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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: LC
ODR #8432/07-08 LS
ODR #8713/07-08 LS

Date of Birth:
Xx/xx/xx

Dates of Hearing:
April 4, 2008
June 2, 2008
June 9, 2008

CLOSED HEARING

Parties to the Hearing:

Mr.
Ms.

Bethlehem Area School District
1815 Main Street
Bethlehem, Pennsylvania 18017

Date Closing Arguments Received:

Date of Decision:

Hearing Officer:

Representative:

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July 2, 2008

July 17, 2008

Linda M. Valentini, Psy.D.

Background

Student is a seventeen year old eligible student who is a resident of the Bethlehem Area School District (hereinafter District). The parents (hereinafter Parents) filed for this hearing on January 11, 2008 seeking compensatory education for an alleged denial of FAPE and reimbursement for independent evaluations. On April 11, 2008 they filed an additional complaint seeking reimbursement for tuition and related costs for two private residential placements. The two requests were consolidated and this decision addresses both.

Issues

1. Did the Bethlehem Area School District fail to offer Student a free appropriate public education? If not, is Student entitled to compensatory education, for what period(s) of time and in what kind?
2. Is the Bethlehem Area School District responsible for reimbursing the Parents for the independent educational evaluation and private psychiatric evaluation they obtained for their child?
3. Is the Bethlehem Area School District responsible for reimbursing the Parents for their child's tuition at [redacted] Academy and/or [redacted] School, for expenses associated with enrollment in either or both schools, and for counseling and family workshops?

Findings of Fact

Background

1. Student is a teen-age eligible student who is a resident of the Bethlehem Area School District. (N.T. 33-34).
2. Beginning at age two, Student had severe temper tantrums, becoming very agitated, banging on windows and having to be held until Student was calm. (NT 34)
3. In preschool and elementary school, Student was excitable and needed extra attention. (NT 34).
4. In middle school Student would do such things as get out of Student's seat, fall out of Student's chair, or "accidentally" bump a child with Student's tray in the cafeteria line. (NT 35)
5. During 8th grade, behavior problems increased, but the parents and teachers worked together to address the behaviors, and Student saw the guidance counselor

daily. Although Student began to be depressed, with the home/school cooperation in place Student ended 8th grade on a positive note. Student's final report card noted that Student was disruptive in class (NT 35-36, 38; P-11)

9th Grade: 2005-2006

6. Student was in 9th grade for the 2005-2006 school year at the [redacted] Campus which was five blocks from the main high school building. Although the Campus was only for 9th graders, students walked between it and the main campus (serving 10th through 12th grades) for various reasons and Student took advantage of the less structured situation. (NT 36-37, 116)
7. Student missed classes on September 23, 2005, October 3, 2005, October 5, 2005, October 20, 2005, and October 25, 2005. (NT 36; S-4, S-5)
8. Immediately upon being made aware of Student's not attending classes, the Parents began to be in frequent contact with school staff. At the end of October 2005 a meeting between the Parents and the school was held. Only one teacher showed up for the meeting. At this meeting the mother expressed concern that the "open door policy" between the freshman campus and the main high school provided Student too much freedom. (NT 36, 124).
9. In fall 2005 Student received Code of Conduct referrals for violations including not reporting for class, being late to class and failing to attend detention. The Parents observed that Student did not do homework, was not caring, not cooperating, and giving up at school. (NT 42; S-7, S-9, S-10).
10. During October and November 2005, the mother was in frequent telephone contact with the District, specifically Mr. Kehler, the guidance counselor and Mr. Jarosz, the assistant principal. (NT 40).
11. Upon the advice of a relative who is a special education teacher the Parents made a verbal request and then a written request for a psychiatric evaluation¹ by letter dated November 7, 2005. (NT 41, 120-121; S-8)
12. The letter specifically noted behavioral concerns. The Parents set forth detailed reasons for the evaluation request related to school including routine absences and tardiness, failing grades putting Student at risk for loss of credit, and insolence toward a teacher after which Student was asked to leave the school building. (NT 251; S-8)
13. The evaluation request also noted that Student had been in private counseling on and off for four years and that several months previously Student had refused to continue in treatment with Student's therapist and was continuing to refuse any psychological treatment. (S-8)

¹ In this letter the Parents also requested counseling. (S-8)

14. The Parents' evaluation request described Student as feeling "hopeless" pursuant to pending charges in juvenile court², as having become "critically negative" over the past several months, as being defiant and verbally aggressive at home, and as leaving clues that defined alcohol abuse and potential drug abuse. (S-8)
15. Both the principal and the guidance counselor signed off on the Referral to the Special Education Office dated October 31, 2005³, noting their agreement that a Psychiatric Evaluation was needed. (NT 79; S-6)
16. The Special Education Department stamped this Referral form as having been received on November 16, 2005. (S-6)
17. By letter dated the next day, November 17, 2005,⁴ despite the guidance counselor and the principal's endorsements of a psychiatric evaluation, the District's then Supervisor of Special Education, Ms. M, denied the Parents' request for an evaluation because: 1) "Academically Student scored in the advanced level for Math and Proficient for Reading and Writing"; 2) "He received average grades in Middle School"; and 3) "Lates to class and cutting are the issues Student is being disciplined for". (S-6, S-11)
18. The then-Supervisor of Special Education made no contact with the Parents to ask more about the content of the letter as regarded prior mental health treatment. (NT 122)
19. The private psychologist's professional experience would suggest that at the very least, given what the District knew at the time of the Parents' request, the District should have solicited more information from the parents before denying their request. (NT 587-588)
20. The director of special education has no recollection of whether or not he was asked by the then-supervisor of special education to review the Parents' request before it was rejected even though both the guidance counselor and the assistant principal agreed with the request. There is no evidence that a school psychologist reviewed the request before it was rejected. (379, 384-386)
21. A Notice of Recommended Educational Placement (NOREP) refusing to evaluate Student was sent along with the District's letter. The NOREP noted that the District used "standardized testing, report cards, and input from parents" as evaluation procedures to come to its proposed refused action. (S-13)
22. Although the District did not specify Student' disability, the NOREP noted, "Any

² Grand theft and conspiracy related to joyriding in a car with an older peer. (NT 112-113; S-52)

³ The reason why this date is earlier than the date of the Parents' letter requesting an evaluation is not in the record. (S-6, S-8)

⁴ And a telephone call alerting the Parents to the content of the coming letter. (NT 124-125)

- mental health needs can be met with a 504 Accommodation Plan”. The NOREP and the letter were sent to the parents without a meeting or telephone discussion. The District did not contact the Parents to offer a meeting to create a 504 Accommodation Plan. (NT 45-46, 260; S-13)
23. The parents were not provided with a Procedural Safeguards Notice at the time the NOREP was issued on November 17, 2005. (NT 46, 127, 162, 258-259)
 24. The NOREP did contain the following at the bottom of the page: “You have rights and protections under the law that are described in a document titled Procedural Safeguards. If you need more information or want a copy of this notice, you may contact us at (phone): Mr., Direction of Special Education [phone number redacted].” (S-13)
 25. There was no copy of a personalized transmittal letter addressed to the Parents that the District routinely sends to parents when it issues a Procedural Safeguards Notice in Student’s school file. (NT 382-383; S-58)
 26. On December 5, 2005 Student was admitted to a partial psychiatric hospitalization program, [redacted], secondary to exhibiting symptoms of depression. Student did not attend public school during this period. Student was treated and discharged on January 16, 2006. Admission and Discharge diagnoses on Axis IV (Psychosocial Stressors) noted “school difficulties” as well as family conflicts and probation. (NT 47-48, 50; S-14)
 27. At the partial psychiatric hospitalization program Student was prescribed medications to address ADHD and depression. Discharge diagnoses from the partial hospitalization program on Axis I were Impulse Control Disorder NOS, Conduct Disorder, ADHD and Bipolar Disorder. (NT 50; S-14)
 28. The Parents signed the NOREP on December 12th, and did not consider rejecting the NOREP. They were unaware of their procedural safeguards and their child’s educational rights and thought that they “had to move on from there.” They were hopeful that the 504 Plan would be helpful and did not know what else to do at the time. (NT 46, 126)
 29. The District received the signed NOREP on December 14th but did not schedule a meeting to create a 504 Accommodation Plan as per the District’s notation on the NOREP, and as per the Parents’ notation on the NOREP that they, “would like a meeting with you to discuss 504 Accommodation Plan and school-based partial”. (S-13)
 30. Student returned to the District’s Campus upon discharge from the partial psychiatric hospitalization program. Although Student started out doing well, problems soon surfaced. On January 30, 2006 Student left a class after the teacher took attendance and received a Code of Conduct Referral that resulted in a

