

This is a redacted version of the original hearing officer decision. Select details may 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: AB
ODR #6795/06-07 AS

Date of Birth: xx/xx/xx

Dates of Hearing:
September 18, 2006
October 16, 2006
October 23, 2006
October 27, 2006

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

Lower Merion School District
301 E. Montgomery Avenue
Ardmore, Pennsylvania 19003

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:
Robert Lear, Esquire
Law Offices of Caryl Oberman
Grove Summit Office Park
607 A North Easton Road
Willow Grove, Pennsylvania 19090

Lawrence Dodds, Esquire
Wisler, Pearlstine and Talone
484 Norristown Road, Suite 100
Blue Bell, Pennsylvania 19422

November 3, 2006

November 17, 2006

Linda M. Valentini, Psy.D.

Background

Student is a xx-year-old eligible student residing in the Lower Merion School District (hereinafter District). He has been classified as having a specific learning disability and other health impairment. Student attends the [redacted] School (hereinafter Private School), a private school for children with learning disabilities. Prior to the start of the 2006-2007 school year, the District offered Student an IEP to be implemented at his neighborhood school, the [redacted] Middle School (hereinafter Middle School). Mr. and Mrs. (hereinafter Parents) believed that the program and placement offered in the IEP were not appropriate, and elected to keep Student at Private School for the current school year. They requested this hearing in order to obtain reimbursement for Student's tuition at Private School.

The Parents' Complaint and Hearing Request was received by the Office for Dispute Resolution on July 24, 2006, and the matter was originally scheduled to be heard on August 29, 2006. On July 27, 2006 the District filed a sufficiency challenge, and although the hearing officer found the complaint insufficient she permitted the Parents to amend their complaint. The Parents retained counsel and, issues of the complaint clarified, the parties held a Resolution Meeting on August 10, 2006. At the Resolution Meeting the parties agreed to hold another IEP meeting, and since all participants' schedules had been cleared for the August 29th hearing date, the parties asked if that date could be used for the IEP meeting instead. The hearing officer agreed as the parties hoped that a resolution could be reached. As that did not occur, the matter was scheduled for September 18, 2006, the next date available for all concerned. Subsequent hearing dates were scheduled when all parties and witnesses were available.

Issues

1. Did the Lower Merion School District offer Student an appropriate program and placement for the 2006-2007 school year?
2. If the Lower Merion School District did not offer Student an appropriate program and placement for the 2006-2007 school year, is the placement unilaterally selected by the Parents appropriate?
3. If the answers to the above two questions establish an entitlement to tuition reimbursement, does a consideration of the equities in any way reduce or remove the District's responsibility for tuition reimbursement?

Findings of Fact

Chronology

1. Student is a xx-year-old eligible student who resides in the Lower Merion School District.
2. Student attended private schools throughout preschool and Kindergarten, as follows: [redacted] Preschool 1 (one year), [redacted] Preschool 2 (two years), [redacted private sectarian] Kindergarten (one year). (NT 85-88)
3. Although after Student's first year in Kindergarten the Parents¹ requested an IEP from the District, they also explored [redacted], a private school for children with learning disabilities, and Private School, and settled on Private School. (NT 89)
4. Student entered Kindergarten at Private School, repeating the grade, as he previously had Kindergarten at [the sectarian school]. (NT 89)
5. At one point the Parents considered sending Student back to [the school age program at redacted Preschool 2], the parents' first choice of schools, as the school had initiated a program for children with special needs, but decided to keep him at Private School. (NT 95-96)
6. When he began at Private School Student displayed a high level of distractibility and disruptiveness in class and after trials of several drugs, a medication regimen was found to be successful in decreasing these difficulties. He currently remains on medication. (NT 91-94)
7. Although he began with a different psychiatrist, Student has been with his current psychiatrist for the past three years, since June 2003. Although his medication regimen was difficult to establish he has been consistently receiving medication and currently receives a stimulant (to address ADHD) and an anti-anxiety agent. (NT 94, 211, 216,)
8. The Parents again requested that the District provide an IEP and, on November 16, 2004, pursuant to a prehearing arrangement, the Parents and the District came to an agreement regarding partial support of Student's placement at Private School for the 2004-2005 and 2005-2006 school years. (NT 89-90, 96; S-2)
9. The Agreement specifically states that Private School would not be considered the "then-current-placement" at the beginning of the 2006-2007 school year. (S-2)
10. By letter dated December 5, 2005 the Parents requested that the District fund Student's placement at Private School for the 2006-2007 school year. The District responded by letter dated December 8, 2005 declining to pay the tuition and notifying the Parents of its intention to re-evaluate Student. (S-7, S-8)

¹ "Parents" is used throughout, although only the mother testified.

