

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

**Pennsylvania Special Education Hearing Officer**  
**Final Decision and Order**

**CLOSED HEARING**  
**ODR File Number: 22560/19-20 AS**

**Date of Hearing**  
September 26, 2019

**Child's Name:** S.O.      **Date of Birth:** [redacted]

**Parents:**  
[redacted]

*Counsel for Parents:*  
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**Hearing Officer:** Linda M. Valentini, Psy.D, CHO  
Certified Hearing Official

**Date of Decision:** October 27, 2019

## **Background**

Student<sup>1</sup> is a mid-teen aged District resident with multiple disabilities who is identified as eligible for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its Pennsylvania implementing regulations, 22 Pa. Code § 14 *et seq.* (Chapter 14). As such, Student is also regarded as an “individual with a disability” as defined by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*, and as a “protected handicapped student” under the Pennsylvania regulations implementing Section 504 in schools, 22 Pa. Code § 15 *et seq.* (Chapter 15).

Student currently attends a small private school for students with disabilities, which is Student’s pendent placement pursuant to a September 5, 2019 ruling by this hearing officer. Student attended District schools from Kindergarten through 5<sup>th</sup> grade, and then was enrolled in a Pennsylvania cyber charter school which was Student’s LEA through the 2018-2019 school year.

The Parents requested this hearing because they believe that the program and placement the District offered to their child is inappropriate. The District maintains that Student’s reenrollment in June 2019 for the 2019-2020 school year was an intrastate transfer, and therefore the IEP and NOREP offered were adequate under the requirements for intrastate transfers. The District also argues that when the Parents reenrolled Student into the District they did not request that the District provide an offer of FAPE.

In reaching my decision I carefully considered the witnesses’ sworn testimony, documents admitted into the record, and the parties’ written closing legal arguments. Below I reference the evidence that I found to be directly relevant to deciding the issues before me; hence not all testimony nor all documents comprising the record are cited. Based on the record before me I find in favor of the Parents.

## **Issues**

1. Did the District deny Student a free, appropriate public education (FAPE) for the 2019-2020 school year?
2. If the District denied Student FAPE, is the private school an appropriate placement for Student?
3. If the District denied Student FAPE, and the private school is appropriate, are there equitable considerations that would reduce or remove the District’s obligation to reimburse the Parents for Student’s tuition?

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<sup>1</sup> In the interest of confidentiality and privacy Student’s name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

## Findings of Fact<sup>2</sup>

### Background Information<sup>3</sup>

1. Student is currently classified under the IDEA as having a Specific Learning Disability (reading, math and writing), Other Health Impairment (ADHD), and Emotional Disturbance (mood disorder, anxiety). Student has also been diagnosed with an Auditory Processing Disorder/Sensory Processing Disorder (misophonia)<sup>4</sup> and has some characteristics of autism spectrum disorder. [NT 257; J-13, J-19, J-25, J-26]<sup>5</sup>
2. Student currently is prescribed psychotropic medications to address Student's mood, anxiety, and ADHD symptoms. [NT 257-258; J-19, J-25]
3. Student easily becomes overwhelmed by a large number of people in a room and certain noises. When Student is overwhelmed, Student either gets agitated and angry at the person making the noises or shuts down. [NT 134, 137; J-19, J-26]
4. At home Student stays in Student's room a good deal of the time because of not being able to tolerate the sounds in the shared areas of the home. [NT 287]
5. Student experiences social anxiety, and experiences up and down mood changes. The anxiety can be triggered by sensory overload and by social situations. [NT 138-139, 288; J-19]
6. From 3<sup>rd</sup> through 5<sup>th</sup> grade Student suffered from severe anxiety and depression. [NT 258]

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<sup>2</sup> Transcript page references to witnesses are as follows: Emotional Support Teacher/Case Manager NT 28 through 99; District School Psychologist NT 101 through 128; Student's Private Therapist NT 131 through 153; Special Education Supervisor NT 155 through 218; Head of Private School NT 219 through 256; Student's Mother NT 257 through 320.

<sup>3</sup> To the extent that the District may claim that it did not know some of the background information in this section, I have no doubt that if the District had 1) read its own past evaluation, the cyber charter school's reevaluation, and the recent thorough private neuropsychological/psychoeducational evaluation, and 2) spoken with the private school staff and with Student's therapist, and 3) conducted a competent interview with the Parents, it would have had knowledge of the entirety of this information. Although a program can only be judged on what an LEA knew at the time it created a program and placement, there is no defense in a District's not having accessed information that was readily available.