- 1-day detention. (NT 51; P-2)
31. On February 2, 2006, after Student had been back in school, the District convened a meeting to create a 504 Accommodation Plan. (NT 51-52)
 32. The basis for the determination of Student's disability was listed on the Plan as the [partial hospital program's] Discharge Summary. The District did not conduct any type of evaluation on its own. (P-1)
 33. The Plan noted the concern as, "Student' behavior and emotional states are interfering [sic] with Student's ability to remain on task and complete assignments on time". (P-1)
 34. How the disability adversely affects Student' education was noted to be, "Inability to initiate school/class work – distracted by social activities. effected [sic] areas – ability to focus. Students [sic] oppositional defiant [sic] distracts on/task rules and not class responsibility". (P-1)
 35. The Plan provided the following accommodations: Preferential classroom seating as determined by teacher, time out arrangement will be established to allow cool down period, student allowed reasonable extension for assignment completion. Also listed under Accommodations were the provisions for the family to update the school on therapy and medication outcomes and school to update parents on progress monthly. (P-1)
 36. The Parents signed their agreement with the Plan. They did not ask for other accommodations because they didn't know what could be available other than what the District was giving. (NT 129-130; P-1)
 37. Disciplinary problems continued with a total of 9 one-day detentions and 6 days of out of school suspension to the Character, Academic and Motivation Program (CA/MP).⁵ On February 21st Student called a teacher a "douche bag" for which Student received a 1-day detention; on February 28th Student yelled at the Dean of Students in front of staff and began knocking on the wall showing a complete disregard for authority for which Student received a 3-day suspension to be served at CA/MP⁶; on March 20th Student did not return to class after visiting the nurse and was seen walking outside the school for which Student received a 2-day detention; on April 28th Student was late to a class for the third time for which Student received a 1-day detention; on May 2nd Student questioned a teacher's authority regarding assigned detention and received another 1-day detention; on May 4th Student left the room when told Student could not for which Student received a 2-day detention; on May 11th Student engaged in behavior that distracted the class for which Student received a 1-day detention; on May 12th Student left the classroom, lying that Student had to go to a volleyball game for

⁵ See NT 467-469 for description of this program.

⁶ The mother was asked to come to school to take Student home on this occasion. (NT 53-54)

which Student received a 1-day detention; on May 16th Student left the classroom without permission and did not return for which Student received an out of school suspension to be served at CA/MP. (P-2)

38. Other issues that did not result in detention/suspension or for which Student was issued detentions referenced but not included in the exhibits were: (March 2006) no effort to make up work, talking while others were taking a quiz, getting out of Student's seat, talking to other students in the hallway rather than being in class, excessive talking in class, eating sunflower seeds in class, sleeping in class; (April 2006) insubordination to a teacher who was involved in dealing with other students who were fighting, not being in the class where Student was supposed to be, sleeping in class; (May 2006) leaving the classroom, being out of Student's seat, going under the teacher's desk and calling out, eating sunflower seeds after Student was asked not to do this, disrupting class. (P-3)
39. The dean of students at the time explained the system of disciplinary referrals in his testimony. He met with Student to discuss the disciplinary referrals. (NT 457-464).
40. On March 28th a teacher noted "Student has not been keeping up with Student's work and Student's grades are dropping"; on March 30th another teacher noted that Student has "not done as well as Student had in the 5th marking period"⁷. His 6th marking period average was a 66%"; on April 18th Student was assigned Mandatory After School Academic Recovery Tutoring for one subject for 5 weeks with averages of 74%, 64% and 70% for the first three marking periods. On April 20th a teacher noted a score of 71% on a quiz, and reported that Student's participation in class had gone down during the previous two quarters. (P-3)
41. The Parents were in contact with the school throughout this time. (NT 57-58)
42. Student' final grades for 9th grade (2005-2006) in major subjects were as follows: English C-, ⁸Western Civilization F, Math C, Chemistry/Physics F, German 2 F. (S-15, S-17)

Academy

43. Student started summer school in June 2006, but was dropped because of attendance issues. During this summer Student drank about three quarts of beer a week, and smoked about three (marijuana) joints a day. (NT 60, 258; S-16)
44. Just before July 4th Student cut off Student's monitor⁹, left home overnight, and when Student returned Student took an intentional overdose of prescription pain medication, prescription psychostimulant medication, prescription antidepressant

⁷ The District has 8 marking periods for high school students. (NT 213)

⁸ The District does not use the letter D. Grades therefore go from C- to F. (NT 122-123)

⁹ Terms of Student's probation involved Student's wearing a monitor and keeping certain hours. (NT 114)

- medication and alcohol purportedly because Student was depressed about having violated terms of Student's probation and facing juvenile detention as a consequence. Student was hospitalized on a psychiatric inpatient unit for about a week and then taken to the juvenile detention center. (NT 60-61, 114; S-16)
45. The District did not receive documentation regarding Student's admission to the hospital until January 2008. (NT 320).
 46. The Parents asked the court to release Student into their custody so that they could place Student in Academy in [state redacted], a program about which they had consulted the psychiatrist on the inpatient unit. The court agreed. (NT 61-63, 114-115, 309-310, 315)
 47. The Parents did not notify the District of their intent to unilaterally enroll Student at Academy. (NT 320)
 48. Academy offered a one-month wilderness program, followed by a village (small community and reflection) phase, followed by an academic boarding school. (NT 63; P-13)
 49. Student was at Academy for five months (July 2006 through October 2006) and did very well there. The academic portion consisted of about 6 weeks and cost \$9,300. Student made up Student's 9th grade academic credits and received good grades in all subjects. The first set of grades were all As; the second set were mostly Bs with one C. (NT 63-66, 305-306; S-18)
 50. When Student left Academy and went to School, Student and/or Student's parents had weekly conference calls with someone from Academy up until Christmas in a program called "After Care". (NT 306-309)
 51. On October 26, 2006 Student received a psychological evaluation before Student left Academy. On the Wechsler Intelligence Scale for Children Fourth Edition (WISC IV) Student earned a Verbal Comprehension Index Score of 104 (61st percentile, average range), a Perceptual Reasoning Index Score of 102 (55th percentile, average range), a Working Memory Index Score of 120 (91st percentile, superior), and a Processing Speed Index Score of 91 (27th percentile, average range). Although a Full Scale IQ could not be computed because of the variability in the Index scores, the examiner did derive a General Ability Index Score of 103 (57th percentile, average range) based on the Verbal Comprehension and Perceptual Reasoning Index scores. The examiner opined that Student's performance was suppressed secondary to illicit drug use and that they would likely be higher in six months if Student maintained sobriety. (S-16)
 52. The psychological evaluation included an achievement test, the Wide Range Achievement Test Third Edition (WRAT-3). Student achieved a Reading

standard score of 102 (55th percentile)¹⁰, a Spelling standard score of 105 (63rd percentile) and an Arithmetic standard score of 102 (55th percentile). (S-16)

53. Personality testing was administered in the form of the Minnesota Multiphasic Personality Inventory – Adolescent Form (MMPI-A). Student’s response pattern on items related to the validity scales suggested that the results were valid. Student evidenced difficulties in the areas of school adjustment, family discord, authority conflicts and drug/alcohol issues, all consistent with Student’s known history. (S-16)

School

54. In anticipation of Student’s completion of the Academy program, in September 2006 the Parents hired an educational consultant¹¹ to help find a school that would be good for Student. The consultant reviewed documents from Academy and interviewed the Parents on the telephone. He did not interview Student or contact the District. (NT 64-65, 138; P-8, P-12)
55. With the educational consultant’s help the Parents selected School, in [city and state redacted]. Student entered School on November 1, 2006. (NT 64-65, 136-137, 276)
56. School is a small (40 students) therapeutic boarding school with daily peer counseling in groups and AA meetings. (NT 66, 271, 300)
57. While at School Student received private tutoring in math as needed for an additional fee. (NT 301)
58. While at School Student received weekly private counseling by an independent psychologist to whom the Parents paid a fee. (NT 300)
59. Student had re-evaluations¹² almost immediately. Student then became depressed after Student’s participation in sports was limited subsequent to breaking Student’s collarbone in a snowboarding accident in January 2007. (NT 319, 324)
60. Student came to be put on a highly structured and restrictive schedule. The students all have the same consequences for behaviors. Student had been smoking in the dorm and losing focus, had a dirty urine, and Student had gone onto the ice on Lake [redacted] with other students so Student had to go through three or four five-day “reevaluations”. Student left the program in mid-May 2006. (NT 67-68, 143, 296-299, 329)

¹⁰ The WRAT 3 Reading subtest addresses decoding only, so Student’s reading fluency or reading comprehension were not assessed.

