

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.

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RD  
8279/07-08 LS  
Name

Xx/xx/xx  
Date of Birth

12/19/07; 1/28/08; 2/4/08  
Dates of Hearing

Closed  
Type of Hearing

Parties to the Hearing:

Mr. & Mrs.  
Parents' Names

2/09/08  
Date Transcript Received

Address

3/9/08  
Date of Decision

Bethlehem Area  
School District

2/19/08  
Date Record Closed

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## **I. BACKGROUND**

Student is a xx year old resident of the Bethlehem Area School District, currently enrolled in 8<sup>th</sup> grade at the [redacted Private School] in [town]. Although Private School is an approved private school, Student was placed there by his Parents who are seeking tuition reimbursement for the 2007/2008 school year and transportation. Student is eligible for special education services under the OHI disability category based upon a diagnosis of ADHD. In recent School District and private evaluations, Student was also determined to have specific learning disabilities in reading, math and written expression and significant language processing difficulties.

Although a long time resident of the District, Student was primarily enrolled in parochial schools, attending a District public school for a period that encompassed less than two full school years. Unfortunately, Student had increasingly difficult school years regardless of the specific setting, most notable for intensifying social problems, which culminated in a hospital admission in the spring of 2007 due to depression and suicide threats. Beginning in January 2007, Student's Parents obtained several private evaluations to determine the best means of addressing his social and academic needs. After Student's release from the hospital, his Parents contacted the School District to obtain IDEA services for Student. The District offered a psycho-educational evaluation to be conducted at the beginning of the 2007/2008 school year, and proposed placing Student in a regular education setting at the start of the current school year pending completion of the evaluation and development of an IEP.

Concerned that attending regular classes would be unsuccessful at best and damaging at

worst in light of his prior school difficulties, Student's Parents enrolled him in Private School. In November 2007, after reviewing the District's evaluation report and its proposed program and placement, Parents rejected the NOREP proffered by the School District and filed a due process complaint, asserting that the District's proposal does not sufficiently address, and would not appropriately meet, all of Student's identified needs.

## **II. FINDINGS OF FACT**

1. Student is a xxyear old child, born xx/xx/xx. He is a resident of the Bethlehem Area School District and is eligible for special education services. (Stipulation, N.T. pp. 12–14)
2. Student has a current diagnosis of Other Health Impairment (OHI) in accordance with Federal and State Standards, upon which his eligibility for special education services rests. He has also been identified as having specific learning disabilities in reading writing and math, and is eligible for speech/language services. 20 U.S.C. §1401(3)(A), 34 C.F.R. §300.8(a)(1), (c)(9), (10), (11); 22 Pa. Code §14.102 (2)(ii); (N.T. pp.216, 217; P-12).
3. Student attended parochial schools through most of 4<sup>th</sup> grade, when he transferred to [redacted] Elementary School in the District. He remained there through the end of 5<sup>th</sup> grade. (N.T. pp. 33–36; P-12).
4. Student began experiencing academic difficulties in 2<sup>nd</sup> grade. Based upon a private psychoeducational assessment obtained by his Parents when Student was in 3<sup>rd</sup> grade, Attention Deficit Disorder was suspected. (N.T. pp. 36, 37, 217; S-1; P-12).
5. In the hope of receiving additional services, Student's Parents enrolled him in the District near the end of 4<sup>th</sup> grade, expecting that he would be evaluated for IDEA eligibility. Although the District determined that Student's academic deficits were not severe enough to warrant an evaluation, he was provided with a §504 accommodation plan, which the District believed was sufficient to meet his needs. (N.T. pp. 35, 38, 39; P-2, S-3).
6. In 5<sup>th</sup> grade, Student began experiencing severe problems with his peers. He was bullied both at school and in his neighborhood, leading to increasing anger and frustration. Reacting to provocations from other children exacerbated the bullying and teasing he experienced and led to fighting. By the end of the 5<sup>th</sup> grade school year, Student was constantly involved in fights and he did not want to attend school. (N.T. pp. 39–42; P-10, P-12).

7. At the beginning of 6<sup>th</sup> grade, Student was enrolled in a different parochial school in order to participate in a program in which he received specialized instruction on one to one basis in a separate classroom for half the day, and the special education teacher accompanied and worked with him in the regular classroom setting for the remainder of the school day. Student's difficulties with peers, however, continued and increased in 6<sup>th</sup> grade when he participated in the regular classroom activities. (N.T. pp. 37– 39, 42, 43; P-1, S-8, S-9).
8. When the school Student attended in 6<sup>th</sup> grade was consolidated with another parochial school and closed at the end of that school year, Student began attending the new combined school in order to continue with his specialized program. As the bullying and social difficulties increased, Student's behavior deteriorated and he was ultimately expelled. Student was then admitted to 7<sup>th</sup> grade in the parochial school he had attended until the end of 4<sup>th</sup> grade. The problems with bullying and fighting continued. (N.T. pp. 43–45).
9. In January and February 2007, Student's Parents obtained a psycho-educational evaluation conducted by Dr. G. She issued a report on March 28, 2007 discussing the information she received from Student and his Parents and the results of a number of standardized measures she administered to Student, including the Wechsler Intelligence Scale for Children, Fourth Edition (WISC IV); Test of Memory and Learning; Woodcock Johnson Tests of Achievement-Third Edition; Wilson Assessment of Decoding and Encoding; Gray Oral Reading Tests; Tests of Adolescent and Adult Language- Fourth Edition; Behavior Rating Inventory for Executive Function- Self Report; Behavior Rating Inventory for Executive Function- Parent. (N.T. pp. 51–53, 103, 104, 306–324 ; P-10).
10. Dr. G concluded that although Student's full scale IQ was in the normal range, his score of 115 on the Perceptual Reasoning Index, in the high average range of intellectual functioning, best represents Student's true intellectual potential. (N.T. pp. 308, 309; P-10).
11. Dr. G further concluded that Student has serious language and information processing deficits, including an inability to quickly retrieve the correct words to use when he is speaking, as well as learning disabilities in reading, math and written expression. Student's difficulties understanding what is said to him, expressing his thoughts and maintaining focus and attention have contributed significantly to both his academic problems, especially with writing, and his peer difficulties. (N.T. pp. 53, 54, 320, 323, 324; P-10).
12. Dr G recommended interventions and classroom accommodations in a number of areas, including speech/language and occupational therapy; auditory retraining (Fast for Word) and sensory integration retraining; a structured writing program such as Orton-Gillingham; assistive technology (Alpha Writer) and instruction in typing; untimed tests and extended time for assignments; availability of oral texts; specific instruction to foster