<sup>4</sup> Misophonia refers to "an extreme sensitivity to specific sounds produced by human beings, resulting in excessive, unreasonable, or out of proportion anger, disgust, or distress. Possible triggers include eating sounds (smacking, swallowing, apple eating), breathing sounds, finger/hand sounds (typing, pen clicking, nail clipping), foot sounds (footsteps, sound of high heels), and repetitive visual movements (leg rocking)". Johns Hopkins Psychiatry Guide, January 29, 2017.

<sup>5</sup> The Parties' presenting a set of Joint exhibits in this matter is noted with appreciation.

7. In 4<sup>th</sup> grade Student engaged in suicidal behavior by attempting to choke self and was placed in a psychiatric hospital. [NT 259; J-19]
8. In mid-5<sup>th</sup> grade Student was given a 504 Plan. [NT 259]
9. After having been diagnosed with a Psychotic Disorder and Generalized Anxiety Disorder Student was evaluated by the District and in June of 5<sup>th</sup> grade Student was found eligible for special education under the classifications of Emotional Disturbance and Other Health Impairment. [J-12]
10. For 6<sup>th</sup> grade (2015-2016 school year) the Parents enrolled Student into a cyber charter school because Student was “unraveling” and they believed that Student needed to be educated in a fashion where Student could be at home in a controlled environment. [NT 260-261]
11. The cyber charter school reevaluated Student in November 2016, Student’s 7<sup>th</sup> grade year, finding a primary disability category of Autism and secondary disability categories of Specific Learning Disability and Other Health Impairment. [J-13, 15]
12. The cyber charter school provided an IEP on November 21, 2016 with a revision on February 8, 2017. [J-14]
13. During 7<sup>th</sup> grade Student told the mother that Student wanted to commit suicide and didn’t feel safe. Student was admitted into a psychiatric hospital for a week and then began receiving outpatient psychotherapy with the current therapist who was the eighth or ninth therapist Student had seen. [NT 264]
14. In 7<sup>th</sup> grade the cyber charter school provided an individual tutor in the home for a few hours a day to help Student get through a few assignments. [NT 267]
15. The Parents began looking for a new school, and after having been rejected by several other schools because of the psychiatric history, Student was accepted into the current private school for 8<sup>th</sup> grade. The cyber charter school remained Student’s LEA. [NT 268]
16. Student attended the private school for the 2017-2018 and the 2018-2019 school years, Student’s 8<sup>th</sup> and 9<sup>th</sup> grades. On August 13, 2018 pursuant to a settlement agreement the Charter School issued a NOREP for Student’s 2018-2019 placement at the private school and on September 5, 2018 issued an IEP for implementation at the private school. Student remained enrolled in the cyber charter school through the conclusion of its 2018-2019 school year, during which time the cyber charter school was the LEA and issued Student’s IEPs and NOREPs. [J-21]

#### Enrollment into the District

17. On April 27, 2019 the Parents enrolled Student into the District for the 2019-2020 school year, Student’s 10<sup>th</sup> grade year, using the District’s online portal, and listed the private

school as Student's current school. [J-6, J-43]

18. The Parents believed that they would be contacted by the District. Having heard nothing from the District after nearly a month, the Mother called the counseling office in late May and learned that due to a District computer system upgrade the Parents had to redo the enrollment process; the Parents completed another enrollment form for the 2019-2020 school year on June 2, 2019. [NT 157; J-7]
19. The District's school year ended on June 13, 2019. [NT 110]
20. If a student is eligible for special education, the District's counseling office contacts the supervisor of special education or the special education liaison to communicate this information. [NT 156-157]
21. The counseling office informed the Parents that the earliest date for a registration meeting appointment was July 17, 2019. [NT 273-274, 303-304]
22. The Parents were disappointed that the meeting was so far out because they knew Student had an IEP and they had to "talk about a bunch of things" with the District. [NT 274]
23. Between June 2, 2019 and July 17, 2019, neither the supervisor of special education, the special education liaison, nor anyone else in the District contacted the Parents. [NT 160, 273]
24. Prior to the registration appointment, the District did not issue an invitation for an IEP meeting or a permission to reevaluate form (PTRE). [NT 161]

#### The Registration Meeting

25. According to the supervisor of special education, "The biggest concern in a registration meeting is to make sure we know how many credits a student has. It's not an IEP meeting. It's really more of a credit check to see how we can create a schedule." [NT 163]
26. Student's Parents, the supervisor of special education and a high school counselor attended the registration meeting. [NT 162]
27. The Parents brought a spring 2019 private Neuropsychological/Psychoeducational Evaluation and the 2016 IEP<sup>6</sup> from the cyber charter school to the registration meeting and gave them to the supervisor of special education. They also gave the District a signed consent to contact the private school. The District did not offer the Parents a consent form to contact the private evaluator. [NT 163; 275, 277]