¹¹ It is of interest that the educational consultant is quoted endorsing Academy on Academy’s website. (P-13, p. 4)

¹² At School “reevaluations” required a student to stay in school but withdraw from activities and reflect for about three days, or leave school for five days, reflect and then come back and address the whole school, telling then why an offense was committed. (NT 143-145, 296)

61. The Parents are unaware if School had any special education teachers, behavioral specialists, or psychologists on staff. (NT 299)
62. Student' 2nd and 3rd Quarter grades at School ranged from B to C. (P-19)
63. Student asked to go back to Academy to refocus. He left School on May 12th, Student re-entered Academy a few days after leaving School and stayed at Academy in the wilderness phase for about 5 weeks during which time there was no academic instruction. The students were required to write in journals while they were in the wilderness. (NT 68, 145-146, 273-274, 302-303, 317-318, 326)

11th Grade: 2007-2008

64. Although the plan had been for Student to re-enroll at School for the coming academic year (2007-2008) Student expressed a desire to go back home to Pennsylvania and the Parents concurred. (NT 80-81, 275)
65. In August 2007 Student re-enrolled in the District in 11th grade.¹³ The father met with a guidance counselor (who was not the guidance counselor who worked with Student during fall 2008), father verbally described Student's entire history, where Student had been, and requested that Student attend a high school other than the one Student would ordinarily attend so that Student would not be with the same peers who were in Student's class previously. However, the Parents did not pursue that in writing. (NT 252-253, 276)
66. The Parents did not share the Academy psychological evaluation with the District upon Student's enrollment. The District did not request any documents from/about Academy. (NT 134, 251)
67. The Parents did not share Student's disciplinary history at School with the District upon Student's reenrollment. The District did not request any documents from/about School. (NT 146, 251)
68. The District did not create a 504 Accommodation Plan nor did it evaluate Student despite Student's being hospitalized and Student's being in two specialized therapeutic schools since Student's previous departure from the District. (NT 81, 86)
69. Almost immediately Student began displaying serious problems. School began at the end of August and the first documented problem was September 6th. (NT 82-83, 174-175, 276; S-19)
70. The Parents shared that Student might be having difficulty transitioning from small boarding schools with Student's teachers and remained in email contact

¹³ Student had made up Student's 9th grade credits in Academy and Student's 10th grade credits in School, finishing at Academy.

- with the teachers, and in phone, email, and personal face-to-face contact with the guidance counselor. (NT 89, 148-149, 174, 277; P-4)
71. The Parents told the guidance counselor who had not worked with Student before that Student had been on medication and was no longer taking it, and that Student had been in counseling and was no longer participating in counseling. The guidance counselor was aware that Student had substance abuse issues and that Student had been involved with juvenile probation. (NT 197, 199)
 72. At some date prior to October 1st the Parents asked the District's attendance liaison for advice, and were told that it would be better to go through the Probation Department than the (Attendance) Magistrate because although the Magistrate can mandate attendance at counseling if it is already set up, enforcement was very difficult and "the volume of students that flood the local Magistrate's offices in Bethlehem is staggering". (NT 278; P-4)
 73. The guidance counselor worked with the Parents to help get Student back on track. He and the Parents communicated several times a week and he met with Student several times a week. However, Student kept spiraling downward and "things got worse and worse" according to the mother. (NT 82-83, 176)
 74. Early on, perhaps in September, the school arranged for Student to have half-days (mornings) to assist with the truancy and allowed Student to drop two classes. Student therefore had two 88-90 minute classes per day (the first two periods of the day) and then was allowed to go home; there was no school-based structure to Student's afternoons. (NT 88-89, 176-178, 217-218)
 75. The classes Student was taking were not core academic classes. The classes in partial fulfillment of Student's credit requirements were Physical Education and Health. The other two classes were electives. (NT 224-225)
 76. The guidance counselor was aware that this truncating of Student's schedule would put Student behind one full credit for the year. (NT 223-224)
 77. No one at the District suggested to the Parents that although their 2005 request for an evaluation had been denied they could request an evaluation again. The Parents were unaware that they could ask again. (NT 222, 260-262, 279-280)
 78. The District was considering placing Student at the Career Academy, a school within the District that provided more structure and addressed dropout prevention. The Parent visited Career Academy in October or November 2007. Student did not go to the Career Academy.¹⁴ (NT 180, 278-279)

¹⁴ The record is not clear exactly why Student did not go, although the current supervisor of special education mentioned in testimony in passing that Student had refused to discuss going to the Career Academy. (NT 333)

79. Student was skipping classes, walking down the street and not coming back, causing distractions in class, pulling out Student's cell phone, refusing to take Student's hoodie off. Student's grades were falling. (NT 84)
80. "Unlawful" (unexcused) absences were recorded for 1 to 5 classes per day (averaging three to four missed classes a day) on September 5, 6, 7, 10, 11, 12, 13, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28; October 1, 2, 12, 17, 19, 23. (S-48)
81. On September 5th, because of Student's "incessant talking" a teacher moved Student's seat but next day Student sat in Student's old seat and refused to move and when sent to the office Student never returned; on October 5th Student left class without permission for which Student received a 1-day detention; on October 9th, asked to stop resting Student's head under Student's sweat shirt Student refused and began making odd noises that made the other students laugh disrupting the class, did not stop when asked, and refused to leave the room when told but left before security arrived; on October 11th Student used Student's cell phone at will and refused to turn it over; on October 12th Student ate a cupcake that another student had been denied permission to eat in class for which Student received a 1-day detention; on October 24th Student continued to use Student's cell phone in class. (S-19, S-20, S-21, S-22, S-23, S-25; P-4).
82. The guidance counselor believed that these incidents were not typical of a 9th grader but were not unusual for students who had disciplinary issues. (NT 200)
83. The guidance counselor discussed the Career Academy with the Parents and they were receptive to the idea. The Career Academy had more structure than the high school, and has personnel more experienced with moving students into other placements if needed. (NT 201-202)
84. On October 25, 2007 the guidance counselor convened a meeting, to which the guidance counselor at the Career Academy was invited, to create a Section 504 Accommodation Plan. There was also discussion of truancy and the Career Academy. None of Student's teachers were present and the assistant principal who had also been invited was not there. Despite the passing of twenty months, despite the fact that the guidance counselor knew that Student had been at Academy and School, despite the fact that Student was now an 11th grader, and despite the previous Plan's not having demonstrated effectiveness, the only accommodation added to the existing Plan from the February 2, 2006 plan was "regular meeting with guidance counselor". The only added area of concern was "not attending regularly". (NT 151, 181-182, 203-205, 282-284; S-26, P-1)
85. The guidance counselor said that Student tried to have meetings with Student, but they did not occur as frequently as he would have liked because of Student's attendance. He estimated that Student had about four brief meetings with Student alone and two or three with Student and Student's parents. (NT 182-183)