development of learning strategies and study skills; clarification of directions and instruction; multi-sensory approaches to learning/instruction; small class size and individualized instruction; quiet, non-competitive environment; study guides and assistance with note taking. (N.T. pp. 325–331 ; P-10).

13. Dr. G recommended, and the Parents obtained, several additional evaluations, including an audiological/language evaluation, occupational therapy evaluation, and perceptual/visual evaluation. Student has not been given an assistive technology evaluation as Dr. G also recommended. (N.T. pp. 319, 320, 326; P-6, P-7, P-8, P-10).
14. The auditory processing/language evaluation completed by audiologist/speech pathologist Ms. Y concluded that Student has a significant auditory processing disorder which makes learning in a typical large classroom setting particularly challenging for him and recommended a number of interventions and strategies, including *Fast for Word Literacy* training to improve auditory and language processing, minimizing extraneous noise and distractions, speech/language therapy, teaching strategies that allow him to anticipate and prepare for what will happen in class, prompts and extended time when responding to questions in class and books on tape. (P-6).
15. Student's Parents had obtained psychological and psychiatric treatment for Student for several years. In the spring of 2007, upon his psychologist's recommendation, Student was admitted to an adolescent unit for inpatient mental health treatment. The psychologist was particularly concerned about his suicidal ideations. (N.T. pp. 46–50, 107; P-4, P-11, S-11).
16. Student did not return to school after his release from the hospital in May 2007, instead receiving instruction in a partial hospitalization program for the remainder of the school year. (N.T. p. 49; P-4, P-11).
17. At the end of May, 2007, Student's Parents contacted the School District, seeking to enroll him for the 2007/2008 school year and obtain special education services for him. Parents provided the District with all of Student's records. (N.T. pp. 54, 56, 57, 92, 236, 449, ; S-1--S-12, S-18 )
18. The District informed the Parents that its own evaluation was necessary prior to offering Student an IEP and determining an appropriate placement. The District further informed the Parents that its evaluation could not be completed prior to the beginning of the 2007/2008 school year, and that Student would attend regular education classes in the school to which he would normally be assigned pending completion of the evaluation and analysis of the results. (N.T. pp. 57, 58, 239, 245, 246; S-14 )
19. Parents, were unwilling to have Student attend regular education classes during the evaluation and IEP process, fearing that his social problems would recur, since Student would be transported to school and attend classes with the same peers who taunted and bullied him in his neighborhood and/or his prior schools. (N.T. pp. 56-58, 92, 454)

20. Parents hired counsel and filed a due process complaint dated August 11, 2007 but subsequently agreed to a District evaluation to be conducted at the beginning of the new school year and withdrew their hearing request pending completion of the evaluation. After reaching that agreement, Parents signed the permission to evaluate issued by the School District and returned it on August 27, 2007. (N.T. pp. 58, 59, 258, 259 ; P-13, S-13)
21. After enrolling Student in the School District the summer of 2007 and learning that he would be in a regular education setting for the beginning of the 2007/2008 school year, at least until the District's evaluation was completed, Parents looked for an alternative placement for Student, ultimately enrolling him in the Private School, which is a considerable distance from their home. Student's Father generally drives him to school in the morning and his mother picks him up in the afternoon. Travel time is 1½ to three hours each way. (N.T. pp. 84, 85, 93, 449)
22. On September 10 and 18, 2007, the District's school psychologist conducted a psycho-educational evaluation of Student. She administered the Woodcock-Johnson Test of Cognitive Abilities, Third Edition and Wechsler Individual Achievement Test, conducted observations of Student and formal and informal interviews with him, and asked his Mother to complete an observational rating scale. (N.T. pp. 197,198, 202, 204, 207, 208, 381, 391, 392; P-12)
23. The District's speech/language support therapist also evaluated Student in September 2007. (N.T. pp. 367–372, 376; P-12)
24. Although the District sought input from Student's parochial school, it received no information. The District was provided, and considered, prior school and medical records, input from Parents and Student himself, as well as the private evaluations obtained by the Parents. (N.T. pp. 57, 198–201, 209-- 210, 219, 236, 244, 245, 371, 382–390; P-12, S-1-- S-12, S-18 )
25. The District issued an evaluation report dated October 4, 2007 which was reviewed with the Parents. The school psychologist's and speech/language support therapist's results are largely consistent with the results obtained by Dr. G and Ms. Y, particularly with respect to Student's intellectual capacity, processing/memory and language deficits, as well as his social/emotional needs. (N.T. pp. 95, 202–217, 243, 334, 392, 367–372; P-6, P-12)
26. The District concluded that Student is eligible for IDEA services under the OHI category and that his primary special education needs are in the areas of social functioning, behavior and language. The ER and NOREP recommended placement in an emotional support class conducted by Intermediate Unit #20 in a neighboring school district, along with speech/language support. The school which houses the IU program is located

approximately 15 minutes from Student's home school. (N.T. pp. 241, 265, 275, 372; P-3, P-12)