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<sup>6</sup> At the time the Parents were not aware that there was a 2018 IEP as well. [NT 275-276]

28. At the registration meeting, the supervisor of special education told the Parents that the District was going to implement the cyber charter school IEP and that the District would plan to have an IEP meeting before the end of September. [NT 170, 277-278]
29. Given Student's emotional fragility the Parents were alarmed about the District's plan to place Student in the large setting of the District's high school without a new IEP, and on July 18, 2019 they sent a letter asking that the District fund Student's placement at the private school for the 2019-2020 school year. [NT 282-283; J-21]
30. On July 22, 2019 the supervisor of special education sent the Parents a reply stating, "As we discussed at the registration, the district is in the process of scheduling [Student] for the classes [Student] will need at [the high school], based on the previous IEP from [the cyber charter school]...The [new] IEP is due very soon and the team will need to meet to have the annual meeting as well as discuss the re-evaluation process. The re-evaluation is due by November." Further, "We will be issuing a Notice of Recommended Educational Placement ('NOREP') describing the schedule as well as the frequencies of interventions." The next day the supervisor of special education sent the Parents Student's proposed class schedule. [NT 171; J-21, J-22]
31. In the same email advising the Parents that the District would implement the IEP from the cyber charter school, the supervisor of special education wrote the Parents that if they "would like to attend an IEP meeting to discuss the pendent IEP and programming prior to the school year beginning, [to] please let [him] know [their] availability during the week of August 19th. ... At this meeting we will be discussing the reevaluation process, including the types of assessments necessary for programming for [Student]." The meeting was scheduled for August 23, 2019. Teachers and students were back for the 2019-2020 school year as of the date of the August 23, IEP meeting<sup>7</sup>. [NT 104; J-23]
32. On July 31, 2019 the supervisor of special education issued a NOREP he had written in the absence of an IEP team meeting, denying Parents' request for payment for the private school. Even though Student was not transferring into the District in the middle of a school year, for some very unclear reason the District was considering Student to be an intrastate transfer student, and issued a NOREP for implementation of the existing 2016 cyber charter school IEP at a District high school. The NOREP states that the action proposed is that the charter school IEP would be honored until a new District IEP is written and conferenced by September 30, 2019. The Parents did not approve the NOREP and filed their due process request on August 9, 2019. [NT 175-176; J-23; J-8]

#### Creation of the District's Proposed IEP

33. The private Neuropsychological/Psychoeducational Evaluation in the District's possession as of July 17, 2019 is a 21-page, single spaced report in very small font that presents an extraordinarily thorough picture of Student. It contains relevant educational, medical, psychiatric, familial and social background history; a detailed review of

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<sup>7</sup> There is a discrepancy in the record. In another place the first day for students in the high school was noted to be Monday August 26<sup>th</sup>. [NT 17] This is a distinction without a material difference.

previous testing including a 2015 Auditory Sensitivity Evaluation, a June 2015 District psychoeducational evaluation with numerical scores, a November 2016 cyber charter school psychoeducational reevaluation with numerical scores; a Winter 2016-2017 Auditory Processing Evaluation, and a January 2017 Speech/Language Evaluation with numerical scores. [J-19]