86. The guidance counselor did not suggest that Student be evaluated for special education eligibility. (NT 183, 207)
87. After the Plan was written, additional unlawful absences to classes continued. They are recorded as: October 26, 31; November 1, 2, 5, 6, 9, 12, 16, 28, 30; December 4, 5, 12, 14, 17, 18, 19, 21; January 4, and 10. (NT 182; S-35, S-48)
88. Code of Conduct Referrals were written for some of the unlawful absences. These were November 30, December 4, December 5, December 19, December 21, January 4, and January 10. (S-35, S-36, S-37, S-40, S-43, S-45, S-49)
89. Student was suspended on November 14 and 15, on December 7, 10 and 11, and on January 7, 8 and 9. (S-48)
90. On November 19th a teacher wrote to the Parent: "I've lost control of this class, partly because Student can do just about whatever Student wants, when Student wants. As a result, I have (must) changed teaching styles and that has gotten the other students angry". On October 9th this teacher had asked that Student be removed from his class, but although the record does not elucidate when or the reason Student obviously had returned to the class. (NT 90; P-4)
91. As of the final marking period Student spent at the high school Student was receiving F's in the major subjects Student was taking, with a B in Physical Education. All the grades for the year were not listed. (NT 187, 216; S-39)
92. The Grade Report incorrectly lists "Citizenship" as being Satisfactory, which the guidance counselor testified was not the case. (NT 213-215)
93. On October 25th the District issued its first Permission to Evaluate, proposing only a psychiatric evaluation, the reason stated as, "504 plan, past mental health issues, placement in an alternative setting", and the Parents immediately consented. The supervisor of special education for the high school had suggested the psychiatric in consideration of the mental health issues Student had had, for the purposes of determining an appropriate educational placement. The guidance counselor was not able to say why only a psychiatric was proposed as the Career Academy did not require a psychiatric, although he thought that maybe a partial psychiatric hospitalization program was being considered. (NT 186, 333; S-27, S-28)
94. The Parents were given a Procedural Safeguards Notice at the time the October 2007 Permission to Evaluate form was issued. (NT 367)
95. The District sent the request for a psychiatric to the IU on October 26th. On November 6th the psychiatrist met at the school with Student, the guidance counselor and the Parents. Student walked out of the evaluation when the psychiatrist told Student that Student was out of control and needed a residential facility. (NT 93-94, 334; S-29)

96. The psychiatrist noted that Student was not receiving any mental health services or medication at the time, that Student had a significant drug addiction, that Student was drinking and that Student was out-of-control at home. The psychiatrist also noted skipping classes, being unmotivated and giving up on school. The psychiatrist reported that Student minimized and denied most of the problems Student's parents reported and that Student did not think Student needed any kind of help. (P-9)
97. The psychiatrist diagnosed Student with ADHD, Conduct Disorder, and Polysubstance Dependence on Axis I, as well as with Parent/child relational problems. (P-9)
98. Given that Student was "not abiding by parental authority and expectations, defying school rules, engaging in truant behaviors and actively using drugs" the recommendation was for a residential treatment program where Student could receive "24/7 supervision, behavioral accountability, structure, crisis management services, involvement in drug and alcohol treatment, psychiatric services, [and] utilization of medication". (P-9)
99. The only information that came out at the psychiatric evaluation at which the guidance counselor was present that the guidance counselor did not know previously was the extent of Student's drug and alcohol issues. (NT 212, 221)
100. The District received the November 6th psychiatric evaluation on November 21st. On or about November 29th (there had been a 5-day break for Thanksgiving) the District's supervisor of special education contacted the Parents asking them to sign permission for a release of records so the psychiatric evaluation report could be sent to the county CASSP coordinator. The Parents signed the faxed consent form. (NT 94, 335-337, 354, 363; S-34)
101. Although the record does not make clear what exactly happened, there was some delay either on the part of the District's special education department or the county CASSP coordinator or both, and the Parents learned that the psychiatric evaluation had expired as of December 11th.¹⁵ The school counselor was aware that the report was not provided to the county within the required time frame. (NT 95-96, 189)
102. The supervisor of special education for the high school spoke with the CASSP coordinator who said that because the problems were related to "conduct disorder" and not "mental health" the county "did not have any treatment for

¹⁵ When an evaluation recommends partial hospitalization, inpatient hospitalization or residential treatment there is a time limit during which the recommendation must be implemented, otherwise the report "expires" and the person needs to be reevaluated.

- [Student]”.¹⁶ The supervisor of special education for the high school conveyed this information to the mother by telephone. The CASSP coordinator reportedly also told the supervisor of special education for the high school that Student needed Medical Assistance¹⁷ to proceed with the CASSP meeting. (NT 337-341, 352-353)
103. The supervisor of special education for the high school testified, “So I kind of let it go at that”. She did not issue a Permission to Evaluate for a psychoeducational evaluation until late in January because she was “collecting the information”. She however did not ask the Parents for any information they might have. She did not make plans to offer Student anything in lieu of the county providing residential treatment. (NT 337, 343, 354-357, 361, 368, 371)
104. The psychiatric report’s having expired did not render it void for purposes of 504 planning or for contributing to determining special education eligibility. The District could have used the report as a basis for creating/revising a 504 Plan. (NT 230-231, 358)
105. The psychiatrist came back to the school to re-do the evaluation on January 4, 2008. Since Student had refused to get out of bed to come for an interview the report consisted of a telephone interview with the Parents and school staff and a review of the previous psychiatric. A residential treatment facility was recommended as being medically necessary and it was recommended that the legal system remain involved to monitor Student’s compliance with treatment. Because Student was not seen face-to-face however, Magellan, the insurer, deemed the psychiatric evaluation report invalid. (NT 97-98, 161; S-44)
106. Student had been sharing a blunt in an alley near school on September 20th and was charged with possession. Although Student was not on probation at the time, and the offense was relatively minor, the Parents pleaded with the probation department in January 2008 to detain Student so that Student could receive a psychiatric evaluation [for which Student would have to be present, as it would be conducted in the detention facility]. Student was detained and did receive a psychiatric evaluation from Dr. D. (NT 99-101, 240-241, 244-245)
107. In a turnabout from the November psychiatric interview Student averred that Student “does need a lot of therapy” and that Student “needs a structured program”. The psychiatrist diagnosed Student with Major Depression Recurrent, Cannabis Dependence, Pervasive Developmental Disorder NOS, ADD without Hyperactivity and Parent/Child Relational Problem.¹⁸ (S-47)

¹⁶ Please note that the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM-IV) published by the American Psychiatric Association lists Conduct Disorder as an Axis I mental health diagnosis.

¹⁷ Actually Student already had Medical Assistance. (NT 96-97)

¹⁸ He decided on the PDD NOS diagnosis because “Student may have subtle features of condition akin to Asperger’s Syndrome [because Student] just does not get it. [Student] wants what Student wants when

108. The psychiatrist recommended an inpatient substance abuse rehabilitation facility as being medically indicated and necessary. He opined that optimally the facility would be a dual diagnosis treatment program that would address both Student's cannabis abuse and Student's underlying depression. (S-47)
109. However, problematically, a Drug and Alcohol Evaluation the previous August had determined that behavioral (emotional) issues were causing Student's drug and alcohol use, and that an inpatient drug and alcohol treatment program was not indicated. (NT 102-103)

Evaluations: Private and District

110. On December 14, 2007 [the supervisor of special education for the high school] from the District verbally told the Parents that the District was going to issue a permission to evaluate Student. Up until this point no one at the District had suggested or offered an evaluation to determine Student' eligibility for special education services. The Permission to Evaluate form was eventually sent, dated January 29, 2008, and was several weeks after the Parents' January 11, 2008 filing for due process and after they had engaged their private psychological evaluator. The Parents signed the form on January 31, 2008. (NT 104, 152, 288, 343-344; S-50, P-5 p. 16)
111. In the meantime by late December or early January 2008 the Parents had decided to obtain evaluations through [redacted] Psychiatric.¹⁹ A psychological evaluation was completed over two sessions in January 2008²⁰ and a psychiatric evaluation was completed in two sessions in February and March 2008. (NT 105, 287, 532; S-52, S-53)
112. The private psychologist, Ms. H conducted a thorough evaluation including a records review, educational input from the District guidance counselor, teacher input from an instructor at [alternative school program], Parent input via interview and structured inventory instruments, and Student's input via interview and completion of structured inventory instruments. The psychologist administered a number of tests to Student, including cognitive, achievement, memory, visual-motor, auditory/verbal, executive functioning, behavioral and emotional assessments. (S-52)
113. The private psychologist administered the WISC-IV. Student earned a Full Scale IQ of 109 (73rd percentile, average range), a Verbal Comprehension Index of 116 (86th percentile, high average, a Perceptual Reasoning Index of 102 (55th percentile, average), a Working Memory Index of 102 (55th percentile,

Student wants it. Things have to go Student's way or the highway...despite multiple Detention placements and psychiatric treatment in the past [Student] does not seem to learn from Student's experience, but just keeps getting caught up in the same trouble". (S-47)

¹⁹ The agency receives requests for evaluations both from parents and from school districts. (NT 590)

