” [NT 377-378]
58. Over the course of the year the District recorded Student’s class by class behaviors daily using the TALID system. The following is a chart showing Student’s progress as expressed in earned percentage of total possible points:

	9/11*	10/11**	11/11	12/11	1/12	2/12	3/12	4/12	5/12
TASK	61	43	63	58	64	59	85	90	98
AREA	78	89	93	85	89	84	93	96	97
LANGUAGE	59	77	85	85	85	91	95	96	96
INTERACTION	56	45	64	58	58	61	84	87	95
DIRECTION	63	43	61	58	59	59	82	89	95

\*Up to 9-20-11; \*\*Beginning 10-20-11

[S-27, S-28, S-29, S-30, S-31, S-32, S-33, S-34, S-35, S-36, S-37]

59. Student’s world cultures teacher who observed Student’s behavior on a daily basis, had conversations with Student on a daily basis, instructed Student on a daily basis, collected TALID data on a daily basis and implemented Student’s PBSP on a daily basis noted that as of May 2012 Student had “done a complete 180 from the start of the school year.” She attributed Student’s improvement to the fact that Student “was invested in [Student’s] program” and “was invested in [Student’s] success at this point.” [NT 405-406; S-11]
60. Student’s grades improved over the course of the year. The following chart reflects the grade for each subject for each marking period.

	MP 1*	MP 2	MP 3	MP 4
ENGLISH	44	61	93	97
BIOLOGY	28	35	59	98
WRLD CULTRS	32	88	90	86
MATH	99	91	94	93

\*Student was out for a 30-day court-ordered placement during this MP

[S-39]

61. Student’s grades improved because Student “began doing work, and [Student] began participating in class and doing what was expected of Student.” Student made some

decisions to participate in the program once Student “felt more connected to the staff supporting [Student].” [NT 378, 409]

### Legal Basis

#### 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*, having then to prove that Student’s program/placement during the year in question was not appropriate. In this matter the Parents also accepted the burden of production even though case law does not clearly assign same to either party. In this matter the evidence was not in equipoise as the evidence produced by the District was preponderant, so an outcome governed by *Schaffer* did not have to be reached.

#### Credibility:

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 Parents offered the family’s caseworker from the [Redacted] County Children Youth and Families agency as a witness. The caseworker holds a bachelor’s degree in criminal justice. [NT 29] The caseworker has been working with the family since May 2009. [NT 29] This witness testified that she is “not an educator” and is not familiar with what Student needs in the classroom. [NT 76-77] During the 2011-2012 school year, there were seventeen casework notes addressing school-related matters written by this witness, of which five were related to scheduling and similar matters.<sup>6</sup> [P-1] This witness did not have any direct contact with Student’s teachers other than during an IEP meeting in November 2011, and did not examine or discuss Student’s educational program or progress with the teachers. [NT 61-62] Although she was undoubtedly invested in the welfare of the family and Student, this witness’ testimony could

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<sup>6</sup> The entire body of casework notes for the family was requested, and the caseworker was directed to redact anything that did not directly relate to Student’s educational program/placement. The casework notes are contained in exhibits S-47, S-48, S-49, and S-50 and are very heavily redacted; there is nothing relevant to the 2011-2012 school year in these exhibits that is not already contained in P-1.

not be credited with a great deal of weight for purposes of deciding the issue in this matter given her lack of educational or experiential credentials in the area of general education or special education. Consistent with her role, she concentrated her efforts on monitoring the family's functioning, including Student's behaviors in the home and community.

Student's mother testified at the hearing and clearly conveyed the sense that she is a loving and caring parent who is making every effort to parent an adolescent with serious mental illness whose behavior is challenging. For the school year in question she was uncertain about the role of at least two of Student's teachers [NT 148]. Although she represented that she requested placement in another school district and alleged that the District declined for financial reasons following up with a telephone call, she was uncertain if it was her husband who took the call. [NT 196-197] Further, although she testified that she discussed her request with the family's caseworker, the caseworker's notes which recorded mundane details such as the scheduling of meetings did not include a record of a discussion such as the mother suggested [S-47; S-48; S-49; S-50], nor did the caseworker reference such a discussion in her testimony. The mother's testimony led to the impression that she very much wanted Student to be content and that this consideration rather than an actual disagreement about the program the District offered led to her seeking a change. As she presented no factual basis upon which the District's program could be deemed inappropriate, her testimony could not be credited with such weight as to exceed or even to counterbalance the District's evidence.

The District's former Director of Special Services who is now an administrator in another school district was accepted as an expert in the areas of delivery of special education services, development of IEPs, and provision of supports to students with emotional disturbance over the objection of Parents' counsel. The determination to qualify her as an expert in these areas was made because in addition to her bachelor's and master's degrees in special education and her employment in a special education administrative capacity in several districts, she also has a professional history that includes being a learning support teacher and an emotional support teacher. [NT 215, 223-231] Before she testified the hearing officer concluded that she had excellent experience upon which to base her opinions. [NT 246] This initial impression was solidly confirmed once she testified. During her lengthy testimony under direct and cross examinations, this witness gave reasoned, logical, and educationally sound explanations for the District's continued choice of placement for Student and the District's manner of proceeding with regard to meeting Student's needs. Her testimony was exceptionally persuasive and given significant weight by the hearing officer in deciding the issue in this hearing.

The testimony of the witness discussed above was supplemented by the testimony of one of Student's teachers. The teacher holds a bachelor's degree in education and special education and a master's degree in curriculum and instruction and has been a learning support teacher for 9<sup>th</sup> through 12<sup>th</sup> grades for ten years. She has worked with emotionally disturbed students transitioning into learning support from emotional support settings. [388-389] As Student's World Cultures learning support teacher, this witness had the opportunity to interact with Student daily during the year under consideration, and to observe Student's progress over the course of that year. She spoke from the perspective of a District staff person with direct experience with Student day-to-day, and with the TALID system being used to monitor Student's

behavioral/emotional progress. [NT 392,402, 406, 409] Her testimony was granted substantial weight in favor of the District’s position on the issue under consideration in this hearing.