34. The private Neuropsychological/Psychoeducational Evaluation in the District's possession as of July 17, 2019 included the examiner's direct one-and-a-quarter hour 5-minute interval observation of Student at the private school in math and English class and behavioral observations of Student during testing. [J-19]
35. The private Neuropsychological/Psychoeducational Evaluation in the District's possession as of July 17, 2019 included cognitive assessment with the Wechsler Intelligence Scale for Children – 5<sup>th</sup> Edition; memory assessment with the Test of Memory and Learning – 2<sup>nd</sup> Edition; attention and focus assessment with the Conners Continuous Performance Test-II Version 5; executive functioning assessment with the Delis-Kaplan Executive Function System; visual motor assessment with the Grooved Pegboard and the Beery-Buktenica Developmental Test of Visual-Motor Integration – 6<sup>th</sup> Edition. [J-19]
36. The private Neuropsychological/Psychoeducational Evaluation in the District's possession as of July 17, 2019 included current academic achievement assessment with the Woodcock-Johnson Tests of Achievement – 4<sup>th</sup> Edition using age-based norms; the Test of Written Language – 4<sup>th</sup> Edition; the Gray Oral Reading Test – 5<sup>th</sup> Edition; the Comprehensive Test of Phonological Processing-2; and the Clinical Evaluation of Language Fundamentals-5. [J-19]
37. The private Neuropsychological/Psychoeducational Evaluation in the District's possession as of July 17, 2019 included assessment of behavioral/emotional/social functioning with the Behavioral Assessment System for Children Parent-Report, Teacher-Report, and Self-Report and the Autism Spectrum Rating Scales-Parent Report and Teacher Report.. [J-19]
38. The private Neuropsychological/Psychoeducational Evaluation in the District's possession as of July 17, 2019 included recommendations for school programming as well as other interventions. [J-19]
39. On or about August 8, 2019 the District's assigned case manager, an emotional support teacher, was assigned to draft Student's IEP. The case manager was told that a new 10<sup>th</sup> grade student was enrolling, and that the enrollment was an intrastate transfer. She had only the 2016 7<sup>th</sup> grade IEP from the cyber charter school and was told "to basically transcribe over based on that [cyber charter school] IEP into a [District] format to provide comparable services until an evaluation would be completed". She completed the draft for Student's 10<sup>th</sup> grade year based on the 2016 cyber charter school's 7<sup>th</sup> grade IEP sometime between August 12<sup>th</sup> and August 23, 2019. [NT 29, 31-34, 36-38, 67, 105, 178; J-13]

40. Although the supervisor of special education gave the case manager the IEP the Parents had given him on July 17, 2019, he did not give her a copy of the private Neuropsychological/Psychoeducational Evaluation the Parents had also given to him on that date until the day of the August 23, 2019 IEP meeting. [NT 34-35; J-19]
41. The supervisor of special education advised the case manager that any outside evaluations would be reviewed further by someone “more qualified”. However, a District psychologist did not review the cyber charter school’s RR or the recent private Neuropsychological/Psychoeducational Evaluation for purposes of crafting the IEP. [NT 67]
42. The case manager used the IEP Writer program to draft the IEP. For reasons that are unclear, she did not have access to the District’s own previous evaluation or IEP. [NT 34; J-12, J-13]
43. The case manager knew that Student attended the private school for the 2018-2019 school year and not the cyber charter school. [NT 99]
44. Prior to drafting the IEP the case manager did not ask the Parents to bring Student in for baseline testing to determine current present levels of educational performance. The case manager did not contact the Parents to solicit information about Student, she did not review records from the private school, and did not attempt to do any transition assessments. The director of special education did not ask anyone else to bring Student in for assessments of present academic levels. [NT 35, 182]
45. The case manager did not send a copy of the draft IEP to the Parents for their review prior to the. August 23, 2019 IEP meeting. [NT 39]

The Draft Proposed August 23, 2019 IEP and the Final Proposed IEP:<sup>8</sup>

46. Rather than holding an IEP meeting over the summer, the District scheduled an IEP meeting for Friday August 23, 2019, not sending out the Invitation to the meeting until August 14, 2019 offering a date the week of August 19<sup>th</sup>.<sup>9</sup> [NT 178; J-9]
47. At the IEP meeting the Parents gave the District a letter from Student’s psychiatrist and a letter from Student’s therapist. The District did not ask the Parents to sign any consent forms allowing verbal or written contact with either mental health professional. [NT 93; J-25]
48. Given Student’s extreme sound sensitivity, the Parents expressed concerns at the IEP meeting about class size and the noise in hallways during change of classes, and also

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<sup>8</sup> The proposed draft IEP is J-28 and the proposed final draft IEP is J-10. There were minimal changes from one to the other. Both were prepared after the Parents filed for due process.

<sup>9</sup>This date was either just after or just before the District’s students started back to high school.



shared information about Student's difficulties in crowded areas and being in large groups, and also about Student's anxiety and depression. [NT 40, 64]