²⁰ Student was just released from the detention facility and had on an ankle monitor. (NT 596)

- average) and a Processing Speed Index of 106 (66th percentile, average). (S-52)
114. The private psychologist administered the Woodcock Johnson Tests of Achievement Third Edition (WJ-III). Student scored in the Average Range on Broad Reading, in the High Average Range on Broad Math, and in the Average Range on Academic Skills and Academic Fluency. (S-52)
115. The private psychologist administered the Gray Oral Reading Test Fourth Edition (GORT-4) and Student attained scores in the average to high average ranges. (S-52)
116. The private psychologist administered the Children's Memory Scale and found that Student's Visual Memory and Verbal Memory are within the average range, 42nd and 58th percentile respectively. (S-52)
117. On a measure of executive functioning, the Behavioral Ratings of Executive Functioning (BRIEF), Student scored in the clinically significant range on indices addressing the ability to appropriately inhibit behavior and emotions and addressing the ability to initiate, plan, organize, self-monitor and sustain working memory. (S-52)
118. On a DSM-IV aligned measure designed to tap into difficulties in the area of ADHD Student's ADHD Index was in the clinically significant range. (S-52)
119. On the Connors' Parent Rating Scale Revised parental responses yielded a clinically significant score on the Oppositional Index and the Connors ADHD Index. (S-52)
120. The mother completed the Achenbach Child Behavior Checklist (CBCL). Her responses yielded clinically significant scores on Externalizing Problems, Anxious/Depressed, Attention Problems, Rule-Breaking Behavior, and Aggressive Behavior (clinical scales) and on Affective Problems, Anxiety Problems, Oppositional Defiant Problems and Conduct Problems. (S-52)
121. On the Youth Self Report of the CBCL Student rated self in such a way that there were no clinically significant scales in the clinical group or the DSM-oriented group of descriptors. It appears that Student under-reported on this instrument. (S-52)
122. On the Piers-Harris-2 Student's responses yielded from low average to high average scores in all categories. Given that Behavioral Adjustment, Intellectual/School Status and Happiness and Satisfaction were among the areas assessed, it would seem that Student under-reported on this instrument. (S-52)
123. The private psychologist did interview Student' guidance counselor at the high school and she also spoke with the principal/counselor at [alternative school

- program] even though Student was placed there after she had finished writing her report. (NT 560-561, 592-593, 598-59, 620)
124. At that time Ms. H's impression was that the principal "loved Student", and the principal thought Student was making "a remarkable adjustment to the program". However she was also aware that Student tended to do well in a placement at first and then do less well. (NT 561, 596)
125. Ms. H had some reservations about the [alternative school program] from the beginning. She wondered if it was structured enough and wondered if it was really treatment-oriented. (NT 562-563)
126. Ms. H's diagnostic impression was ADHD combined type, ODD, and R/O Bipolar Disorder I. (S-52)
127. Ms. H found that emotional and behavioral assessments revealed significant "difficulties with both internalizing and externalizing disorders punctuated by heightened levels of inattention and other symptoms of ADHD." Ms. H further reported that "it appears that Student has been self medicating for a long time through the use of alcohol and drugs. The alcohol and drug use is secondary to Student's mental health issues." (NT 553; S-53)
128. Ms. H found Student eligible for special education services, having the disability classifications of Other Health Impairment and Emotional Disturbance and being in need of specially designed instruction. She recommended an "intensive alternative educational program that will be able to provide a sound, research-based curriculum that also provides a therapeutic component as well as the opportunity for drug and alcohol intervention". The psychologist noted that the program should be both academically and therapeutically aligned and believed that residential treatment was warranted. (S-52)
129. Ms. H made specific recommendations that could be discussed by an IEP team and used to guide the crafting of an appropriate IEP. (S-52)
130. Ms. H recommended that Student have a small class environment with a low student:teacher ratio and individualized instruction, that the teachers be trained to work with students with Student's disabilities, that the program be academically and therapeutically aligned, and that the classroom should have a behavior management system allowing for positive change through positive reinforcement. She recommended preferential seating to increase supervision, explicit extensive and clear rules that are reviewed regularly, that the specially designed instruction include strategies to assist Student in managing Student's ADHD, that the class limit external distractions, that Student be taught behavioral delay strategies, that Student verbalize Student's plan before starting Student's work, that Student be given frequent breaks after completing work segments, that Student have a time-out provision to remove self from an emotional situation, that

- antecedents and consequences of behavior be monitored and the behavioral plan adjusted accordingly, that the behavior plan be applied across settings, and that ongoing behavioral consultation be available. (NT 571; S-52)
131. Ms. H recommended pre-teaching information, establishing eye contact when giving directions, having Student repeat instructions or directions to check for understanding, an altered rate of presentation of new material, chunking of information, and frequent changes of task. (S-52)
132. Ms. H noted that attention needed to be paid to Student' transitional needs. (NT 572; S-52)
133. Ms. H also opined that Student could benefit from psychotherapy. (S-52)
134. Ms. H recommended a residential treatment facility because "Student seems to get in trouble when Student's at home...if we don't have that kind of structure throughout the entire day, I think Student loses it". (NT 573)
135. The cost of the private psychological evaluation was \$3,600. (NT 107, 288)
136. The Parents shared Ms. H's report with the District upon its completion. (NT 107)
137. The private psychiatrist, Dr. B was specifically asked by the Parents to render an opinion regarding whether or not a diagnosis of Bipolar Disorder was warranted. He found that although Student had some characteristics of Bipolar Disorder, most of the impulsivity, resistance and trouble-making seemed more related to Oppositional Defiant Disorder (ODD) than to any periodic mood variability, but that the diagnosis of ADD was "probably valid" dating back to early school years. (S-53)
138. The private psychiatrist endorsed drug and alcohol counseling on an individual and group basis. (S-53)
139. The mother was not aware of whether the psychiatric evaluation was done at any cost to the family, and the father said that it cost the family only their \$30 co-pay. (NT 107, 288-289)
140. The District completed its psychoeducational evaluation report on March 27, 2008. However, the actual testing and gathering of information from teachers and parents took place over a three-week period at the end of February and the beginning of March. The evaluator comprehensively reported data from previous evaluations, including Ms. H's evaluation. (NT 398-399, 425; S-54)
141. The District evaluator administered the Kaufman Assessment Battery for

- Children Second Edition (KABC-2) to determine current level of intellectual functioning. Student obtained scores as follows: Fluid Crystallized Index 105, 63rd percentile, average; Sequential 115, 84th percentile, average; Simultaneous 94, 34th percentile, average; Learning 94, 34th percentile, average; Planning 111, 77th percentile, average; Knowledge 107, 63rd percentile, average. (S-54)
142. The District evaluator administered the Kaufman Test of Educational Achievement Second Edition (KTEA-2) to assess Student's academic skills. Student scored as follows: Reading Composite 99, 47th percentile, average; Math Composite 109, 73rd percentile, average; Written Language Composite 107, 68th percentile, average; Listening Comprehension 112, 79th percentile, average; Oral Expression 106, 66th percentile, average. (S-54)
143. On the Behavior Assessment Rating Scale Second Edition (BASC-II) Self-Report Student's responses yielded scores in the average range for all scales. Given Student's history Student was clearly under-reporting. (S-54)
144. On the BASC-II Teacher Reports Student scored in the Clinical Range on Hyperactivity, Atypicality and Overall Behavioral Symptoms. On one teacher's response set, Student scored in the At-Risk Range on Aggression, Conduct Problems and Externalizing Problems, Depression, Somatization and Internalizing Problems, Attention Problems, Learning Problems and School Problems, and Withdrawal. On the Adaptive Scale teacher reports placed Student in the At-Risk Range for Adaptability, Social Skills, Leadership, Study Skills, and Adaptive Skills. (S-54)
145. On the BASC-II Parent Report Student scored in the Clinical Range on Hyperactivity, Conduct Problems, Externalizing Problems, Anxiety, Depression, Somatization, Internalizing Problems, Behavioral Symptoms, and Adaptability. Parents' responses placed Student in the At-Risk Range on Attention Problems, Atypicality, Withdrawn and Adaptive Skills. (S-54)
146. On the Conners' Teacher Rating Scales responses placed Student in the Clinically Significant Range on Emotional Lability and in the At-Risk Range on Oppositional, Hyperactivity, ADHD, Restless/Impulsive, and Inattentive. (S-54)
147. On the Conners' Parent Rating Scales responses placed Student in the Clinically Significant Range on Oppositional, Psychosomatic, ADHD, Restless/Impulsive, Emotional Lability, Inattentive, and Hyperactive-Impulsive. Student placed in the At-Risk Range on Cognitive Problems/Inattention, Hyperactivity, Anxious/Shy, and Social Problems. (S-54)
148. The District's evaluator chose to have only teachers at [alternative school

program]²¹ complete behavioral questionnaires, rather than asking teachers at the high school who knew Student for a longer period of time. It is notable that the teachers asked to complete these scales had known Student since February 4, 2008 and filled them out on or around March 7, 2008. However, the Directions for the BASC-II ask the rater to respond about “how this child has behaved recently (in the last several months). The District psychologist was not aware of the specific timeframe for reporting on the BASC-II). As was Student’s pattern, initially Student was doing well at the [alternative school program] although problems were emerging. (NT 108, 427-429; S-54; HO-A)