### Special Education:

Free Appropriate Public Education: Students in Pennsylvania who are found eligible for special education are entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). The term “free appropriate public education” means *special education and related services* that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with [an] individualized education program [IEP]. 20 U.S.C. §1414(d); 34 C.F.R. § 300.347.

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

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 obligation to a special education 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.”

Benefits to the child must be ‘meaningful’ and meaningful educational benefit must relate to the child’s potential. *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3<sup>rd</sup> Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3<sup>rd</sup> Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

FAPE involves not only the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability, but also the location in which special education services are provided. As children should be educated in the least restrictive environment that is appropriate for the particular child, school districts must provide “a continuum of alternative placements . . . to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. § 300.551(a).

In *Oberti v. Board of Education of the Borough of Clementon*, 995 F.2d at 1204, 1214 (3d. Cir. 1993) the Third Circuit adopted a three-part test to determine whether the “least restrictive environment” requirement is met. The court must first determine whether education in the regular classroom, with the use of supplementary aids and services, can be achieved

satisfactorily, then must compare the educational benefits the child will receive in a regular classroom (with supplementary aids and services) with the benefits the child will receive in a special education setting and finally consider the disruptive influence, if any, the child may have upon the educational environment for other pupils and whether this disruption would erode the child's educational benefit.

### Discussion

This case concerns whether the program and placement the District provided to Student for the 2011-2012 school year was reasonably calculated to provide meaningful educational benefit. The District maintains that Student's program was appropriate and provided meaningful educational benefit, while the Parents believe that 2011-2012 was a "lost" year [NT 15] and are seeking compensatory education. The evidence falls overwhelmingly on the side of the District.

Receiving for 11<sup>th</sup> grade an adolescent who had spent only a handful of months in its schools since 7<sup>th</sup> grade, the District looked at all the available historical data and considering the significant needs of the Student chose a very appropriate placement to address serious behavioral and emotional difficulties which had persisted for years despite multiple placements that included inpatient psychiatric hospitalization, partial psychiatric hospitalization, diagnostic/treatment residential placement, intensive residential placement, and child welfare/court approved residential placement.

The Parent testified that her main concern, albeit not shared with the District in August/September 2011, had been that Student was not happy with the program/placement the District chose. Given the history of severe aggression in the home as well as in recent residential settings, this hearing officer can well understand that the Parents must have found themselves walking on eggshells following Student's return home. Nevertheless, Student's immediate dislike of the placement chosen by the District was predictable and perhaps inevitable considering Student's lengthy documented history of angry oppositionality to authority in all settings. In response to Student's dislike of the program which the District had chosen, the Parents began seeking a change, looking for either a less restrictive [learning support, general education] or a more restrictive placement [program in another school district]. [NT 368-369] However, the District was in a far better position than the Parents to hold firm against Student's displeasure, and carried out its responsibility to Student.

The District considered the factors discussed in *Oberti* when choosing the program/placement to offer Student in the context of Student's severe behavioral challenges that had not by any means been significantly ameliorated in previous residential placements. Taking into consideration that Student had just returned from lengthy mental health/behavioral health residential placements that had somewhat ameliorated but not by any means eliminated the manifestations of Student's emotional disturbance and family conflicts, the District's being able to program for Student in the same high school Student would have attended if not disabled offered Student the potential for great benefit if the placement was successful. The District carefully constructed an emotional/behavioral support approach to Student consisting of a structured behavior modification system, the TALID, all the elements of which pertained to Student's presentation,

as well as an individualized Positive Behavior Support Plan based on addressing behaviors/needs Student's teachers observed Student demonstrating on a daily basis. Within the strong emotional support structure Student was instructed in a combination of learning support classes and emotional support classes with the opportunity for a gradual loosening of restrictiveness. The District's choice was successful as implemented over the course of the year once regular attendance was established in late October 2011: it aided in preventing Student's being removed once again from the home and school community; it provided intensive behavioral/emotional support which, through daily monitoring, gave immediate feedback that allowed Student to see the consequences of appropriate vs. inappropriate behavior; it established a setting where Student could feel secure that adults remained in charge regardless of Student's dissatisfaction and attempts at manipulation; it enabled Student to begin caring about grades and schoolwork and thus contributed to timely graduation despite previous disruptions in schooling; and most importantly taught Student that Student could in fact achieve behavioral control and maintain appropriate behavior in a structured, normal, age-appropriate setting. The District's choice was initially risky in that it may have proved to be not restrictive enough, but by staying the course with Student, and not lowering its expectations or giving into Student's dissatisfaction the District provided Student the opportunity to achieve surprising progress in emotional self-regulation and investment in learning.

The fact that this Student remained in the District from late October 2011 to the end of the 2011-2012 school year, and to this hearing officer's knowledge as of the end of the hearing was still being maintained in the home and in public school, is remarkable. This hearing officer must completely concur with the opinion offered by the District's former Director of Special Services, that an emotional support placement is not inappropriate just because a sixteen year old "says I don't want to be in emotional support, I want to be in learning support" [NT 306]. The District's willingness to take the hard road and be patient while Student's behavior and hence accessibility to learning gradually improved is to be commended.

Order

It is hereby ordered that:

The School District offered Student an appropriate program/placement for the 2011-2012 school year.

The District is required to take no further action.

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

January 19, 2013

Date

*Linda M. Valentini, Psy.D., CHO*

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