49. The District proposed two IEPs – one at the August 23<sup>rd</sup> IEP meeting and another in September. The draft proposed IEP was based solely on the 2016 cyber charter school's IEP. After the August 23, 2019 IEP meeting the case manager gained access to the 2018 cyber charter school's IEP. She then compared the 2018 IEP with the 2016 IEP and transcribed the differences/changes into the final IEP. [NT 54-55]
50. When she transcribed them into the District's IEP, the case manager did not realize that the goals on the cyber charter school's 2018 IEP were exactly the same as those on the cyber charter school's 2016, 7<sup>th</sup> grade, IEP. [NT 46]
51. The proposed IEP recorded the same Present Levels of Functional Performance as were on the cyber Charter School's 2016 IEP. The case manager did not know how Student was doing currently; she just transcribed the information from the three-year-old 2016 IEP. [NT 44]
52. The effect of Student's disability on involvement in general education was taken from the 2016 IEP. [NT 44]
53. The statement of Student's strengths and needs was taken from the 2016 IEP. [NT 44]
54. Although it was not necessary for the District to itself complete an entire reevaluation in order to place current information into the IEP, information about Student's current functioning contained in the private Neuropsychological/Psychoeducational Evaluation that was in the District's possession since July 17, 2019 was not included in the proposed IEP. [NT 45, 62, 91]
55. The proposed IEP provided for special education 10<sup>th</sup> grade classes for English, Math, Reading and Study Skills. Student's other major subject classes (science and social studies) would be in the general education 10<sup>th</sup> grade classes that hold about 25 to 30 students. [NT 42-44, 295]
56. The proposed IEP provided for a special education emotional support class, "Strategies". The Strategies class was scheduled for two periods in a five-day cycle, but Student would have access to the emotional support classroom as needed, not for direct instruction but just for a break. [NT 43; J-10]
57. The two periods a cycle Strategies class was intended to help Student cope with anxieties and sadness, understand Student's learning differences, encourage motivation to engage in academic activities, and find areas of competence to improve Student's attitude about school as well as to assist in developing age appropriate social skills including pro social skills, conflict resolution strategies, and self-advocacy skills. [J-10]

58. The goals on the cyber charter school's 2016 IEP (7<sup>th</sup> grade) and 2018 IEP (9<sup>th</sup> grade) were identical. Transcribed directly, the District offered five academic goals in the IEP it offered to Student: a math goal for improving performance in math applications; a math goal for improving performance in math fact fluency; a reading goal for improving reading comprehension; a reading goal for improving reading fluency; a writing goal for improving the total words written by Student. [NT 46-48; J-10]
59. The baselines connected to the goals written into the District's IEP for 10<sup>th</sup> grade are exactly the same as those in the 2016 7<sup>th</sup> grade IEP with 7<sup>th</sup> grade information. [NT 48; J-10; J-14]
60. Compared with the cyber charter school's IEP, the District offered direct instruction with more frequency and longer duration in the areas of reading, math, and writing. [J-5, J-10]
61. The District offered direct instruction in time management, planning and organization skills three times per week in 45-minute periods. [J-10]
62. The final IEP provides for occupational therapy (OT) services but there is no IEP goal for this related service. [NT 53; J-10]
63. Counseling services were included in the draft proposed IEP but were dropped from the final IEP. The case manager who wrote the IEPs does not remember why counseling as a related service was dropped. [NT 53; J-10, J-28]
64. Student was deemed eligible for extended school year (ESY) services in the draft proposed IEP but ESY eligibility was denied in the final IEP. The case manager did not consult with or inform the Parents that ESY was being removed from the final IEP. [NT 55]
65. Although with regard to placement the cyber charter school's 2018 IEP is inconsistent with its 2018 NOREP the supervisor of special education did not contact the cyber charter school to ask for an explanation and "just consulted the IEP" to figure out the inconsistency. [NT 208; J-5, J-18]
66. The District offered Student supplemental learning support and autistic support but as of the time of the issuance of the District's IEP it was not determined whether Student would be placed in an emotional support homeroom. [NT 57; J-30]
67. Although the District maintained that it was offering Student "comparable services" it did not consider full time special education as its offered placement even though that was the last placement offered by the cyber charter school and carried out at private school. [NT 58; J-30]
68. The District did not issue a Permission to Reevaluate form (PTRE) to the Parents until August 29, 2019. The Parents consented, signed, and returned the PTRE on September 4, 2019. To date an evaluation has not begun. [NT 167; J-29]

## The Private School

69. As per this hearing officer's ruling, the private school is Student's pendent placement. The Parents have not signed the contract for this school year. [NT 229]
70. The private school is licensed by the Pennsylvania Department of Education. The curriculum of the upper school is based on state standards. [NT 221-222]
71. The private school's goal is to provide a nurturing supportive individualized environment. [NT 221]
72. The class size at the private school is three students to one teacher, and a student may take breaks as needed. In the very small classroom environment Student self-advocates, asks questions, and contributes to discussions. [NT 221, 224]
73. Student still needs to go to the library for a break three to four times a day because of extreme sensitivity to noise. [NT 224]
74. Student needs to eat alone or with a friend rather than in the small kitchen where fewer than fifteen students eat lunch. [NT 225].
75. Student has daily periods of anxiety. The teachers at the private school are able to recognize students who are having an anxiety period and take them out to review coping skills or recommend they take a break. [NT 228-229]
76. The private school provides Student with one to one coaching and support, quiet space, and hands-on activities. [NT 234-235]
77. Student has been doing well academically at the private school and has gained in confidence, with a relative lifting of mood and attitude toward school. [NT 232, 270-271, 288-289; J-33; J-34]

### **Legal Basis**

**Burden of Proof:** The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

**Credibility:** During a due process hearing the hearing officer is charged with the responsibility of

judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); The District Court “must accept the state agency’s credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.” *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). I found Student’s mother to be very credible, as her memory for details was evident and because she was willing to provide candid responses about difficult but pertinent personal and family information. In contrast I found the testimony of the District psychologist to be a tortuous but unconvincing attempt to persuade this hearing officer that completing an evaluation or at least obtaining present academic levels of Student over the nearly three-month period between when the District became the LEA and the creation of the IEP was impossible. I found the case manager to be credible as she described the directives she had been given regarding transcribing the 2016 cyber charter school’s IEP onto the 2019 District IEP to be implemented in the “bricks-and-mortar” high school setting.

FAPE: Student is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE “consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction.” *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). The IDEA contemplates educational programs tailored to “how the child’s disability affects the child’s involvement and progress in the general education curriculum.” 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa). In *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”

Intrastate Transfers: A school district’s programming and placement obligations to a student within the IDEA’s intrastate transfer provision at 20 U.S.C. §1414(d)(2)(C)(i)(1) is as follows:

“In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.” [20 U.S.C. §1414(d)(2)(C)(i)(1); see also 34 C.F.R. § 300.323(e); 22 Pa. Code §14.102(a)(2)(xxvii) (requiring compliance with 34 C.F.R. § 300.323).]

“Comparable services” is not defined in the IDEA or federal regulations. But in comments accompanying the 2006 regulations, the Office of Special Education and Rehabilitative Services, U.S. Department of Education (“OSERS”) responded:

We do not believe it is necessary to define “comparable services” in these regulations because the Department interprets “comparable” to have the plain meaning of the word, which is “similar” or “equivalent.” Therefore, when used with respect to a child who transfers to a new public agency from a previous public agency in the same State . . . , “comparable” services means services that are “similar” or “equivalent” to those that were described in the child’s IEP from the previous public agency, as determined by the child’s newly designated IEP Team in the new public agency. Fed. Reg. Vol. 71, No. 156 at 46681 (Aug. 14, 2006) (emphasis added).

Evaluations: Under the Pennsylvania evaluation timeline, an evaluation “shall be completed and a copy of the evaluation report presented to the parents no later than 60-calendar days after the agency receives written parental consent for evaluation, except that the calendar days from the day after the last day of the spring school term up to and including the day before the first day of the subsequent fall school term will not be counted.” 22 Pa. Code § 14.123(b). The IDEA requires consideration of privately obtained evaluations, although not adoption of any conclusions or recommendations set forth therein. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(c).

Tuition Reimbursement: Parents who believe that a district’s proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement, but they 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 parents’ selected placement is inappropriate.

In *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985) the United States Supreme Court established the right to consideration of tuition reimbursement for students placed unilaterally by their parents. *Florence County Sch. Dist. Four V. Carter*, 114 S. Ct. 361 (1993) later 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. This three-part test is referenced as the “Burlington-Carter” test for tuition reimbursement claims under the IDEA. The second and third tests need be applied only if the first is resolved against the school district.

Section 504/Chapter 15 – Denial of FAPE:

Section 504 and Chapter 15 also require that children with disabilities be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1). The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section 504 and

Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial of FAPE. (See generally *P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)). Therefore, the foregoing analysis under the IDEA is adopted here for purposes of considering the claim under Section 504/Chapter 15.

### **Discussion**

Hindsight, of which I have the privilege, reveals the various stages at which the District could have acted in such a way as to create an appropriate program and placement for this child. Unfortunately, although this certainly could not have been its intent, the District presents itself in this matter as being, at best, *laissez-faire* about its obligations to Student. I have to concur with the Parents' attorney who expressed wonderment in her opening statement as to why we were having the hearing in the first place, as there are several things about the District's handling of its obligations to this child that are puzzling.

First of all, especially since the District's computer system error resulted in a registration date of June 2, 2019, why did the District consider Student to be an intrastate transfer student when it was clear that enrollment was for the 2019-2020 school year? Second, having learned that this was a child who was eligible for special education and who was attending a specialized emotional support private school, why did the District let the entire summer pass before obtaining academic baselines, if not doing an evaluation based largely upon the recent and thorough private Neuropsychological/Psychoeducational Evaluation the Parents gave the District? Third, after making the choice to consider this an intrastate transfer, and to transcribe the existing IEP, why didn't the District realize that the IEP on which it was basing 'comparable services' was written in 2016, from early 7<sup>th</sup> grade, when Student was enrolling as a 10<sup>th</sup> grader? Fourth, after receiving the recent private Neuropsychological/ Psychoeducational Evaluation from the Parents at the July 17<sup>th</sup> registration meeting, and not using it as a basis to craft a reevaluation report, why didn't the District at least have one of the District psychologists review it in order to inform the IEP that was being prepared for the August 23, 2019 meeting? Fifth, after learning firsthand from the Parents about Student's emotional and extreme sensory challenges, why didn't the District reconsider its placement options and provide a significantly more robust emotional support program, with truly "comparable" services, even if it were still going to be offered within the District? These concerns are more fully addressed below.

The intrastate transfer provision of the IDEA makes perfect common sense, as well as legal sense: when an eligible child for whatever reason has to change LEAs, it is appropriate for the receiving LEA to provide a comparable program and placement so that the child's special education services are not disrupted during the course of a single school year. However, I can adduce no logical reason for the District to consider Student an intrastate transfer student given that the Parents were not moving Student into the District in the middle of an ongoing school year, but instead, days before the end of the 2018-2019 school year, enrolled Student for the following school year.

That having been said, neither the IDEA nor its implementing regulations address a school district's obligation to provide services to a student who transfers at the very end of a school year

or over the summer. Instead, the plain language of the intrastate transfer rule specifies that the rule applies only “when a child transfers within the same academic year.” (emphasis added) As such, as I noted in my Pendency Ruling, I find that the intrastate transfer rule does not apply to this case. I hold that the IDEA’s intrastate transfer provision does not apply to transfers that occur while school is not in session or when there are merely days left, particularly when the enrollment is for the next school year not the current school year.<sup>10</sup>

The District argues that since a student cannot be enrolled in two LEAs at once, Student could not be “enrolled” in the West Chester Area School District any earlier than the day following the last day of the 2018-2019 school year at the cyber charter school since the cyber charter school provided for all of Student’s education and served as Student’s LEA through the conclusion of Student’s 9th grade, the 2018-2019 school year. I have no quarrel with this assertion, and find that it in fact supports the position that Student was not an intrastate transfer student. Although the last date of the cyber charter’s school year in 2018-2019 is not available in the record or online, I note that the last day for the cyber charter school’s 2019-2020 school year is Thursday June 4, 2020.<sup>11</sup> Extrapolating from this information, with 2020 being a leap year, I calculate that the end of the cyber charter school’s 2018-2019 school year was likely to have been either Wednesday June 5<sup>th</sup> or Thursday June 6<sup>th</sup>. Since the Parents had to redo the enrollment procedure on June 2, 2019 (giving the District the one-day benefit of the doubt) the District became Student’s LEA as of Friday June 7<sup>th</sup>. The District therefore had nearly three months to work with the Parents to craft an appropriate IEP for this child.

Seemingly abandoning its position that the District was not Student’s LEA until the end of the cyber charter school’s academic year, the District argues that assuming an enrollment as early as April 27, 2019, there was not enough time for the District to complete an evaluation of Student prior to the start of the 2019-2020 school year. In defending itself for not attempting to reevaluate Student over the summer (which would have been in its own best interests), in addition to unconvincingly claiming that there was no available psychologist’s time over the summer, the District argues that finishing the evaluation would not have been possible before the start of school given the 60-day completion requirement. The District conflates black letter obligation (the 60<sup>th</sup> day is the deadline for producing an evaluation) with prohibition. There is absolutely nothing in the law that says that a District cannot conduct an evaluation and produce a report before the 60-day deadline. For various reasons school districts may and do conduct expedited evaluations. Moreover, without completing an entire evaluation, with parental consent the District could have at least obtained updated present levels of academic performance and/or based a District reevaluation on the recent very thorough private Neuropsychological/ Psychoeducational Evaluation the Parents had provided to the supervisor of special education over one month before the IEP meeting. Even if this child were an intrastate transfer Student, and I reject the proposition that this is the case, knowingly creating an IEP based on 3-year-old data for a seriously impaired child is beyond any possible justification.

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<sup>10</sup> My determination may be a matter of first impression, as my research revealed no other cases directly on point. I recognize, however, that reasonable minds could differ. It is possible but counterintuitive to conclude that an academic year does not end until the next academic year starts.

<sup>11</sup> <http://s3.amazonaws.com/achievementcharter.com/uploads/2019-20-School-Calendar-List-View.pdf?mtime=20190701123415>. Visited on October 26, 2019.