11. In response the District requested and received permission to conduct a reevaluation. The Permission form was dated January 12, 2006 and was received by the Parents on January 18, 2006. The Parents signed the Permission Form on January 24, 2006 and the District received it back on January 25, 2006. (NT 98-99; S-8, S-9, S-10)
12. At some time prior to February 15, 2006 the Parents signed² a Tuition Contract with Private School wherein they agreed to pay 65% of the tuition by August 1, 2006, with the remainder being due by January 1, 2007. The Parents opted not to participate in the Tuition Refund Plan. (NT 148; P-5)
13. The District's Reevaluation found that Student was eligible for learning support services with speech and language support, requiring specially designed instruction to address needs in reading, written expression, mathematics and organization and study skills. (S-16)
14. Student was classified as having a specific learning disability and other health impairment. (S-16)
15. The report was transmitted to the Parents with a cover letter dated April 26, 2006. (S-17)
16. By their signatures the Parent indicated their agreement with the District's report. (S-16)
17. An IEP meeting was held on May 16, 2006. The Parents sent the May IEP to the Director of the Lower School at Private School, to Student's psychiatrist and to a private psychologist who had evaluated Student in 2004 and asked them to "look at it with an eye toward whether Student could succeed at Middle School in this program". (NT 116, 245, 248-249)
18. At the May IEP meeting the Parents did not share information regarding behavioral concerns Student was showing at Private School, and other than completing the BASC did not specifically share this information during the District's evaluation. (NT 196-197)
19. After the IEP meeting the Parents had ample opportunities to share any of their concerns or the concerns of their experts (Director of the Lower School at Private School, psychiatrist, private psychologist) with the District but did not until just before the August IEP meeting. They did not receive and thus could not share the psychiatrist's report until sometime in September. (NT 197-199)

² Only one page of the contract was entered into evidence, such that the actual signature page showing the date of signature is missing. (P-5)

20. A NOREP dated May 16, 2006 was mailed to the Parents postmarked May 18, 2006. The NOREP called for placement in part-time learning support at Middle School beginning on September 5, 2006. (NT 133; S-22, S-23)
21. The Parents signed the NOREP as unapproved on June 15, 2006 and mailed it on June 17, 2006; the District received the document on June 24, 2006. The Parents' reason for disapproving the NOREP was "The proposed program and placement do not provide the structure and intensity of instruction that Student needs. We intend to re-enroll Student at Private School and request that LMSD pay tuition". (NT 133; S-22, S-23, S-28)
22. The Director of the Lower School at Private School prepared a six-page document titled "Comments Regarding the Proposed Individualized Education Program for Student" critiquing the May IEP. The document was dated June 26, 2006. This document was not shared with the District until just before August 10, 2006. (NT 157-158; S-26)
23. On July 1, 2006 a credit of \$2,230.00 was posted on Student's account at Private School. The Parents paid an additional \$12,865 to Private School pursuant to an August 3, 2006 statement marked "Past Due". (P-5)
24. A report by the private psychologist was emailed to the District on August 8, 2006. (NT 157; S-35)
25. Student's March and June report cards and annual report were sent to the District with a cover letter dated August 8, 2006. (NT 158-159; S-38)
26. A second IEP meeting was held on August 25, 2006 or August 29, 2006³, pursuant to a Resolution Meeting held earlier that month. Both parents attended the meeting. (NT 139, 336)
27. The Parents received the final August 2006 IEP on the Saturday before Labor Day, September 2, 2006. The District started school on Tuesday September 5th. (NT 641-642)
28. The Parents again sent the IEP to the Director of the Lower School at Private School, to Student's psychiatrist and to the private psychologist. (NT 142, 589)

Evaluation Findings

29. The District's reevaluation was conducted over four or five sessions by a school psychologist, a speech therapist and an occupational therapist. (NT 99)
30. When District personnel asked to observe Student at Private School for purposes of conducting the re-evaluation, they were informed by Private School that the policy set forth by the school's Board of Directors was that such observations can

³ The record contradicts the hearing officer's file.