149. The teachers at [alternative school program] were given the Scale for Assessing Emotional Disturbance (SAED). The scale asks the responder to rate the student in various areas “now and over the past two months”. The District psychologist was not aware of the specific timeframe for reporting on the SAED). Teacher ratings did not result in a significant score on “Emotional Disturbance”. (NT 429; S-54; HO-A²²)
150. The District guidance counselor who had the most contact with Student in the fall of 2007 did not recall that he was contacted by the District’s evaluator regarding Student. (NT 193)
151. Although the ER is not crystal clear, it appeared that the District evaluator determined that Student is not emotionally disturbed on the basis of the BASC-II and the SAED teachers’ responses rather than a comprehensive review of the records. It is clear that none of the staff at the high school who knew Student better than the staff at the [alternative school program] were asked for input. (S-54)
152. In her testimony the District psychologist directly addressed this point when asked upon what she based her conclusion that Student is not emotionally disturbed: “Several different things. One were the behavior scales that were given to the teachers, ranging from the BSC to the SAED, specifically the fact that all four teachers rated Student within the average range on the specific categories of the SAED Scale. Also, input from the teachers on how Student performs every day, talking with Student’s guidance counselor [at alternative school program] and how Student performed on an everyday basis within the classroom. Comments such as excellent student, excellent behavior. Student is able to perform very well academically and behaviorally when in a structured environment, a behavioral structured environment, such as the [alternative school program]”. (NT 414)

²¹ The District psychologist testified that the teachers at alternative school program were school district teachers. The supervisor of special education for the high school testified that it was a private program to which the District paid tuition. (NT 407)

²² The hearing officer asked for a copy of the SAED as she is not familiar with this instrument. Only the first two pages were sent, but it was decided not to hold the record open waiting for the remaining pages. (NT 452; HO-A)

153. The District psychologist asserted that she thought the alternative school program teachers had “a very good grasp on Student and how Student was doing”. (NT 425)
154. The District psychologist admitted in testimony that Student’ former teachers at the high school may have rated Student differently than the alternative school program] teachers. (NT 428)
155. The District psychologist did not speak with any of Student’s 9th grade teachers or any of Student’s 11th grade teachers at the high school, and did not speak with anyone else at the high school either. (NT 431)
156. Further in her testimony the District psychologist re-emphasized that alternative school program is “a very behavioral based structured environment... [students’ behavior is more in control [than at home]]” and that in that setting “that Student requires, those behaviors [that the former high school teachers may have reported] did not show. But in a different environment, maybe that would have been the case [that other teachers would have rated Student differently]”. The District psychologist agreed that the “different environment” may be the Campus of the high school but that she wanted to know how Student was performing within the structured environment. (NT 422, 430, 434-435)
157. The District psychologist stated that her evaluation “deals with how Student was currently functioning within my time with Student at [alternative educational program]”. She did not believe that information from Student’s former teachers would have changed her evaluation. (NT 428, 435, 443)
158. The District psychologist testified that her reason for disagreeing with Ms. H’s classification of Student as emotionally disturbed was “based on my evaluation with Student and the fact that Student did not meet the criteria of an emotionally disturbed student with the assessment tools that I conducted.” (NT 423)
159. The ER concluded that Student is a student eligible for special education under the classification of “Other Health Impairment”. (NT 416; S-54)
160. The District psychologist conceded that in order to make a determination about Student’s placement and needs currently it is important to consider the difficulties Student encountered at [alternative school program] after her report was completed. (NT 437)

Alternative School Program

161. Student spent three weeks in detention in January 2008 at the Parents’ request. Mr. P from Juvenile Probation suggested the [alternative school program], a private certified school, for Student. The [alternative school

- program] works with the probation department in planning for youths. School Districts pay the tuition at [alternative school program]. After detention with the District's cooperation Student entered the [alternative school program] in late January or early February. (NT 103-105, 349)
162. The District did not convene a team such as a 504 team or an IEP team or an MDT team to discuss the alternative school program placement despite having a psychiatric evaluation in hand and despite ongoing evaluations by the private psychologist and possibly the District psychologist. (NT 364)
163. The placement at alternative school program occurred after the Parents had filed for due process. (NT 364)
164. The District believed that alternative school program would be a good placement for Student. It is a smaller setting, with 8 to 12 students per class, that provides instruction in English, math, science, social studies, computer technology, woodworking and cooking. The students are assigned a guidance counselor with whom to meet once a week or more often as needed, there is a daily group counseling/discussion period, there are drug and alcohol groups and the director is very in tune with the types of students placed there. (NT 347-350)
165. After the District completed its evaluation it convened an IEP meeting at the District office and then the supervisor of special education for the high school, the director of special education and the mother went to the program for a second IEP meeting. (NT 351)
166. The IEP team decided to keep Student at alternative school program because Student seemed to be doing well there, at that time was receiving As and Bs and behavior problems were not being reported. (NT 365)
167. Although Student started out very well at alternative school program without major incidents, Student subsequently had issues with attendance, rule-breaking, smoking, going to another part of the building, being disruptive and focusing. (NT 235, 349)
168. Although Student started out with A's and B's, Student received Student's first report card from alternative school program at the beginning of April. Student was disappointed in Student's grades which were in the C+ to D- range. (NT 237-238; P-16)
169. In February 2008 Student agreed to accept psychiatric medication management and Abilify was prescribed. (NT 235; P-17)
170. In mid-April Student was placed in the Northampton County Juvenile Justice Center's adjunct treatment program by court order for a curfew violation. (NT 235, P-17)

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.²³ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. This hearing officer has made the following determinations of the witnesses' credibility related to the parties' cases in chief:

Student's Mother: The mother was judged to be highly credible. She testified in a low key, quiet manner and appeared to be trying to answer exactly and to the best of her recollection about two years' worth of events, some clearly traumatic for her as well as for her child. The mother conveyed the clear impression that whatever steps the Parents took or decisions they made were to save their child. Although this family was certainly caught right in the very cracks between education/mental health/juvenile justice that the CASSP system was designed to eliminate, the mother did not display rancor towards anyone and maintained a dignified demeanor throughout the hearing.

Student's Father: When father testified he provided fairly exact and to-the-point answers. He firmly established the point that the Parents did everything the District ever asked them to do. Occasionally it did seem that he was deliberately trying to weave the words "education" and "educational" into his testimony whenever possible, and this detracted slightly from his credibility as did his testimony that he didn't know if the discussion and concurrence of the treating [redacted] hospital staff about the appropriateness of Academy centered on academic or psychiatric care needs (NT 309-310). This desire to emphasize the educational aspect of Student' placements is understandable, given the tremendous cost to the family of providing placements where Student could be safe.

The private psychologist was about three weeks shy of defending her doctoral dissertation at the time she testified. She worked for the [redacted] School District as a psychology associate for a year and then as a psychology intern for a year. She worked for two other school districts for a five-year span. For the last two years she has worked privately and with [redacted] Psychiatric, the second of these years completing her internship and her doctoral work.²⁴ She was very knowledgeable about her instruments

²³ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

²⁴ At some unspecified time she also worked for [mental health agency] in a unspecified capacity. (NT 614)

and provided a comprehensive description of Student's strengths and weaknesses. Her decision to classify Student as emotionally disturbed as well as other health impaired was based in a well-reasoned and comprehensive review of the history and of testing results. Among other things, her careful consideration of the history she was provided, her making contact with Student's former school counselor as well as Student's counselor at the time, and her skepticism regarding Student's seemingly remarkable adjustment to [alternative school program], revealed a perspicacious viewpoint that the less experienced District psychologist lacked. The intervention recommendations she made in her report are judged to be sound and can be used to craft an appropriate IEP. However, her recommendation for a residential placement because Student tends to get into trouble when Student is at home did not provide a convincing underpinning for an educational placement decision.