The District's position articulated by the supervisor of special education and the school psychologist that it lacked the time and the personnel to conduct an evaluation is severely undercut by the fact that from July 17, 2019 on it had the recent, exceptionally thorough private Neuropsychological/Psychoeducational Evaluation in its possession. That evaluation satisfied every IDEA criterion for an appropriate evaluation. Rather than transcribing the 2016 cyber charter school's IEP into District IEP format, the District would have better served its purposes and Student's needs by extensively using the private evaluation as the basis for writing a District evaluation upon which a reasonable IEP could have been based. Putting the District's imprimatur on at least the academic and behavioral findings of the private evaluation, the District may have gone a long way in being able to offer a program and placement that this hearing officer could seriously consider.

The District maintains that because the Parents did not request an offer of FAPE to determine what the District could offer the Student prior to registration, the District was only obligated to consider the Student an intrastate transfer student and provide "comparable services". I admit that I fail to grasp the District's point here. As of the end of the 2018-2019 school year the Parents were enrolling their child into the District for the 2019-2020 school year. Student had been eligible for special education at the time the Parents disenrolled Student from the District and Student continued to be eligible for special education when the Parents reenrolled Student in the District. The Parents did not know they had to say magic words indicating they wanted FAPE for their child [NT 300-302] when the District certainly knew that the child was entitled to FAPE. I hold that given the District's knowledge that Student was eligible for special education the District incurred the obligation to make a genuine offer FAPE with or without the magic words having been said.

The Parents rightly dispute the appropriateness of the District's offered services regardless of whether those services were developed through the regular IEP process or through the intrastate transfer process. The final IEP the District proposed was in great part transcribed from an IEP that was three years old and to be implemented at home through a cyber program and another IEP that was one year old and to be implemented in a small private emotional support school. The present levels in the 10<sup>th</sup> grade IEP were three years old, with data taken from Student as a 7<sup>th</sup> grader, the goals were three years old based, on Student's 7<sup>th</sup> grade needs, and there was no behavioral data to support programming for Student's emotional support. Even as an intrastate IEP the District's offer was so inadequate as to be indefensible, and judged from a robust FAPE standard the District's proposed program and placement is even less adequate and is wholly inappropriate. Sadly, this conclusion must be reached even though the District had the wholly appropriate and extremely thorough private Neuropsychological/Psychoeducational Evaluation in its possession given freely by the Parents for its consideration in programming for this child.

However, even if for purposes of argument, the intrastate transfer rule did apply in this case, and I hold that it does not, under the intrastate transfer rule the District failed to meet even the few basic requirements under the rule. The intrastate transfer rule says that an LEA must provide services "*in consultation with the Parents*" until it can develop its own IEP. In this case, the Parents were offered no meaningful opportunity for their input to be considered in any way that could remotely be viewed as fair. Further, the Department of Education interprets "*comparable*" to have the plain meaning of the word, which is "*similar*" or "*equivalent*" and thus "*comparable*" services means services that are "similar" or "equivalent" to those that were described in the



child's IEP from the previous public agency, as determined by the child's newly designated IEP Team in the new public agency. In neither the program nor the placement did the District offer services "similar" or "equivalent" to those provided in the cyber charter school's IEPs, whether implemented in Student's home or in the private school.

It is beyond striking that without collecting at least preliminary behavioral/emotional/social data *or considering the extensive data the Parents provided through the recent private evaluation*, the District expected this child, with serious learning, sensory, and emotional issues, to enter a large public high school on the first day of the school year with minimal emotional supports after two years of being educated at home through a cyber charter school followed by two years of being educated in a very small specialized emotional support private school. The Parents have an older child and a younger child attending schools in the District. As revealed in a colloquy between the mother and the hearing officer, the Parents seemed genuinely interested in having Student attend the high school if the program consisted of small classes and a high level of emotional support. [NT 278-281] However, as discussed above, the program and placement the District offered this child was inappropriate under either a traditional FAPE standard or a modified intrastate transfer standard and accordingly the Parents have fulfilled their burden of proof on the first prong in this matter. There was no probative evidence or argument presented that the private placement is not appropriate, or that equitable considerations alter the outcome of this case, and therefore an Order granting the relief the Parents seek is issued.

#### Order

It is hereby ordered that:

1. The District denied Student a free, appropriate public education for the 2019-2020 school year.
2. The private school is an appropriate placement for Student and remains the pendent placement throughout the duration of any appeals of this Order.
3. There are no equitable considerations that would reduce or remove the District's obligation to reimburse the Parents for Student's tuition.

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

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

October 27, 2019

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