- only occur on Visiting Day. Visiting Day at Private School is a typical day but it is disrupted by the presence of other people who may have a tour and look in on the children as they're doing their activities. The Parents were not aware of this restriction. (NT 81-82, 152)
31. Cognitive Skills: The Reevaluation Report (RR) dated April 25, 2006 noted that on the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) Student received a Full Scale IQ score of 88 (83-93)(Low Average-Average), with Index scores as follows: Verbal Comprehension 98 (91-105)(Average); Perceptual Reasoning 90 (83-98)(Low Average to Average); Working Memory 77 (71-86)(Borderline to Low Average); Processing Speed 94 (86-104)(Low Average to Average). (S-16)
 32. Student's strength was identified as being in the area of verbal comprehension; a need was identified as being in the area of working memory. Specifically Student has difficulty sequencing auditory information in memory. (S-16)
 33. Memory Skills: The Test of Memory and Learning (TOMAL) was administered to provide a more detailed assessment of Student's memory ability. He achieved a Verbal Memory standard score of 115 (High Average), a Nonverbal Memory score of 94 (Average), and a Composite Memory Index of 105 (Average). (S-16)
 34. Student shows difficulty in memory tasks wherein he is required to sequence both verbal and visual information. (S-16)
 35. Achievement: Academic Achievement was assessed through the Wechsler Individual Achievement Test – Second Edition (WIAT-II). Student's age-based scores/grade-based scores were as follows: Word Reading 89/97; Pseudoword Decoding 98/97; Reading Comprehension 104/106; Reading Composite 94/97; Numerical Operations 81/83; Math Reasoning 71/77; Mathematics Composite 74/78; Spelling 81/83; Written Expression 100/102; Written Language Composite 90/93; Listening Comprehension 102/105; Oral Expression 94/96; Language Composite 96/100. (S-16)
 36. Student's skills in reading, written expression and language were in the broad average range; his area of need was mathematics. (S-16)
 37. Behavior: On the Behavior Assessment System for Children (BASC), the Parents consistently endorsed a greater extent of difficulty than the Teacher, resulting in an elevation to clinical concern on five of the thirteen areas reported. On two additional areas, the Parents and the Teacher both endorsed items that combined to elevate the area to clinical concern: Conduct Problems and Atypicality. (S-16)
 38. On the BASC Adaptive Subscales, none of the Teacher's T-scores resulted in a clinically significant concern, while three of the Parents T-scores reflected clinical concern. (S-16)

39. Overall Student's areas of behavioral concern and adaptive concern are more pronounced in the home than in the school settings, with the Parents reporting that this historically has generally been the case. (S-16)
40. Speech/Language: Student's speech/language competencies were assessed through the Comprehensive Assessment of Spoken Language (CASL) which assesses comprehension, expression and retrieval, Standard scores were as follows: Antonyms 84; Grammatical Morphemes 87; Sentence Comprehension 90; Nonliteral Language 101; Pragmatic Judgment 96 (106)⁴, Core Standard Score 91; Inferences 96; Ambiguous Sentences 95. These scores range from Low Average to Average. (S-16)
41. Student's language was further assessed with the Clinical Evaluation of Language Fundamentals –4 (CELF-4). Standard scores were as follows: Recalling Sentences 11; Word Classes – Receptive 5; Word Classes - Expressive 6; Word Classes – Total 6; Word Definitions 8; Understanding Spoken Paragraphs 6; Number Repetition 8. (S-16)
42. On the CELF-4 Student's difficulties with Word Classes was related to weaknesses in vocabulary development. (S-16)
43. Occupational Therapy: On the Beery-Buktenica Developmental Test of Visual-Motor Integration Student scored at the 45th percentile on the Visual-Motor Integration subtest, at the 55th percentile on the Visual Perception subtest, and at the 55th percentile on the Motor Coordination subtest. (S-16)
44. Student typed at a functional speed, slightly faster than he printed in longhand. (S-16)

The Proposed Program and Placement

45. The proposed IEP contains annual goals and objectives for reading that are specific and measurable, addressing fiction and non-fiction, factual and inferential information, and vocabulary development. (NT 518-519; S-43)
46. Based on Student's difficulty with working memory, the District's psychologist finds that a very direct, intensive type of reading instruction with an optimum teacher: student ratio is necessary to build Student's decoding and comprehension skills. The psychologist also opined that frequent "motor breaks" would benefit Student. (NT 301-303)
47. Student's reading program would be delivered by a reading specialist five days a week for 45 minutes a day in a small group of six students. (NT 519-520)

⁴ Score reported differently on two separate pages of the report. One is erroneous. (S-16, pp 10 and 12)

48. Reading instruction would be done using materials from the Wordly Wise and the MegaWords programs. The programs are appropriate for Student's age and instructional needs, and provide a systematic multi-sensory approach based on reading research. (NT 520-534)
49. MegaWords is based on the same principles as Student's current reading program at Private School, the Wilson program, and therefore would not require a drastic change from the type of instruction to which he has become accustomed. (NT 531-532)
50. The Director of the Lower School at Private School testified that the MegaWords program is a perfectly good program that is used at Private School for some students although it does not have as much of the practice and intensity that the Wilson program has. (NT 626-628)
51. Student's math needs would be addressed in a small class with 11 students and four adults, two of whom are certified teachers, one of whom is working towards certification and the other of whom does not hold certification. (NT 340)
52. Student's writing needs would be addressed in the learning support class English class where there are thirteen students and four adults, two of whom are certified teachers, one of whom is working towards certification and the other of whom does not hold certification. The students are 6th graders, working on between the third and fifth grade levels in reading and writing. (NT 420-430)
53. Student's needs in the area of organizational skills, study skills and work habits would be addressed in lab class, where there are three students taught by the special education teacher. During this class the teacher also reinforces what the students are getting in their content areas, history for example. (NT 436-437)
54. Student would receive instruction in history in a class of 20 students, co-taught by a regular education teacher and the special education teacher whom Student has for his English, math, writing and lab instruction. An assistant is also in that class, making a total of three adults. (NT 441-443)
55. Student's computer class has 11 students with three adults. (NT 343)
56. The Director of the Lower School at Private School testified that a six to one student to teacher ratio would provide an appropriate opportunity for Student and that small group instruction is appropriate for Student as long as it is differentiated instruction. (NT 65, 72)
57. Student would have one special education teacher for a minimum of four periods a day, possibly five if she were his advisor. Student will also have a reading specialist and a Wilson instructor. (NT 370-379)

58. Student's specials would be taught by specialty teachers, and there may be an additional teacher for club if he were not placed in a club with someone who was already his teacher. Student would also have a special education counselor (social worker), access to the regular education counselor, and a speech therapist. (NT 370-379)
59. Student would receive one thirty-minute period a calendar week of direct speech/language services delivered in his learning support English period, at least once a month consultation for 30 minutes by the speech therapist to the regular education teachers, and a once a month consultation with the special education and the reading teachers to plan classroom strategies related to vocabulary development and language processing (the latter consult having been added at the August IEP meeting). During the direct service portion the speech therapist would lead the class and work on skills Student needs with the whole group. (NT 393-394, 403-405, 407, 410-411; S-43)
60. Vocabulary development to assist Student in his academic subjects, such as science, would be partially provided by the speech therapist in conjunction with the special education teacher, the reading teachers and regular education specials teachers. (NT 394)
61. The speech therapist will also focus on development of Student's general vocabulary such as synonyms, antonyms and multiple-meaning words. (NT 398)
62. Should Student begin to experience some anxiety during the day there are staff would could go out of the class with him and talk about what's going on. (NT 445-446)
63. The school social worker (special education counselor) would be available to Student on an as-needed basis as well as holding a meeting weekly for 30 minutes with him to assist with anxiety or behavioral concerns. (NT 503-504)
64. At the August IEP meeting, held to address concerns about the May IEP that had been raised by the Director of the Lower School at Private School. These concerns included providing Wilson reading instruction, putting a more immediate Behavior Plan into place, size of class, and scheduling. (NT 336-337; S-44)
65. At the August IEP meeting, in lieu of taking a foreign language, two periods a week (42 minutes each) of individual Wilson instruction were added to Student's proposed program. The Wilson instruction would be delivered someone who has been trained in the method by the District's Wilson trainer. Wilson has been provided at Middle School for the last ten years. (NT 306-308, 316-317, 333, 372-373, 540-541; S-21, S-43)

66. The District's process is to assess a student's technology needs through the SETT (Student, Environment, Task, Tools) approach which in conjunction with the IEP team begins with an initial meeting that results in an action plan that leads to systematically trying out technologies, followed by ongoing revisions of the action plan. The District is able to provide the brands as well as the types of technology that Student currently has available at Private School if the SETT process determines that these meet Student's needs initially and over time. (NT 548-562)
67. As the Parents and the Director of the Lower School at Private School had concerns about the District's taking a two-week baseline before putting a Behavior Plan in place, at the August IEP meeting it was decided to put a tentative plan in place during the two-week data collection period and that Dr. S's [psychiatrists] written report, when it was received, would be taken into consideration. (NT 361-362)
68. The District would address behavioral concerns through a supportive Behavior Plan to give him the tools and strategies to keep his behavior in check during classroom instruction. The Behavior Plan was to be supplemented by counseling support services and social work services to the family. (NT 305)
69. Student's special education teacher would be responsible for maintaining the behavior plan. (NT 449)
70. Student's specially designed instruction includes preferential seating that is class dependent, modifications of materials, tests and homework for all subjects, a positive reinforcement system for appropriate behavior, and preview and review of content area materials. (NT449-453; S-43)
71. Student would have about one hour of homework a night. (NT 461-463)
72. Middle School has about 840 students ranging from 11 years old to 14 years old, in grades 6th through 8th. (NT 330)
73. The school is set up to make a smaller environment for students. All the 6th grade classrooms are on one floor of the building so they do not have to travel long distances to get to their classes. There are four teams of four or five teachers dividing up the approximately 250 6th graders. Currently one team has 44 students and one has 75 students. Student would be assigned to a five-person team. (NT 330-331)
74. The lunchroom is located three floors down from where Student's academic instruction and advisory would be held, and PE and music are two floors down. (NT 370)

75. Students follow two schedules, and each schedule is an eight-period schedule or a nine-period schedule. Students are given a monthly calendar, every room has a projector and every morning the students are shown what day it is, the schedule is posted on the classrooms' boards, and the office provides this information as well. (NT 333-335)
76. In a typical year, four or five special needs students transition from private schools to Middle School. The District is familiar with the school from which these students come. The District provides transition services to these students, making sure that they work with the sending schools to learn the students' needs. (NT 364-365)
77. Over the fourteen-year experience of the individual who just left the principalship at Middle School, a position he held for six years, although some students take a little longer to transition, transition is an expected part of what the District does, and successful transition has been the outcome. (NT 365-366)
78. Transition is partly accomplished through daily contact between the special education teacher and the parents, possibly a behavioral contract, frequently a communication book, contact with the respective special education counselor (school social worker) anytime during the day and/or contact as needed with the regular education grade counselor. (NT 366-368)
79. The special education teacher identified an aspect of the program that would assist Student in transitioning to Middle School, namely that the adults (aides and assistants) all have the same schedule and move with most of the students as a group if classes change. (NT 454-455)

The Parents' Concerns

80. After reading the District's reevaluation report, the Parents' "biggest concern was being in the size school that he would be attending and what the classroom size would be (and) how they would actually react to Student's behavior, especially because at Private School, you know, they work with the child. They send a note home. You work things out". (NT 100)
81. The Parents were concerned about how tolerant the District's middle school would be of "some of Student's antics". (NT 100)
82. As Student had, for the past two years, been making one year's progress in a year's time (at Private School), the Parents were hopeful that that would continue and wanted him "in a place where that could continue". (NT 100)
83. During a two-hour observation, Student's mother observed a couple children slouched in their chairs, one boy wearing a hat, two students getting up to get tissues while the teacher was reading, a telephone call coming into a classroom, food (lollipops) being given as a reward in a classroom, and children sitting up on

- their legs with their knees up on the desks essentially in different postures (than you would see at Private School). She felt that Middle School had a “much more relaxed” atmosphere than Student was used to at Private School and that he would find it distracting. (NT 119-126)
84. After the August IEP meeting the Parents continued to have concerns about the District’s offered program. They were concerned about Student’s having to carry around a behavior chart from class to class, although the District suggested that it could be the teachers’ responsibility to transmit the sheet. (NT 140, 179)
 85. The Parents were concerned with the type of reward (drawing time) that would be offered to Student. (NT 140-141)
 86. The Parents believed that if Student brought home a weekly sheet indicating misbehaviors it would not be “a self-esteem builder”. However, Student also had a behavior plan at Private School the previous school year, with reporting to the Parents by email, and “Student could tell by the look on (his mother’s) face (when he came in from school) whether (she’d) received an email or not”. (NT 141, 178-179, 181)
 87. The Parents were concerned that Student would only be offered Wilson two days per week. (NT 142)
 88. The Parents were concerned that the IEP did not provide Student with the kind of technology he uses at Private School. (NT 143)
 89. The Parents were concerned that the District estimated Student would have an hour and a half of homework at night as they thought it would take him twice as long to accomplish because of his lack of desire to do homework and his difficulty transitioning from subject to subject. Currently he finishes homework in about an hour. (NT 145-146)
 90. The mother testified that she and her husband based their decision to have Student attend Private School for the 2006-2007 school year upon two things: “How Student felt when he visited (Middle School)” and “what my experts, quote, unquote, are saying about his ability to cope and attend and learn at the school, and that’s primarily – and my own observation”. (NT 173)

The Private Psychologist’s Concerns

91. The Parents engaged the private psychologist with whom they had consulted in 2004 to observe the Middle School program and to interview Student. (NT 250; S-36)
92. The private psychologist believes that the District’s special education program is among the best available, and on her visit to the school regarding Student found

- the science classroom/teacher very impressive vis a vis its organization. (NT 252-253)
93. The private psychologist thought that although the more relaxed atmosphere of the language arts class would be good for some students, for Student it might be out of sync with what he was accustomed to at Private School. The observation was done on a day that may have been atypical due to a special event. (NT 254-255, 594)
 94. The private psychologist spoke with the reading teachers and found that they took a lot of time to assess the needs of their students, and to match the curriculum to these needs. (NT 257)
 95. The Private psychologist, reviewing the August IEP thought there were elements of the program that were excellent and some facets of the program were exactly what Student needs. She believed the program as a whole to be inappropriate because the scheduling would be problematic in terms of changing classes. She was concerned about how the Wilson program would be implemented. She was concerned about Student's being in an environment where he would not have the social skills to interact with students without special needs and that he would become anxious because he would feel different. (NT 591-592)
 96. The private psychologist was concerned about Student's ability to transfer from class to class and that the schedule would confuse him. (NT 573-574)
 97. Because of his language impairment and working memory deficits the private psychologist thought that at the beginning of the school year it would be difficult for Student to negotiate his schedule, and remember his assignments and his books and that being in an unfamiliar environment would make him anxious. (NT 581)
 98. The private psychologist testified that even a person who is very impaired has some skills to learn new routines although it may not be easy to learn them. She believes that Student can learn new routines with difficulty. (NT 599)

The Director of the Lower School at Private School's Concerns

99. The Director of the Lower School at Private School testified that her "biggest concern (with the May 2006 IEP) was the size of the student body (at Middle School) as Student gets very anxious when there are a lot of students, and he gets very obsessive of he's not sure what the routine is". (NT 36)
100. The Director of the Lower School at Private School testified, concerning the August 2006 IEP, that the IEP team "did a very good job of setting goals and including a lot of ideas that weren't in the first (May 2006) IEP".

101. The Director of the Lower School at Private School testified that “the writing goals were very, very good but using a graphic organizer was something Student couldn’t do on his own” and that she “didn’t find much that was related to assistive technology” as “Student does a minimum output in written work unless he’s using technology and is guided into exactly how he has to use it”. (NT 55)
102. With regard to the August 2006 IEP, the Director of the Lower School at Private School testified that the only parts she was concerned about were the “six day (schedule) rotation” and “the number of students who would be right around him because he wouldn’t be in a self-contained classroom”. (NT 54)
103. The Director of the Lower School at Private School testified to her belief that Student “needs to have a self-contained class with a teacher who can follow him and monitor him throughout the day...(as he) can easily become distracted, anxious and shut down if he is in a confusing environment, if it’s noisy, if there are a lot of transitions”. (NT 36)
104. The Director of the Lower School at Private School has not observed the learning support [program] at Lower Merion’s schools in recent years. She is not familiar with the qualifications of the instructors in the program. (NT 79-80)

The Psychiatrist’s Concerns

105. Student’s prescribing psychiatrist opined that the issue is not the number of teachers Student would have at Middle School, “the issue is not the number (of teachers) but in fact the newness and difficulty Student has adapting to change”. (NT 230)

Parents’ and Parents’ Experts’ Description of Student

106. When Student becomes anxious he engages in behaviors such as naming something repeatedly or inserting the same word repeatedly into a conversation. (NT 46)
107. Student picks at his lip and at scabs that happen to be on his body. He peels off labels and peeled the covering off his skateboard. He chews on a pillowcase when he goes to bed and tries to take this pillowcase with him in the car. (NT 144-145)
108. Student has seen a psychologist for approximately three sessions since January 2005. (NT 160-162’ S-42)
109. If Student were to attend school in the District his ongoing psychiatric medication management and the psychiatrist’s consultation with the school would continue providing the Parents provided their consent. (NT 239)
110. At Private School Student does not receive any type of regular individual counseling, although the class meets with a counselor as a group. (NT 192-193)

111. Last year Student “did not have a good behavior year”. The teacher needed to confiscat(e) the scissors from his pencil box because he was cutting up a lot of things that he shouldn’t be cutting up”, he “mutilated and contorted” a plastic figure to the point “where it was useless and (the teacher) had to get rid of (it)” and approached a dog that was being walked in the neighborhood surrounding Private School when he was told not to do this. (NT 102, 136)
112. During the last year his Private School teacher called and asked the Parents not to send him on a class trip. The teacher was concerned that Student would “start eating grass” or “take the turtles out of the pond and embarrass the class” as the venue was a private club. With some resistance from the teacher, Student was allowed to go on the trip with his father in attendance and Student’s “behavior was good”. (NT 133-135)
113. Although on the BASC and on the Teacher Narrative Report the Private School teacher and the Parents endorsed items such as bullying and inappropriate physical contact, when the District psychologist spoke with the Private School teacher and the Director of the Lower School they reported that serious instances are rare and physicality is largely inadvertent. (NT 317-318, 320)
114. The Private School teacher told the District psychologist that Student had to be engaged and redirected to stay on task, that he had a tendency to be oppositional, need coaching to follow the rules, and was very remorseful. The only “property destruction” as noted by the teacher referred to ripping up papers in the classroom. (NT 321-324)
115. The Director of the Lower School at Private School described Student to the District psychologist as a very “manageable child” in that setting, behaviorally. (NT 320, 324)
116. The District psychologist sensed more of a concern at home with Student’s behaviors, and she and the Parent agreed that social work services to address problems Student presented in the home could be offered through the IEP.
117. Student “loves his school and would like to stay there”, although during the previous year his behavioral plan was not working and has been changed. (NT 187-190)
118. When the private psychologist interviewed Student for about 20 minutes Student said that he wanted to stay at Private School, that he thought he wouldn’t fit in with the students at Middle School, that he was concerned about the scheduling demands, that he was concerned about getting to know the teachers and that he was anxious about switching schools. (NT 574-575, 606)

119. Student was particularly worried about the schedule, and shifting from class to class, remembering where to go. He was also concerned if the work demands would be too difficult for him and concerned about the in class and homework assignments. (NT 575-576)
120. If Student attended Middle School his homework would begin earlier as he would get home earlier and there would be more time at home to do his homework. (NT 170)
121. The private psychologist believes that in order for Student to learn the new routine of changing classes he needs to have the task broken up into smaller parts and have a multisensory support system and an adult or peer buddy to accompany him until he learns the schedule. (NT 601-602)
122. Both the Director of the Lower School at Private School and the mother noted that Student is capable of learning a new routine if he is given supervision and guidance. NT 69-70, 176-178)
123. Student attends [religious] School and has a difficult time as he has trouble with learning a second language. His behavior in [religious] School is good during the twice-weekly classes that range from two and quarter hours to three and a quarter hours in length. (NT 204-205)
124. Student's [religious] School classes have 16 students and one teacher but Student has an aide. Student has just begun private lessons as well. (NT 206, 644)
125. Student attended 3-hour long classes at the [redacted] [Art] College on Saturday afternoons from February to May 2006. The classes contain from 10 to 14 students with one teacher. The students were ages 9 to 12 and in grades four through six.⁵ There were nondisabled students in Student's art class. (NT 164-167, 630, 636)
126. At the beginning Student was anxious about the [Art College] classes, worried about the ID and the security and finding the classroom. (NT 647-648)
127. Student enjoyed the classes, succeeded in them and made some friends with whom he has had some phone contact. He received his medication at snack time, about halfway through the class. (NT 168)

Credibility of Witnesses

A hearing officer is specifically charged with assessing the credibility of witnesses. Student's mother testified, and it was clear that the Parents are extremely caring and concerned about their son's best interests. Her testimony was credible and candid, and

⁵ Student was at a fourth grade level at Private School but age-graded at sixth grade at the time. (NT 630)

clearly reflected her beliefs about what Student requires to be successful in school. The private psychologist's testimony was measured and considered. She gave evidence of not reaching beyond the limits of her current competencies (NT 595-597), but clearly was looking for what she thought was the best situation for Student at this time. Her testimony was given limited weight, however, as she had very little contact with Student and could not provide any clinical information that would establish that Student would not be able to have a successful transition to Middle School. The Private School witness was credible and provided a comprehensive description of the Parents' unilateral placement. Her concerns about the District's program were based upon her knowledge about Student at Private School and not upon a study of the program at Middle School and therefore was of limited value as to the first prong issue. The psychiatrist's testimony was given virtually no weight, as his testimony tended to make predictions about Student's responses in the future based on scant knowledge of the District's program. Additionally he conveyed a lack of precision and a lack of regard for thoroughly grounding his facts, for example testifying about the number of teachers Student would have before he knew about the number by looking at the IEP, then saying the concern was not the number but the newness and Student's problems adapting to change. Most striking was his testimony that he had reviewed the August IEP as of Sept 1st when he wrote his letter, when in fact the Parents did not even receive the August IEP until September 2nd. (NT 236-237) The District's witnesses were all credible and their testimony served to complete the picture of the program and placement being offered to Student.

Discussion and Conclusions of Law

Legal Basis

Special education programming and placement issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004).

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. 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). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This was a tuition reimbursement case. Therefore in this hearing the Parents bore the burden of proving 1) that the District's proposed program and placement did not offer Student FAPE; and if they met their burden on that issue, that 2) the placement they unilaterally selected for Student was appropriate. If the Parents met their burden on both these counts, then the hearing officer would be required to examine the equities in the case to see if the District's liability would be reduced in any way.

Having been found eligible for special education, Student is 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). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (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)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that "Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. Additionally, the court in Polk held that educational benefit "must be gauged in relation to the child's potential."

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)

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. 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). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a "free appropriate public education as defined by the Act." Polk, Rowley. The purpose of the IEP is not to provide the "best" education or maximize the

potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

The 1999 implementing regulations of the IDEA, which were authoritative as regulations for the IDEA at the time events in question transpired, provided that:

At the beginning of each school year, each public agency shall have an IEP in effect, for each child with a disability within its jurisdiction. Each public agency shall ensure that an IEP is in effect before special education and related services are provided to an eligible child under this part...”. 34 CFR Section 300.342(a)(b)(1)(I).

Parents who believe that a district’s proposed program is inappropriate may unilaterally choose to place their child in an appropriate placement. The right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in Burlington School Committee v. Department of Education, 471 U.S. 359, 374 (1985). A court may grant “such relief as it determines is appropriate”. “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” Burlington, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

In 1997, a dozen years after Burlington the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

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

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

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court’s test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district’s proposed program was appropriate; 2) if not, whether the parents’ unilateral

placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Discussion:

Although the District's only obligation is to provide Student with an educational program and placement that offers him a basic floor of opportunity, the program and placement offered to Student far exceeds this statutory requirement. The District performed a thorough, comprehensive multidisciplinary evaluation, and in May 2006 proposed an IEP that exceeded the standard for appropriateness, further refining it in August 2006 in response to the Parents' concerns and those expressed by the Director of the Lower School at Private School. The IEP of May standing alone, and the August IEP which provides additional supports in response to the Parents' concerns, contain the elements required by law and spell out the program Student would receive very clearly, a program that offers Student the opportunity to derive meaningful educational benefit in the least restrictive environment.

A very careful study of the testimony of Student's mother and the Parents' other witnesses has convinced this hearing officer that their only real objection to the District's program and placement is that it is not Private School, and that therefore Student will be required to go through a transition period that could be anxiety-provoking for him. The District has many supports in place to assist Student with this transition. Although there is clearly a place along the continuum for private school placements wherein only disabled children are educated, this hearing officer is unconvinced that either the nature or the severity of Student's disability warrants such a restrictive option. Student's cognitive and academic skills are approaching age-level as assessed by standardized tests. Although he clearly has a generalized anxiety disorder, this is apparently being managed by medication alone; he has received only three psychotherapy sessions in the past two years and receives no individual counseling at school. Student successfully interacts with his peers in religious school and had a successful experience, albeit with some initial anxiety, at his mainstream classes at [redacted] [Art] College. If Student's family wishes to continue him in private school, in a setting designed for disabled students that is certainly their prerogative. However, if they avail themselves of their right to use the resources of the public schools in their community, Student is entitled by federal and state law to be educated in the least restrictive environment appropriate to meet his educational needs.

This hearing officer finds that for Student the least restrictive appropriate environment is that offered at the District's proposed program and placement at Middle School. As the District has offered an appropriate program and placement, in fact one which exceeds the standards for appropriateness and takes nearly all the concerns of the Parents and their experts into consideration, the issues of whether the Parents' unilateral placement is appropriate and an examination of the equities is not necessary.

Order

It is hereby ordered that:

1. The Lower Merion School District offered Student an appropriate program and placement for the 2006-2007 school year.
2. As the Lower Merion School District offered Student an appropriate program and placement for the 2006-2007 school year, it is not necessary to examine whether the placement unilaterally selected by the Parents is appropriate.
3. As there is no entitlement to tuition reimbursement, a consideration of the equities is not necessary.
4. The District is not required to take any further action.

November 17, 2006

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.

Hearing Officer