The District's Psychologist is completing her first year of employment as a certified school psychologist. Last year she was an intern in the District. Her prior experience consists of two years working in a grant program with students with low incidence disabilities at the high school level while she was in graduate school and working as a paraprofessional in an early intervention program with young autistic children. This witness, as would not be unexpected given her brief professional experience, tended to rely on numbers and rote interpretations of her testing data without conveying a rich understanding of her instruments. Her evaluation was fatally flawed by her deliberate decision to virtually put on blinders regarding most of Student's past school behavior and to look solely at how Student was doing, after a week or two, at a new very structured placement. Had she been more experienced she would have recognized the likely presence of the honeymoon effect, and would not have been so likely to be taken in by Student's good behaviors at the beginning of Student's alternative school program experience. The fact that the alternative school program's principal/counselor was also taken in by Student (for example, allowing Student privileges like taking out the trash, to which Student responded by sneaking a smoke) speaks to how skillful Student had become at manipulating adults, an aspect of Student's personality first addressed in Dr. D's report (and the major reason this hearing officer found Student's letters from juvenile detention not to be probative). Although she found Student to be eligible for special education, her failing to classify Student as emotionally disturbed in addition to other health impaired compromised Student's chances of having an IEP that would address all Student's educational needs by providing supports sufficient to allow Student to receive meaningful educational benefit.

High School Guidance Counselor, 11th grade: This witness testified to what he remembered and did not embellish. He put forth considerable effort with the parents, and what efforts Student would allow, to help the youth. He came into the picture rather late however, and events prematurely ended his work on this case.

Supervisor for Special Education for the High School: This witness was remarkable for her lack of defensiveness, even when questions involved shortcomings on her part. She accepted that she did what she did, and did not do what she did not do, and this was refreshing. Unfortunately, like the Parents, she let herself be sucked into the cracks of a

flawed youth-service system and allowed herself to assume a passive stance instead of mustering the resources that were at her disposal on Student's behalf.

Director of Special Education: This witness' testimony served to establish fairly clearly for this hearing officer that the Parents were not provided with notice of their procedural safeguards in November 2005, and also established with fair certainty that the former Supervisor of Special Education had acted without consulting him, or anyone else, when in about 24 hours she received and rejected the Parents' request for an evaluation.

The other two District witnesses' testimony added little of specific relevance to the record and their credibility will therefore not be addressed.

Discussion and Conclusions of Law

Burden of Proof

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 burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parent asked for this hearing, the Parent bears the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this case, on each issue, the evidence was not in equipoise.

1. Did the Bethlehem Area School District fail to offer Student a free appropriate public education? If not, is Student entitled to compensatory education, for what period(s) of time and in what kind? This question is answered in the AFFIRMATIVE.

Special Education

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), 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).

Child Find

IDEA's so-called "Child Find" provision requires that states ensure that:

"...All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine

which children with disabilities are currently receiving special education and related services.” 20 U.S.C. § 1412(a)(3).

A ‘child with a disability’ means a child evaluated in accordance with §§300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. §300.7

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

It is this hearing officer’s understanding, and she has been able to locate no authority to the contrary, that the IDEA and Pennsylvania Chapter 14 provide that when a District receives a written request for an evaluation from any parent the District is obligated to respond in one of three ways: 1) Issue a Permission to Evaluate form and commence the evaluation, including data gathering, when the signed form is returned; 2) Confer with the parent and request permission to institute an instructional support process rather than begin an evaluation; or 3) Initiate a due process hearing and seek a decision to support its refusal to conduct an evaluation. The District’s outright refusal to conduct the parentally-requested evaluation, less than 24 hours after it received the Parents’ request, was a clear substantive and procedural violation of its Child Find obligations and an egregious violation of Student’s rights to FAPE. Compounding its violation, the District failed to provide the Parents with a Procedural Safeguards Notice.

In the 2004 revisions to the IDEA, Congress affirmed its position that *de minimis* procedural violations do not constitute a deprivation of a Free, Appropriate Public Education (FAPE). Section 1415, provides that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies: impeded the child’s right to a free appropriate public education; significantly impeded parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the child; or caused a deprivation of educational benefit. Thus, mere procedural violations do not compel a finding that a student has been denied FAPE. The denial of FAPE will be found only where the violations of a procedural safeguard result in the loss of educational opportunity or prejudice the student’s ability to receive FAPE. In Re J.D. and the Colonial School District, Special Education Opinion No. 1120 (2001); In Re K.B. and the Sto-Rox School District, Special Education Opinion No. 1477 (2004); In Re B.T. and the Harrisburg School District, Special Education Opinion No. 1577 (2005); In Re D.J.

and the Philadelphia School District, Special Education Opinion No. 1745 (2006). Nevertheless, in this particular case, this hearing officer is compelled to quote the appeals panel's Opinion No. 655 (regarding another school district) as follows, "We advise the District that the procedural safeguards established under IDEA and Pennsylvania regulations are neither optional nor insignificant. We further advise the District that the pertinent legal opinion (see, e.g., Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 1982) requires compliance -- not partial compliance, not compliance only with significant aspects, not intended compliance."

"Child Find is a positive duty requiring a school district to begin the process of determining whether a student is exceptional at the point where learning or behaviors indicate that the child may have a disability. *Ridgewood Board of Education v. M.E.*, 172 F.2d 238 (3rd Cir. 1999) A district is on notice of the *possibility* of a disability where a student is experiencing failing grades, or where it has notice that the student has been identified for ADHD. See *S.W. v. Holbrook Public School* 221 F. Supp. 2d 222, 2260227 (D. Mass 2002)" In re the Educational Assignment of R.R., A Student Residing in the Souderton School District, Appeals Panel Opinion No. 1859.

The District's procedural violations – refusal to conduct a parentally-requested evaluation and failure to issue a Procedural Safeguards Notice – resulted in a loss of educational opportunity to Student and prejudiced Student's ability to receive FAPE. This hearing officer calculates that having received the Parents' request for an evaluation on November 17th, in generous consideration of the Thanksgiving holiday, the Permission form would have been signed and returned on November 30th. The sixty school day period (under the old Pennsylvania regulations) would have begun on December 1st. Accounting for winter break and bad weather, this hearing officer roughly calculates about 20 school days in December, about 20 school days in January and about 20 school days in February. Thus, a written Evaluation Report should have been presented to the Parents on March 1st at the latest. This hearing officer deliberately did not toll the days Student was in the partial psychiatric hospitalization program because the District could have conducted parent and staff interviews and gathered records and questionnaire data during this period. As of March 15th an appropriate IEP should have been in place. Accordingly compensatory education shall be awarded in the amount of five hours per day for every day school was in session, whether or not Student was in attendance (because an appropriate IEP should have addressed truancy and behaviors leading to suspensions at CA/MP) from March 15th to the last day of the regular academic year in June 2006.

The next period for which compensatory education will be awarded is from the first day of the school year in August 2007 until the date in April 2008 when Student left [the alternative school program]. Had the District evaluated Student in November 2005 Student would be returning in August 2007 as a special education student and an IEP team would have been quickly convened. Student received no special education services, and the flimsy 504 Plan was not a substitute, for the entire time Student was in the District's high school. Moreover, the District agreed with the juvenile probation department that Student should be placed at [alternative educational program] without the benefit of an evaluation that assessed Student's special education needs and without the input of an IEP team. In fact, although Student was eventually evaluated and found

eligible for special education, and reportedly an IEP team met twice – once at the District and once at [alternative school program] – no IEP was introduced into evidence and it may even be that no IEP was drawn up. The District’s obligation for compensatory education ends, for purposes of this hearing, when Student was placed in the current juvenile justice program. If and when Student returns to a District school or becomes the direct educational responsibility of the District again, an appropriate IEP must be developed and implemented in the least restrictive environment appropriate for Student. In accord with the Special Education Appeals Panel Opinion No. 1783 (December 2006), the District should have known of these disabilities since long before the 2007-2008 school year yet failed to address them in any meaningful way; consequently, I find no deduction is necessary to allow for a period of reasonable rectification by the District for the 2007-2008 school year.