27. Although the District's school psychologist also determined that Student has specific learning disabilities in reading, math and written expression, she and the other District members of Student's IEP team concluded that those disabilities could be addressed through classroom accommodations and that Student does not require specially designed instruction in those areas because his standardized achievement test scores indicate that he is functioning in the average range. (N.T. pp. 204– 206, 256–258, 393; P-12)
28. The District's middle school educational support teacher, who is in charge of students placed outside the District, drafted a proposed IEP based upon the District's ER. The proposed IEP includes speech and behavioral goals and objectives, and accommodations for academics, but no goals or objectives in reading, math, written expression or any other academic subject area. (N.T. pp. 234, 235, 259, 266, 269, 415, 416, ; P-12)
29. The School District teacher who drafted the proposed IEP to be implemented in the IU classroom was generally familiar with the programs, since other District students had been successful in the program. She was not, however, familiar with the number of students in the class, the disability categories of students presently in the class, the curriculum used, the level of academic functioning of students in the class. (N.T. pp. 274, 275, 278, 279, 418)
30. The IEP as presented to the Parents did not include a behavior management plan, but such a plan was also drafted and would have been presented to the Parents upon their approval of the NOREP. Because that did not occur, the Parents received the behavior plan during the due process hearing. The IU class requires both an IEP and a behavior plan to accompany a student upon enrollment. Those documents are revised as needed based upon a student's functioning and progress in the classroom. (N.T. pp. 288–291, 420–423, 430; P-3, S-22)
31. The IEP as drafted provides for part time emotional support, with Student joining the regular school population for lunch, specials and some academic subjects. Testimony at the hearing established that Student would be integrated into the regular school population gradually, based upon his readiness for joining the typical student population. (N.T. pp. 128, 129, 254, 261; P-3)
32. Student's homeroom teacher from Private School, who also teaches him literature (reading), history, math, social studies and social skills, participated in the IEP meeting with District staff and Parents and made some suggestions which were incorporated into the IEP. No one from the IU program participated in the IEP process. (N.T. pp. 68, 69, 97, 98, 142, 144, 165, 166, 185, 281, 417, 418; P-3)
33. The IU emotional support classroom proposed for Student was described by the IU #20 supervisor of special education as an academic classroom with mental health

components. Daily behavioral goals for each student are developed based upon the IEP behavioral goals, and a specific program is developed for each student in the class which incorporates the IEP goals, daily goals and a positive behavior support plan. Speech/language goals in Student's IEP would be administered by the speech teacher. The classroom/instructional accommodations and modifications listed in the proposed IEP are generally used in the program on a daily basis. The academic program is based upon Pennsylvania education standards, and the program incorporates differentiated instruction, and a standardized instructional program to address various behaviors is used as part of the mental health component of the program. (N.T. pp. 432, 435–440, 444, 445; P-12)

34. Student's speech/language needs would be addressed generally in the proposed classroom, which incorporates social language intervention, as well as through speech therapy, which could be increased above the recommended one time/week if needed. (N.T. pp. 373, 374; P-3)
35. Upon Parents' request, they visited the IU program proposed for Student on two occasions. During the first visit they met with the District special education teacher and the staff who would be working with Student. On their second visit, which was approximately ½ hour long, they observed the class in which Student would be placed. After those visits, and after rejecting the District's proposed IEP on November 4, 2007, Parents initiated the instant due process complaint. (N.T. pp. 77–83, 90, 99, 112, 128–133, 455; P-3, P-13)
36. The disagreements expressed by Parents, directly and through counsel, and by their consultant, Dr. G, with the IEP/program and placement proposed by the District are: failure to address the non-verbal learning disability diagnosed by Dr. G; concerns that mainstreaming is likely to be too stressful; failure to include assistive technology as an area of need/special consideration; failure to directly and specifically address learning disabilities in reading, math and writing; failure to specifically provide for a language-based classroom with multi-sensory instruction; failure to address Student's educational needs in detail, especially educational needs in the regular classroom; inadequate measures for monitoring Student's progress with respect to the stated goals; vagueness with respect to implementation, *e.g.*, how he will develop and use strategies to assist in developing appropriate peer interactions and how he will generalize behavioral strategies beyond the emotional support classroom; failure to provide for specifically designed instruction to address Student's educational needs rather than accommodations based upon good teaching practices; insufficient amount of time for speech/language therapy and counseling. (N.T. pp. 66, 68–75, 90, 91, 113, 122, 336, 339–349; P-3, P-13)
37. Student's Parents were also concerned that the proposed placement would single Student out as "different," which they perceive to be the cause of the bullying and other difficulties with peers that he experienced at school for the past several years. Parents believe, in addition, that the classroom would trigger unpleasant memories of his hospitalization. (N.T. pp. 39, 80–83, 130)



38. Student does not have an IEP at Private School which, as an approved private school, is subject to Pennsylvania educational requirements. The school typically works with a student's home school district to develop an IEP, which did not occur with respect to Student due to his parent-initiated private placement. (N.T. pp. 141, 142, 156–158, 185, 191, 192 )
39. Private School accepts students from age 5 to age 21, and serves children with behavioral deficits and autism spectrum disorders in a lower, middle and high school. (N.T. pp. 141)
40. Student's academic program at Private School is based upon Pennsylvania educational benchmarks. The group to which he is assigned receives instruction at an 8<sup>th</sup> grade level. Reading is taught through literature-based, standard middle school texts. (N.T. pp.145, 149–151, 176, 184, 188, 189 )
41. Student's educational needs were termed a "style" deficit by his teacher, meaning that he has difficulty focusing and requires means and methods to encourage him to work at an 8<sup>th</sup> grade level which are not age-appropriate. Student's academic needs are addressed through classroom accommodations which include differentiated and individualized instruction, rewards, specific questions addressed to him, un-timed responses, calm questioning, opportunities to think about and prepare oral answers, minimizing writing tasks, (N.T. pp. 143, 150, 170–173, 177, 192, 193)
42. Student participates in speech therapy for one 45 minute session/week, and individual counseling once a week, also for 45 minutes, but does not receive occupational or physical therapy. (N.T. pp. 152, 153, 186 ; P-12)
43. Social/emotional, behavioral and anger management issues are addressed by participation in a program of team-building exercises, weekly group and individual counseling, and a "circle" discussion group conducted by the homeroom teacher which permits the students to discuss issues of importance to them or matters which may be bothering them. A consulting psychologist and behavioral specialists are available, as well as "timeout" facilities. (N.T. pp. 153–156, 174, 175)

### **III. ISSUES**

1. Are Student's Parents entitled to tuition reimbursement and transportation costs for Private School for the 2007/2008 school year?
2. Are Student's Parents entitled to reimbursement for the costs of private evaluations they obtained prior to enrolling Student in the Bethlehem Area School District?
3. Should the Bethlehem Area School District be required to provide an assistive technology evaluation for Student?

#### IV. DISCUSSION AND CONCLUSIONS OF LAW

##### A. Tuition Reimbursement

IDEA regulations provide that a public agency is not required to reimburse parents for the costs of a private school placement if it offered FAPE to the student, and further provide that disputes concerning that issue are to be resolved through the IDEA due process procedures. 34 C.F.R §300.148(a),(b).

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court established the principle that parents do not forfeit an eligible student's right to FAPE, to due process protections or to any other remedies provided by the federal statute and regulations by unilaterally changing the child's placement, although they certainly place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE or otherwise acted appropriately.

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied. based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *In Re: The Educational Assignment of C. D.*, Special Education Appeals Panel

Decision No. 994 (June 27, 2001) A decision against the parents at any step of that process results in a denial of reimbursement. *Id. See also, In Re: The Educational Assignment of N.B.*, Special Education Appeals Panel Decision No. 1685 (January 2005).

1. Appropriateness of the District's Proposed IEP and Placement

In this case, the question whether the District offered an appropriate program must be considered both before and after the District's evaluation and offer of an IEP. The evidence in this case establishes that the Parents enrolled Student in the School District prior to the beginning of the 2007/2008 school year, that the District was aware that the Parents were seeking special education services for him at the time he was enrolled, and that the District assigned Student to a regular education classroom for the beginning of the 2007/2008 school year. (F.F. 17, 18; S-13, S-14) Although testimony at the hearing indicated that the middle school special education supervisor would have recommended that Student be assigned to a "co-teaching situation" with a learning support teacher (N.T. p. 246), there is no evidence that such proposal was ever communicated to Student's Parents. Consequently, their fears that Student would, in essence, "get off on the wrong foot" when he re-entered the School District were not unreasonable. The record is clear that Student completed the prior school year in a partial hospitalization program after a period of inpatient treatment which had been recommended due to concerns that he was entertaining suicidal thoughts. (F.F. 15; P-4, S-11) The record also establishes that Parents discussed Student's problems with the District and provided it with all of Student's medical and school records immediately, which disclose the peer problems he experienced and the fact that those issues had worsened every school year since at least 5th grade. (F.F. 6, 7, 8, 24; S-1-S-12) The District, however, did not take Parents' serious concerns into account with respect to

Student's placement at the beginning of the 2007/2008 school year by considering or offering any alternatives that might have alleviated those concerns.

Neither the federal nor the state special education regulations require a school district to implement an existing IEP unless it comes from another public school district. *See*, 34 C.F.R. §§300.323(e), (f); 22 Pa. Code §14.31(4); *Schuylkill Haven Area School District v. Rhett P.*, 857 A.2d 2006 (Pa. Commwlth 2004). In addition, in the absence of an IEP which the District is obligated to implement, services cannot be provided until after an evaluation and development of an IEP. 34 C.F.R. §§300.301(a), 300.121. Finally, the School District has 60 school days to complete an evaluation, and, therefore, had no obligation to evaluate Student over the summer. 34 C.F.R. §300.301(c)(1)(ii); 22 Pa. Code §14.123(b). Nevertheless, the District had alternatives to simply assigning Student to a regular education classroom pending completion of its evaluation.

When Student was previously enrolled in the District, it refused to conduct its own psycho-educational evaluation, yet the District provided Student with a §504 accommodation plan based upon a parentally-obtained outside evaluation which indicated possible ADD. (F.F. 5; S-7) The District might have pursued such an alternative as a means of providing Student with interim accommodations to address his well-documented educational and social/behavioral needs pending completion of an IDEA evaluation. The District might also have considered homebound instruction until the evaluation could be completed.<sup>1</sup>

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<sup>1</sup> “Homebound instruction is not a special education placement but a temporary excusal from school, under general education compulsory attendance regulations, for physical, mental or other urgent reasons. 24 P.S. §13-329; 22 Pa. Code §11.25.” *In Re: The Educational Assignment of K. F.*, Special Education Opinion No. 958 at 2. (10/15/99). *See also, In Re: The Educational Assignment of T. W.*, Special Education Opinion No. 1191 (11/07/01).

In light of Student's ADD diagnosis, recent in-patient mental health treatment, history of intractable problems with peers and extreme difficulties in school during virtually his entire school career, the District should, at the least, have considered ways and means of assuring that Student's re-enrollment in the district for the 2007/2008 school year did not compromise his mental health status or expose him to disciplinary issues arising from peer problems or other sources of classroom frustration prior to an IDEA eligibility determination. The District's failure to consider alternatives or to communicate to the Parents that it would at least make an effort to assure that Student had access to a special education teacher from the beginning of the school year justifies the Parents' decision to seek an alternative private placement for Student pending completion of the District's evaluation.

The conclusion that the District failed to offer an appropriate program at the start of the school year, however, would provide approximately two months of tuition reimbursement, assuming that the alternative placement Parents selected meets the appropriateness standard. The next issue is whether the District offered an appropriate program and placement after it completed its evaluation and proposed an IEP in October 2007 which provided for Student to be assigned to the IU #20 emotional support class in a neighboring school district.

The Parents' contention that the District's proposed IEP is inappropriate is supported by a review and comparison of the evaluation report (ER) issued by the District to the contents of the IEP and to the regulatory requirements. First, the IEP proposed for Student contains no academic goals and objectives, yet the special education regulations provide that it must include

academic and functional goals designed to (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and (B) meet each of the child's other educational needs that result from the child's disability.

34 C.F.R. §300.320(a). *See also, In Re: The Educational Assignment of K.B.*, Special Education Opinion No. 1470 (April 2004). In both the District's ER and proposed IEP, it is noted that Student has "a history of academic and behavioral concerns beginning in second grade." (P-3 at 1; P-12 at 2). Although Student's intellectual capacity is in the high average range and he is capable of learning at grade level, material must be presented to him at a different rate. (P-12 at 3) His language processing deficits are well documented, manifested by difficulty with word recall and retrieval, as well as difficulty in making inferences from what he reads, which "impacts his schoolwork" as well as his social interactions. (P-3 at 3). Otherwise, the IEP includes no discussion of Student's academic functioning other than in terms of his average performance on standardized tests. (P-3 at 8) The refusal of Student's parochial school teachers and administrators to provide information to the School District clearly placed the IEP team at a disadvantage with respect to fully describing his classroom performance and needs, but by the time the proposed IEP was drafted, he had been in 8<sup>th</sup> grade for over a month, so some such information was clearly available from his current teachers at Private School. The proposed IEP, however, provides only that "the general education curriculum will be presented at his current grade level in a structured setting with supports to assist with...social, coping and on-task behavior skills...speech therapy to assist with needs for improved word retrieval and inferencing skills along with semantic knowledge and social language." (P-3 at 8) The IEP says nothing about how the rate or means of presenting the grade level curriculum needs to be modified in order to assure that he progresses in the general education curriculum as his language deficits are addressed. There is also nothing in the IEP indicating how, if at all, Student's difficulties with processing speed will be specifically addressed in his special education setting, yet depressed cognitive efficiency, along with Student's language deficits, were the basis for the District's

school psychologist's conclusion that his thinking ability score best represents his true intellectual capacity. The discrepancy between that score and Student's standardized achievement test results was, in turn, the basis for determining Student's specific learning disabilities in reading, writing and math as stated in the District's evaluation report (ER). The ER also notes Student's self-reported difficulty concentrating in class, which is obviously a manifestation of ADD, his primary disability category. (P-12 at 7, 8) Nevertheless, the District's psychologist relied solely upon Student's average achievement test scores to conclude that he does not need specially designed instruction to address those disabilities. If Student's intellectual capacity is high average, but his achievement scores are average, he is obviously not able to reach his full learning potential without clearly identified modifications to instruction and classroom accommodations.

Although it may be that the accommodations listed under SDI in the proposed IEP would be adequate to assure Student's academic progress, relying solely upon standardized achievement test scores in the average range does not sufficiently support such conclusion, and certainly does not excuse the absence of any academic goals and objectives. *See, K.B.*, No. 1470 at 11--13 The IEP, however, includes no goals whatsoever for academic subject areas, including the need for modifications to instruction to permit Student to make appropriate academic progress. (P-3)

In addition, the IU occupational therapist who evaluated Student for the District recommended one 30 minute occupational therapy session/week and included goals for increasing his printing speed and improving his ability to type by using all fingers of both hands and finding keys on both sides of the keyboard. (P-12 at 14). In the IEP, however, occupational therapy services are included only on a consultative basis as a support for school personnel. (P-3)

at 20, N.T. at 260). The District offered no explanation why the IEP team decided not to follow the recommendation of the OT evaluator, or address such identified need at all in the IEP in terms of goals, objectives and training/instruction.

With respect to the appropriateness of the recommended placement in terms of whether Student is likely to make reasonable academic progress in that setting, neither District nor IU witnesses could describe, even generally, the composition of the emotional support class in terms of their grade level or the academic subjects covered, beyond stating that the class follows the standard Pennsylvania middle school curriculum, which encompasses 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grades, and that all students work in the same subject area, with adaptations to meet their specific needs. (N.T. pp. 254, 275—279, 433—446) It is impossible to determine, therefore, whether the specific subject matter of the academic work will be at an 8<sup>th</sup> grade level and new to Student or would be a repetition of matters he has already covered in 6<sup>th</sup> and 7<sup>th</sup> grade. Such uncertainty would not be so significant if the District had presented evidence of how the curriculum would be adapted to assure that Student covers all of the academic subject matter an 8<sup>th</sup> grade student is expected to know in the event the majority of the class is working at a 6<sup>th</sup> or 7<sup>th</sup> grade level. No such assurance, however, can be drawn for the testimony at the hearing. Although there is a reasonable inference from the very limited testimony that was presented that science, social studies and any other subject generally taught in middle school are part of the curriculum of the IU class, there was no direct testimony on that subject, and, as noted, no assurance that Student would be presented with all of the course content expected for 8<sup>th</sup> grade.

The focus of Student's proposed educational program and placement is exclusively on his language deficits and behavioral/social issues, which are his greatest areas of need. Given the self-esteem issues which are discussed in the District's ER, and his intellectual capacity,



however, it is surprising that the IEP team did not, at the least, include academic goals to assure that Student does not fall behind academically simply because he is not exposed to the subject matter of an 8<sup>th</sup> grade curriculum. The school psychologist's observations of Student during the testing process concerning his avoidance of tasks which he finds particularly difficult should have prompted some concerns with respect to assuring that he does not avoid challenging work. (P-12 at 8) The last thing this student needs is an educational setting that does not challenge him academically with grade level work. Academic success at a lower level may give a short-term boost to his self-esteem, but will ultimately be destructive if an information/content deficit surfaces in high school.

It may be that the program as implemented will be challenging for Student, and that a more specific IEP which addresses academics would be prepared after Student is in the classroom for a period of time. Both the District and IU staff were at a disadvantage in developing a detailed IEP because they don't know Student and no one from either agency has direct information with respect to his classroom functioning, academically, behaviorally or socially. Nevertheless, the IEP should include all of Student's needs in those areas and certainly could, even with the expectation that it will be altered, perhaps substantially, with direct experience. The process that the District used, however, resulted in an inadequate, and, therefore, inappropriate educational plan. Moreover, the District's lack of specific knowledge about the classroom it recommended leaves the impression that it did not take sufficient steps to assure that it will meet Student's needs.

Even taking into account the disadvantage of not really knowing Student, for which neither the District nor IU staff can be faulted, the testimony of the District's witnesses was unconvincing in terms of establishing that the IU program was recommended for Student based

upon his educational/academic needs as well as his social/behavioral and language needs. As discussed above, there was virtually no testimony concerning academics or testimony describing in detail how Student's language deficits would be addressed on a daily basis. (*See* FF 35). The IEP language goals do not differentiate between the speech/language therapy setting and the classroom, and according to the specially designed instruction portion of the IEP, small group instruction appears to be reserved for the 30 minute weekly speech support setting. (P-3 at 19).

In light of the dearth of knowledge concerning the specifics of the IU classroom and Student's apparent success at Private School during the early part of the school year, it is surprising that the District IEP team did not even consider Private School as a recommended placement for Student for the current school year, in addition to considering the IU program and learning support in his neighborhood school. (P-3 at 1) The District's middle school special education teacher testified that such a placement was "not within our district realm" of possibilities that she could suggest the IEP team consider. (N.T. p. 283) That testimony, however, is inaccurate, since approved private schools may certainly be considered as a special education placement. *See* Pa. Dept. of Education Website, [www.pde.pa.us/special\\_edu](http://www.pde.pa.us/special_edu) "Approved Private Schools and PA Chartered Schools for Deaf and Blind." Such placement is actually listed on the IEP form utilized by the District, albeit in a list of placements termed more restrictive than education in regular school buildings. Although the District is purportedly concerned about the restrictiveness of the Private School placement for Student, the evidence at the hearing established that Student would actually spend 100% of the school day in the emotional support classroom until he progressed to the point where he could function adequately, behaviorally and socially, in a typical classroom. (FF 31, N.T. 255) The District, therefore, recognizes that Student's needs do not currently support much, if any, ordinary daily contact

with typical peers, which is certainly reasonable given Student's history of social difficulties. Such recognition, however, undercuts the District's position that LRE (least restrictive environment) concerns were a basis for recommending the IU emotional support placement for Student. Given the evidence that Student would be unlikely to participate in regular education programs immediately, and perhaps for a considerable period, and the District's testimony that an APS, in effect, **could not** be considered by the IEP team, there is a reasonable inference that the District's placement decision was driven by considerations that had nothing to do with recommending a placement based upon Student's needs. Such inference, in turn, leads to the conclusion that contrary to IDEA principles and requirements, the placement recommendation for Student was based upon District preferences and needs. In other words, the District considered only its preferred placements, with little or no attention given to whether the program appropriately meets Student's academic needs. In other words, the District was determined to fit Student into its own self-limited continuum of placements and accomplished that by focusing primarily on Student's behavioral needs, and secondarily on his language deficits, without truly considering his academic needs. The practice of fitting the student to the program/placement rather than fitting the program to the student's needs is a violation of the IDEA statute and both federal and state special education regulations. *In Re: the Educational Placement of N.B.*, No. 1685 at 9

Certainly, it is difficult for school districts to adequately meet the needs of their entire student populations and adhere closely to both the spirit and letter of the IDEA statute. There is no doubt that most school districts strive mightily, with true concern, to meet all of their sometimes conflicting obligations-- and do so most of the time with admirable success. Nevertheless, when a District's compliance with the special education regulations is challenged

in a due process hearing with respect to a particular student, the law must be applied to the facts without considering either good intentions or the difficulties facing school districts.

## 2. Appropriateness of Alternative Placement at Private School

As an approved private school, Private School is certified by the Pennsylvania Department of Education as a school where the special education needs of IDEA eligible students can appropriately be met. *See*, Dept. of Education Website information, above. In most instances, in fact, the students at Private School are there pursuant to school district NOREPs, with students' special education programs developed by school district IEP teams. (N.T. p. 157) Although Private School's status as an APS does not conclusively establish that Student, specifically, is receiving an appropriate program at the school, there can be no dispute that Private School is generally on the same plane as any school district or intermediate unit in terms of offering special education programs in compliance with federal and state IDEA standards.

In contrast to the almost complete lack of information concerning the IU emotional support classroom to which the District proposes to assign Student, there is ample evidence in the record concerning Student's class at Private School in terms of the grade level and general academic functioning of the other students in his class. Moreover, there was considerable testimony establishing specifically how Student's academic instruction is modified. Student's home room teacher, who teaches him math, social studies and reading (literature), testified that all of the students are working at an 8<sup>th</sup> grade level and follow the same curriculum, but with differentiated and individualized instruction. The teacher also testified to the efforts and adaptations required to assure that Student works at grade level and to the techniques he uses to minimize the impact of Student's language deficits on his academic progress. (FF 40, 41) To

address his social/behavioral needs, Student receives formal group and individual counseling, has opportunities to discuss his problems with his homeroom peers and participates in group activities, including a structured team-building program. (FF 43) Given Student's history of problems with peers, which the District's school psychologist noted was particularly bothersome to him, (*See*, P-12 at 7, 8), the classroom discussions and group activities are particularly beneficial, and represent systematic and structured opportunities to develop appropriate social skills. Based upon the absence of evidence that the IU program includes a comparable task-oriented component, that aspect of the Private School program offers an important advantage over the recommended emotional support class. The evidence in the record, including the District ER, leaves no doubt that the opportunity to develop and practice social skills in a natural classroom environment meets a longstanding need of this student to begin developing peer friendships.

With respect to related services, Student receives counseling and speech therapy once each week, as recommended in the District's proposed IEP and does not receive occupational therapy. In those respects, Student's Private School program is equivalent to the District's proposal. There was no evidence concerning strategies or instruction to improve Student's writing/typing and written expression with respect to either the Private School or the District's proposed IEP, so the programs are likewise equivalent in those respects.

On balance, there is considerable evidence that the Private School program is appropriately meeting Student's behavior and language needs at least as well as those issues would be addressed in the District's proposed program. More important, there is considerable evidence that the Private School program is appropriately meeting Student's needs with respect to academics, as to which very little consideration was given or evidence produced with respect

to the IU program. Private School also addresses Student's need to develop social skills and positive peer interactions. Although one of the behavioral goals in the proposed IEP does address those needs, no detail was given as to how that would be accomplished in the IU program. It is clear, however, that such goal is appropriate for Student, and is being met in the Private School program.

### 3. Equitable Considerations

Contrary to the District's argument that Student's Parents had a settled purpose of enrolling him in private school at the District's expense from the beginning of his re-entry into the District, the evidence does not support that conclusion. Although the Parents had begun looking into private schools, as indeed, they previously sought parochial school programs and private evaluations in order to help their son, Student's Parents testified credibly that when they contacted the District to seek assistance for Student, they had no preconceived notion that they intended to place him in a private school with tuition paid by the District. All of the relevant documentary evidence, including the District's own ER, supported Student's Father's testimony that the Parents were extremely—and reasonably—concerned that a regular education placement at the beginning of the current school year would be problematic—if not outright disastrous for Student, particularly in light of his recent hospitalization. Such considerations justified the Parent's decision to place Student in a private school which is recognized as appropriate for meeting special education needs. Moreover, the evidence establishes that Parents participated in good faith in the District's evaluation process, as well as in a serious effort to develop an appropriate IEP for Student. They discontinued their first due process complaint in order to permit the District's evaluation to proceed and visited the District's proposed placement on two

occasions, persisting in viewing the actual proposed classroom after they were initially denied that opportunity.

With respect to the balance of equities, language in a recent Appeals Panel decision affirming an award of tuition reimbursement is as apt in this case as it was when applied to the circumstances of that case:

Parents did nothing to impede the District's ability to develop an appropriate program. In fact, Parents provided relevant and critical information. Having done so, Parents had every right to search for another school and to be prepared, if and when, the District failed to offer an appropriate placement .

*In Re: The Educational Assignment of N.B.*, No. 1685 at 10. As in the prior case, balancing the equities here does not result in a denial or reduction of tuition reimbursement.

Having concluded that the District failed to offer an appropriate program and placement for Student for the current school year, that the Parent-selected Private School does provide an appropriate program and placement for him and that there is no equitable reason to deny or reduce tuition reimbursement, the Parents will be awarded the costs of tuition for the full school year at Private School, as well as the cost of transportation as a necessary related service.

#### B. Reimbursement for Private Evaluations

The IDEA regulations are quite clear with respect to reimbursement for independent evaluations, providing that parents have the right to a private evaluation at public expense only when the parent disagrees with the school district's evaluation. 34 C.F.R. §300.502(b)(1). Here, the Parents obtained several private evaluations prior to requesting that the District provide special education services to Student. There is no provision in the regulations for retroactive payment for private evaluations obtained before the District even has notice that a child is potentially IDEA eligible. In this case, Parents had actual notice of the availability of an evaluation from the District, notwithstanding their earlier experience with the District's denial of

an evaluation when Student was in 4<sup>th</sup> grade. Then, as now, IDEA provided due process to obtain an evaluation if a district denied a parental request for an evaluation. Parents had an obligation to follow such procedures and first seek an evaluation from the District if they wanted an evaluation at public expense. They could then have sought an IEE if they were dissatisfied with the results of the evaluation.

Moreover, it is impossible for the Parents to establish that any of the District's evaluations are incomplete or inappropriate, since the results of all such evaluations are consistent with their previously obtained private evaluations. Finally, the District considered the results of the private evaluations in compiling its ER, as required by the regulations. 34 C.F.R. §300.502(c). Although the District did not use as many standardized tests and measurements as the private evaluators, there is nothing in the IDEA statute or regulations requiring the District to duplicate the evaluative measures used by the private practitioners where such information has already been compiled and the District incorporates it into its own ER.

Since Parents do not meet the standards for obtaining IEE reimbursement, that claim is denied.

#### C. Assistive Technology Evaluation/IEP Review and Revision

Parents's request for an assistive technology evaluation will be granted. Nothing in the record contradicts Dr. G's conclusion that Student might benefit from the use of assistive technology as a means of addressing his difficulties with both the mechanics of writing and composition/written expression. (P-10 at 23). Moreover, the District's ER notes that Student needs to develop typing skills, yet the District has made no effort to address that need in its proposed IEP. In connection with correcting that deficiency in Student's IEP, there should be a



full evaluation of Student's need for assistive devices/technology to address his written expression needs in terms of both the mechanics of writing and composition.

The District will be ordered to re-convene Student's IEP team immediately, and with the participation of Student's teachers, counselors and speech therapist at Private School, develop academic goals for all subject areas in which he is being instructed, as well as review Student's speech/language and behavior goals and adjust or revise them as necessary. The IEP team will also be directed to specifically consider whether Student's difficulties with the mechanics of writing should be addressed by occupational therapy, instruction in use of a keyboard or some combination of those or other means prior to the assistive technology evaluation. The IEP team will need to reconvene again after that evaluation is completed to determine whether that aspect of Student's IEP will need to be revised in light of the evaluation results.

Finally, this decision and order applies to private school tuition for this school year only. Nothing herein should be construed as a conclusive determination that Private School would provide the only appropriate program/placement for Student going forward. The IEP team is certainly free to consider other alternatives for his remaining school years, provided, however, that the District is not permitted to categorically reject or refuse to consider any alternative in the continuum of placements, and that every recommendation of program/placement must be based upon Student's needs and the appropriateness of the group to which he will be assigned, not upon the District's preference for utilizing its own or IU program alternatives.

## **V. SUMMARY**

Because the Bethlehem Area School District failed to offer Student an appropriate special education program for the 2007/2008 school year, his Parents were justified in seeking a private school placement for him. Their selection of the Private School, a Pennsylvania approved

private school is appropriate for him. The Parents fully cooperated in the District's evaluation and IEP development process and gave careful consideration to the District's proposed placement for Student. Having, therefore, met all of the criteria for tuition reimbursement, Parents will be awarded the cost of tuition at the Private School and transportation, since that is a necessary related service for Student to attend Private School.

Since Parents have not met the criteria for IEE reimbursement, that is denied. Finally, the District is directed to initiate an assistive technology evaluation of Student and to revise the inappropriate proposed IEP in order to provide him with an appropriate educational plan for the remainder of this school year at Private School.

## VI. ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Bethlehem Area School District is hereby **ORDERED** to take the following actions:

1. Reimburse Student's Parents for the cost of tuition at the Private School for the 2007/2008 school year, as well as for the costs of transportation they have incurred.
2. Determine by agreement with the Parents how transportation to Private School will be provided for Student for the remainder of the 2007/2008 school year, *i.e.*, by directly providing it or by the Parents' making transportation arrangement which will be reimbursed by the District.
3. Within ten (10) days of this order, arrange for an assistive technology evaluation for Student.
4. Within ten (10) days of this order, convene Student's IEP team, which shall include at least one of his Private School teachers, and seek input from all of his Private School teachers and therapists and shall thoroughly review Student's needs in the areas of academics, speech/language, behavior, socialization and occupational therapy in order to draft a complete and appropriate IEP which explicitly addresses all of Student's identified needs.
5. Within ten (10) days of receiving the report of the assistive technology evaluation, reconvene Student's IEP team to determine whether additions or adjustments are necessary to address any newly identified needs.

Dated:

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Anne Carroll, Esq., Hearing Officer