Compensatory education is an appropriate remedy where a school district has failed to provide a student with FAPE. M.C. v Central Regional School District, 81 F.3d 389 (3rd Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 488 U.S. 923 (1991). For many years the period of compensatory education has been calculated to be equal to the period of deprivation, less a reasonable rectification period. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999) Since 2006, hearing officers can also focus on what it will take to bring the student to the point Student should have been if not for the deprivation of FAPE. B.C. v. Penn Manor, 906 A.2d 642 (Pa. Cmwlth. 2006) In the instant matter this hearing officer finds it impossible to determine where Student would be educationally but for the denial of FAPE since March 15, 2006 and furthermore is unable to devise a reasonable plan for bringing Student up to where Student should be. Therefore an hour-for-hour compensatory education package will be awarded.

The regulatory school day for a high school student is a minimum of 5.5 hours per day. 22 PA Code §11.3; In Re A.J. and Methacton School District, Special Education Opinion No. 1766 (2006)

Spec. Educ. Appeal No. 1763 (September 2006) provides a comprehensive explanation of the parameters of compensatory education awards and is reproduced here for the benefit of the parties:

The Panels have provided guidance for determining how, when and where compensatory education that is due a student must be provided. In B.R., Spec. Educ. Opinion No. 1102 (2001), the Panel held: “Certain guidance may be inferred from applicable case law, however, as well as in common sense principles. First and foremost, compensatory education is a remedy which does not seek to give a student that to which Student is already entitled. As an eligible student is entitled to FAPE, it follows that compensatory education may not simply further current and future educational goals which are (or should be) included in Student’s present IEP. Instead, compensatory education serves to make up for a prior deprivation of service. In addition, it is the parent who has properly sought and obtained an award of compensatory education from a school

district which had deprived a student of FAPE. Just as a parent may choose the site of a private school placement, which will be upheld where a school district has denied FAPE so long as the placement is 'reasonable', then logically a parental selection of compensatory education services should be honored so long as the selection is appropriate and reasonable under the circumstances."

Thus, we hold that Student's parents may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers the goals of Student's present or future IEPs. Such hours must be in addition to Student's then current IEP and may not be used to supplant such services. These services may occur after school hours, on weekends and during the summer months, when convenient for Student and Student's parents.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's present or future IEPs. The costs to the District of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services and the actual costs for salaries, tuition and transportation for contracted services. This principle sets the maximum cost of all of the hours or days of the compensatory education awarded. The parents may balance expensive and inexpensive instruction or services so long as the total cost and hours do not exceed the maximum amount. The parents also may use fewer hours of expensive services so long as the maximum amount is not exceeded. Finally, the parents may not be required to make co-payments or use personal insurance to pay for these services.

Additionally, we reiterate the rule underscored in previous decisions that the time for utilizing the compensatory education awarded may extend beyond age 21. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); R.S., Spec. Educ. Opinion No. 1755 (2006).

2. Is the Bethlehem Area School District responsible for reimbursing the Parents for the independent educational evaluation and private psychiatric evaluation they obtained for their child? This question will be answered in the AFFIRMATIVE for the psychological evaluation and in the NEGATIVE for the psychiatric evaluation.

The ordinary standard for an award of an independent educational evaluation at public expense is parental disagreement with a school district's evaluation as provided in the IDEIA's implementing federal regulations at 34 CFR§300.502(b)(1)(2)(3).

In this matter, however, the District was asked to perform an evaluation in November 2005 and did not do so in the course of the 2005-2006 school year. When Student returned to the District for the 2007-2008 school year the Parents did not renew their request for an evaluation, as they did not know they had this right. Although the District did eventually arrange a psychiatric evaluation in early November 2007, the psychiatric evaluation did not comprise a comprehensive educational evaluation sufficient to address any areas of suspected disability and the District basically did nothing with it. Finally, on December 14th 2007 the Supervisor for Special Education for the High School said she would send a Permission to Evaluate to the Parents. She did not send the Permission to the Parents until January 29th 2008. There was no tenable explanation for this delay in the record, and no reason why on December 14th the Permission to Evaluate form could not have been given to the Parents. The Parents had no reason to believe that the District would follow through with its verbal promise, and they arranged a private psychological evaluation. The private evaluation was done by a competent school psychologist, with experience, and yielded a wealth of information that an IEP team can use to craft an appropriate educational program for Student. The private evaluation done in January and written on February 25th 2008 also countered a significant flaw in the District's eventual evaluation of March 27th 2008 by classifying Student as a student with both an emotional disturbance and other health impairment.

The District will be ordered to reimburse the Parents for the cost of Ms. H's evaluation.

The District will not be ordered to reimburse the Parents for the cost of the private psychiatric evaluation because its explicit and delimited purpose was to clarify Student's diagnosis, specifically whether or not Student suffers from Bipolar Disorder.

3. Is the Bethlehem Area School District responsible for reimbursing the Parents for their child's tuition at Academy and/or School, for expenses associated with enrollment in either or both schools, and for counseling and family workshops?

This question is answered in the NEGATIVE.

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 IDEIA, 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.

In this matter the Parents may like the hearing officer to analyze the District’s refusal to evaluate Student in November 2005 along the lines of “for want of a nail the horse was lost, for want of a horse the battle was lost, for want of the battle the war was lost”. Although the District’s refusal to evaluate Student, and its failure to program in any way appropriately for Student for the 2005-2006 and the 2007-2008 school years, denied Student FAPE and entitles Student to compensatory education, this hearing officer will decline to take the leap that an appropriate special education program would have prevented Student’s spiraling drug and alcohol abuse, stayed Student’s behavioral health/mental health problems, or prevented Student’s involvement in the juvenile justice system. The usual three-step analysis for tuition reimbursement needs to be taken. The first step, the District’s failure to provide FAPE, is clearly met.

However, it is at the second step that the Parents’ case fails. In July 2006 the Parents were understandably desperate to save their child – Student had violated Student’s probation and had attempted suicide. There is nothing convincing in the record that the placement at Academy was related to special education aims; rather the placement was clearly lovingly chosen to provide Student a safe place where Student could recoup emotionally and behaviorally. The fact that Student made up 9th grade credits at Academy was a boon, but the District will not be held responsible to pay tuition and costs for a placement about which it was not informed and over which it had no say. Although Academy seemed a safe place for Student for five months, it was not a special education placement and was not required for Student to receive FAPE. Furthermore it did not fulfill the IDEA’s least restrictive environment criterion. School, the Parents’ second unilateral placement, provided no educational benefit to Student, and seems not to have

provided Student with any emotional benefit either. If anything Student seemed to regress at School and ultimately Student requested to re-do the Academy wilderness program which Student had found helpful. Neither placement was an appropriate special education placement, neither program was disclosed to or consulted about with the District, and neither program warrants tuition reimbursement or reimbursement for any associated costs.

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 first 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, otherwise acted appropriately, or that the parent selected placement is inappropriate. Although the District did not offer FAPE and did not act appropriately, in this matter the Parent's selected placements were unfortunately not appropriate.

As in Special Education Opinion No. 1301 (2002) the Parents voluntarily chose to place Student in private programs for the 2006-2007 school year. In doing so, they removed compensatory education as an available remedy in lieu of tuition reimbursement.

Order

It is hereby ordered that:

1. The Bethlehem Area School District failed to offer Student a free appropriate public education. Student is therefore entitled to compensatory education as follows:
Five and a half (5.5) hours per day for every day school was in session, whether or not Student was in attendance from March 15, 2006 to the last day of the regular academic year in June 2006, and from the first day of the school year in August 2007 until the date in April 2008 when Student left [alternative school program].
2. The Bethlehem Area School District is responsible for reimbursing the Parents for the independent psychological evaluation conducted by Ms. H. The District is not responsible for reimbursing the Parents' out-of-pocket cost for the private psychiatric evaluation they obtained from Dr. B.
3. The Bethlehem Area School District is not responsible for reimbursing the Parents for their child's tuition at Academy and/or School, or for expenses associated with enrollment in either or both schools, or for counseling and family workshops.

July 17, 2008

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer