

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

**PENNSYLVANIA**  
**SPECIAL EDUCATION HEARING OFFICER**

DECISION

DUE PROCESS HEARING  
BIFURCATED: PART ONE

Name of Child: AD  
ODR #9443/08-09 LS

Date of Birth:  
xx/xx/xxxx

Dates of Hearing<sup>1</sup>:  
January 26, 2009  
March 24, 2009  
March 30, 2009  
April 13, 2009  
June 5, 2009

CLOSED HEARING

Parties to the Hearing:

Upper Merion School District  
435 Crossfield Road  
King of Prussia, Pennsylvania 19406

Date Record Closed:

Representative:

Catherine Reisman, Esquire  
20 East Redman Avenue  
Haddonfield, New Jersey 08833

Mark Fitzgerald, Esquire  
Fox Rothschild  
Suite 200 PO Box 3001 Ten  
Blue Bell, Pennsylvania 19422

June 18, 2009

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<sup>1</sup> One additional scheduled date, May 26<sup>th</sup>, was instead used for an expedited ESY hearing for this student.

Date of Decision:

July 2, 2009

Hearing Officer:

Linda M. Valentini, Psy.D.

## Background

Student is a seventeen-year-old eligible student with Asperger's Disorder whose family resides in the Upper Merion School District (hereinafter District). He is currently unilaterally placed as a residential student at The Pathway School (hereinafter Pathway), a private school. The Parents seek reimbursement from the District for their son's placement at Pathway. The hearing officer bifurcated the case as two distinct time periods were at issue. This first part of the due process hearing addresses the appropriateness of the District's offer of FAPE upon Student's enrollment in September 2008. The decision regarding the appropriateness of a second offer of FAPE tendered in January 2009 is pending, as the sessions addressing that portion have not yet concluded.

## Issues

1. In the fall of 2008, did the District offer an appropriate program and placement to Student ?
2. If the District did not offer an appropriate program and placement to Student in the fall of 2008, was the placement chosen by the Parents appropriate?
3. If the District did not offer Student an appropriate program and placement in the fall of 2008, and the placement unilaterally chosen by the Parents was appropriate, are there equitable considerations that would serve to remove or reduce the District's responsibility to reimburse the Parents for the period from October 8, 2008 through January 23, 2009?

## Findings of Fact

1. Student is a seventeen-year-old eligible student whose family resides in the District. Student is classified as a student with autism, specifically Asperger's Disorder. Student attends Pathway, a nearby private school, as a residential student, having been unilaterally placed there by his parents on October 7, 2008. [NT 236, S-6, S-15, P-18b]
2. On a Woodcock Mini Battery administered by a District school psychologist, Student achieved a reading score in the superior range (120), a Math score in the high average range (113) and a writing score in the low average range (90). Student has a significant weakness in processing speed. [NT 1109; S-6, S-7, S-15]
3. Student has social/pragmatic language deficits, consistent with Asperger's Disorder. [NT 520]

4. As described by his mother and endorsed by his father, Student is sweet, kind, loving, very bright, interested in talking about politics, and cares about the world. [NT 213, 918]
5. Student takes medication that may be contributory to weight gain; he stands 6'1" and weighs about 275 lbs. [NT 213-214]
6. The last public school district in which Student was enrolled and attended was the [Redacted school and state]. His IEP, dated May 23, 2003, called for part-time special education support. The IEP did not indicate behaviors that impeded learning or communication needs. The Parents approved the IEP. Student was promoted from 4<sup>th</sup> to 5<sup>th</sup> grade based on "District adopted criteria for regular education students." [NT 218, 340-344; S-2]
7. The family moved to [Redacted state]. Student's psychiatrist in [Redacted state] felt that while Student had done well in the public school he "was tolerated", and that "he really needed to be with some kids like himself" [so he would not feel different].<sup>2</sup> [NT 226-227]
8. The Parents<sup>3</sup> went to [Redacted state] and consulted with Sherry Kraft<sup>4</sup>, a woman who authored a book about a neurological disorder; this individual recommended a specialist. Both persons suggested the [Redacted school] School and the Parents enrolled him there. [NT 225-226]
9. The Parents did not contact their [Redacted state] public school district to see what would be offered to Student . [NT 227]
10. Student attended the [Redacted school] School, a private day school with an exceptionally small [10 boys] middle school student body, for three years. [NT 228; S-3]
11. After three years of Student's being in the [Redacted school] School, the Parents obtained a private evaluation through the Behavioral Institute of [Redacted state] (BIA) for purposes of assessing progress and for educational placement planning as the Parents thought that [Redacted school] was not as strong on academics as Student needed. [NT 228-230; S-3]
12. The June 2006 BIA evaluation found Student to have broadly average cognitive and academic abilities overall. Student had average scores on the Achenbach Child Behavior Check List in the relevant areas of School Performance and

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<sup>2</sup> The [Redacted state] psychiatrist is presumably not an educational expert and does not seem to have been familiar with the LRE concept; he presumably did not observe any public school programs in the greater metropolitan area of [Redacted state] .

<sup>3</sup> The term Parents is generally used in this decision although the mother was the more active in this process while keeping the father informed. When necessary for clarity mother or father are individually referenced.

<sup>4</sup> A by no means exhaustive internet search to verify the spelling of her name did not yield any findings using various spelling permutations. The name used here is as it appears in the transcript.

Behaving Appropriately and an overall score in the average range on behaviors in general. [S-3]

13. The BIA evaluation did not find Student to have symptoms of depression or anxiety, although the Parent scores on the rating scales were more elevated than the Teacher and Student scores. [S-3]
14. The BIA evaluation noted, “Student has made progress in [his] school setting and will soon be ready to go to a larger school setting with other youngsters his age....both in and outside of [Redacted state] .” [NT 937-938; S-3]
15. BIA declined to make more specific placement recommendations.<sup>5</sup> [NT 397, 919, 939-940]
16. The Parents went to an “educational specialist” who “looks at private situations. She looks at all types of private schools.” She matches students with two or three of what she believes are “the best schools or most appropriate schools”. The educational consultant has no background in public education, but has extensive contacts with private boarding schools. [NT 230-232; 345-386]
17. The educational consultant reportedly said that there wasn’t a school in [Redacted state] that would meet Student’s needs, “the most appropriate needs”, according to the mother. The educational consultant reportedly said, “It will have to be a residential placement”. [NT 232-233]
18. Although the Parents resisted the idea of residential placement for 9<sup>th</sup> grade, on the recommendation of the educational consultant the mother and Student visited the [Redacted residential school] School, a private boarding school in [Redacted state] that just had a space opening up. Sally [Redacted residential school] “got Student immediately”, she could talk to parents and to a child, and she told Student it was his decision whether or not to come to the school. Student decided he wanted to go to [Redacted residential school]. [NT 233-234, 920-921]
19. There were 42 boys in [Redacted residential school], a high school. All the students there had learning issues and/or social differences. Student became much

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<sup>5</sup> This hearing officer is highly skeptical that BIA would tell families that no schools in the greater [Redacted state] metropolitan area could meet their child’s special education needs, except perhaps in the rarest of situations [e.g. a deaf/blind/autistic child, or a child with severe neurological impairment leading to intense life-threatening repetitive self-injurious behavior]. Autism/Asperger’s Disorder is not an uncommon special education classification, with an estimated 1 in every 150 births occurrence. [Redacted state] is a metropolitan area with the resources of other demographically comparable major cities. BIA, if asked about the public school districts in the area, should at the very least have advised the Parents to contact their local school district. It may be that BIA assumed the Parents in this case were looking for a private school, but even so it would have been imprudent for BIA to make a statement to the effect that no appropriate schools existed in the area. The Parents may have misinterpreted a reasonable policy of an assessment agency’s not getting into the business of helping place students with a statement that no placements existed in the area. The father’s testimony under cross-examination seems to be the closest approximation of what would have made sense for BIA to have said. [NT 354-355, 938-942]

- more independent, learned to negotiate relationships on a 24-hour per day basis, and learned to communicate. [NT 234-235]
20. The [Redacted residential school] School did not focus on autistic children. The Parents were not focused on the [Redacted residential school] School's dealing with Student's diagnoses including autism. They were focused on the information they had received from their educational consultant who knew the school. [NT 359-360]
  21. Student did not receive speech/language or occupational therapy at the [Redacted residential school] School, nor were there any special education goals of any kind for him at this program. [NT 360-363]
  22. Student was behind academically, so did not do well initially at [Redacted residential school]. However he finished his first year, the 2006-2007 school year, and went back for his second year. [NT 235-236]
  23. He returned home for the summer as would be the case for any academic boarding school. [NT 360-363]
  24. Student returned for the 2007-2008 school year. He did well as of mid-fall semester of his second year at [Redacted residential school], but around the time before Thanksgiving he had problems with headaches that the school's consulting psychiatrist believed were related to stress. Student was stressed about the academic demands, was not receiving enough help with organizational skills which were a weakness that affected academics and daily living areas such as laundry, and didn't feel he was fitting in socially. Sally [Redacted residential school]<sup>6</sup> and the School's consulting psychiatrist recommended a different environment with more structure, supports, and therapeutic help. [NT 236-238, 242, 362]
  25. Even though the Parents and Student's sister<sup>7</sup> had moved into the District the summer between Student's first and second years at [Redacted residential school], they did not contact the District to see what was available in the public schools, or look at private schools in Pennsylvania closer to their home. [NT 236]
  26. The Parents quickly found another residential school for Student, [Redacted 2nd residential school], which the educational consultant had originally recommended as a backup to [Redacted residential school]. [NT 239, 241]
  27. Student was enrolled at [Redacted 2nd residential school] Preparatory School in [Redacted state] for the second semester of academic year 2007-2008. [NT 308]

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<sup>6</sup> Her current role at the school is unclear. She founded the school. Her son was running the school when Student left. Her professional credentials are not in the record, particularly as they may relate to training in psychology, psychiatry or special education [NT 358]

<sup>7</sup> Student's younger teenage sister is enrolled at [Redacted]. [NT 970; S-6]

28. [Redacted 2nd residential school] added an element that [Redacted residential school] seemed to be missing. There was a family style dorm with two dorm parents, one of whom was sleeping there overnight; there were a number of assistant dorm parents. The dorm staff helped with homework. [NT 243]
29. [Redacted 2nd residential school] had special education teachers, or teachers with special education training. It had organizational supports. It had social workers and interns. It had extracurricular activities such as ping-pong and clubs. [NT 243-244]
30. [Redacted 2nd residential school]'s supports allowed Student to take a full academic schedule that would permit him to access college if he chose. [NT 243]
31. [Redacted 2nd residential school] utilizes a tier system to regulate its students' behaviors in the residential setting. The system focuses on such typical [family-type] daily living activities as room cleanliness, chore completion, time management, and personal responsibility for hygiene and taking care of possessions. Student did not do well in these areas during the first part of his first semester enrollment at [Redacted 2nd residential school], in part due to arriving mid-year, maintaining a Tier Zero [lowest] level; by the end of the semester he had advanced to a Tier Five [highest] level. With support from staff Student struggled but made substantial improvements with this system. [P-4]
32. A September 18, 2008 letter from [Redacted 2nd residential school]'s associate director indicates that Student's involvement in gaming [PSP, Xbox, Playstation 3] caused conflicts; however time for these activities was used to reward him although the staff recognized that they were a means of internal self-soothing. [P-4]
33. Student did not have an educationally based behavior plan under the [Redacted 2nd residential school] IEP. [S-4]
34. The present educational levels in the [Redacted 2nd residential school] IEP are limited, noting, for example, "spelling- difficult" or "verbal comprehension-easy". [S-4]
35. The Student's academic program may have been modified while at [Redacted 2nd residential school]. The Parents did have some disagreements with the [Redacted 2nd residential school] IEP, but the mother noted she was "not particularly caring of the IEP"; rather she was caring about what "they were doing for my communications with him." [NT 371-374; S-4]
36. The [Redacted 2nd residential school] associate director holds a license in social work and is a school-certified social worker. He does not hold licenses or certifications in psychology despite having a doctorate in educational psychology and counseling. His only post-doctoral employment has been at [Redacted 2nd

- residential school] where he has remained for twenty-two years. [Redacted 2nd residential school]'s associate director believes, as written by [Redacted 2nd residential school]'s director in a public information piece, that public educational systems lack an understanding with regard to supporting students with learning difficulties.<sup>8</sup> The [Redacted 2nd residential school] associate director believes Student requires residential programming. He did not provide data to support his opinion. He has never been employed in a public school. [NT 505, 531-532, 540-541, 549, 558-561; S-48]
37. As indicated in its informational literature, and endorsed and explained by its associate director, part of the service [Redacted 2nd residential school] provides by offering a boarding school setting is to allow families to “reclaim a normal family life” as opposed to “being consumed with the struggles of trying to have provided for the student the type of learning environment that they need...[which] is a full time job and really changes the dynamics of families because of the amount of intense focus that’s required in trying to meet the needs of one of the children within the family system”. [NT 534]
38. Student lived at home with his parents during the summer of 2008. He returned to [Redacted 2nd residential school] “more compliant with the expectations and engaged with his peers”. [NT 248-249; P-4]
39. Student was expelled from [Redacted 2nd residential school] for kicking a student in the head, during residential time, in a conflict involving a video game. This type of behavior was not typical for Student . [NT 994; P-4]
40. Student returned home on Friday, September 5, 2008. Sometime between learning of Student’s expulsion and September 10, 2008 the Parents made contact with their educational consultant who mentioned Pathway among other schools and who agreed to meet the mother and Student in Baltimore.<sup>9</sup> [NT 386, 714, 759-760]
41. The Parents contacted the Pathway School and left a message on Wednesday September 10, 2008 referencing the name of the educational consultant who had referred other students to Pathway. [NT 653-654, 757]

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<sup>8</sup> The associate director of [Redacted 2<sup>nd</sup> residential school] has had no direct professional involvement in public school education of students with disabilities. In the 22 years he has been at [Redacted 2nd residential school] the IDEA and school districts’ implementation of its mandates have evolved through reauthorizations and case law. Additionally, in the last 22 years widespread understanding of autism and Asperger’s Disorder has increased in enormous measure, moving from a psychoanalytic basis of understanding to our neurobiological understanding. His mistrust of public schools’ ability to educate students with learning difficulties has no credible foundation.

<sup>9</sup> The educational consultant, Student’s therapist and the Parents also discussed whether they should try to have Student reinstated at [Redacted 2nd residential school] or find another school. [NT 713-714]



42. On September 11, 2008 the mother had a conversation with Pathway's director of external affairs<sup>10</sup>. [NT653]
43. The mother and Student met with the educational consultant at a Baltimore hotel on the evening of Friday, September 12, 2008. [NT 386]
44. On Monday, September 15, 2008 Student and his mother visited Pathway and observed the academic, the vocational and the residential areas. An application for admission was either handed to the mother that day or emailed, as this was "an expedited process".<sup>11</sup> [NT 663-665, 657]
45. On Monday, September 15, 2008 the educational consultant got back in touch with the Parents regarding Pathway. [NT 396]
46. On Monday, September 15, 2008 the Parents also contacted the District, leaving a message for the director of special education. The director of special education recalled a message slip but not the date. [NT 132, 259]
47. On Tuesday, September 16, 2008 the mother called the District's special education director, spoke to her assistant, and left a voicemail message. On Tuesday, September 16, 2008 the mother downloaded registration applications from the District's website. [NT 259-260]
48. On Wednesday, September 17, 2008 the mother filled out the District registration material she had downloaded and she and Student visited the District and met with the child accounting specialist and then and a secretary to do the official registration. The mother asked if an emergency IEP meeting was needed and was told no by the former individual. On this date the mother gave the District a signed authorization to release records which she had filled out the previous day. As of this date Student was enrolled in the District. [NT 260-262, 266-267, 377; S-6]
49. By Thursday, September 18, 2008 the Parents had supplied the District with Student's transcripts from [Redacted 2nd residential school] and from [Redacted residential school], the [Redacted 2nd residential school] IEP[s], and the BIA evaluation. [NT 264-265]
50. On Friday, September 19, 2008 the mother emailed the director of special education and expressed her concern at not having received any direct contact from her and noted that Student was anxious. The mother also telephoned to follow up on the email. The supervisor of the director of special education called back and arranged a meeting for September 22, 2008. [NT 57-58, 270-271; S-8]

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<sup>10</sup> The position involves marketing and admissions. [NT 652-653]

<sup>11</sup> The director of external affairs said that as far as Pathway goes the turnaround time from first contact to admission was about as fast as it can be done. [NT 666]

51. On Friday, September 19, 2008 at around 2:30 pm the director of special education emailed the mother and told her she was reviewing the documentation. [S-8]
52. Between Friday September 19, 2008 and Saturday, September 20, 2008 the Parents hired an advocate. [NT 272, 379-380, 388, 972-974]
53. Before the meeting with the District on September 22<sup>nd</sup>, the Parents had made up their minds regarding residential placement, specifically Pathway. Acknowledging that everything they had was pointing to residential, the mother testified "everyone I trusted, everyone who knew Student, everyone who worked with Student, were telling me that's what he needed. I was definitely moving forward on that recommendation. There was no one saying he'd be okay in the public school system, so I moved forward because I did not like what the public system did." [NT 388]
54. On Monday, September 22, 2008 the mother and the Parents' advocate met with the District. The District considered a placement in the high school but as the Parents and the advocate seemed focused on a smaller setting the District discussed the Vantage program for a diagnostic period which would allow the District to perform a complete evaluation. The most recent psychoeducational assessment had been the June 2006 BIA evaluation. [NT 995-996]
55. In a brief conversation with a District staff member, Student asked if the Vantage program was residential, noting "well, you know, my mom says I need help outside of the school day." He also asked if Vantage was a public school or a private school, and told it was public he said, "I don't do well in public school." He also opined with some mathematical certainty that he needed a student/staff ratio of 5 to 1. [NT 997]
56. At the September 22, 2008 meeting neither the Parents nor their advocate spoke about Student being in crisis or [redacted]. [NT 999]
57. On Monday, September 22, 2008 the Parents signed and completed the application for admission to Pathway. [P-21]
58. On Tuesday, September 23, 2008 the mother visited the Vantage program, an alternative school serving regular education and special education students. [NT 995-996]
59. On Tuesday, September 23, 2008 the District psychologist performed a brief assessment of Student.
60. On Monday September 29, 2008 Student had a preadmission screening at Pathway. [NT 661-662]

61. On Tuesday, September 30, 2008 the mother, the Parents' advocate and the District met again. This was a holiday for students in the District but administrative staff worked. [S-46]
62. On Wednesday, October 1, 2008 Pathway staff held an internal case conference at which it was decided to accept Student for a 60-day diagnostic period. [NT 668-669]
63. By letter dated Monday, October 6, 2008 Pathway informed the Parents that Student was accepted for the diagnostic period. [NT 667; P-21]
64. On Monday, October 6, 2008 Student had a Health and Safety Assessment at/by Pathway signed and dated that day by a program specialist and a nurse. [P-21]
65. On Monday October 6, 2008 the director of external affairs generated an enrollment memorandum to alert staff to Student's possible admission the next day. She testified there "was still some degree of uncertainty because there was still dialogue with the school district occurring right around that time, so I did not know whether or not we were going to be able to proceed with October 7<sup>th</sup> or whether it would be delayed." The director of external affairs testified that October 7<sup>th</sup> was "a date that was desirable if Parents were going to proceed, and we were able to manage that date as well." [NT 669-674]
66. On Tuesday, October 7, 2008 the mother, the Parents' advocate and the District met again. At the end of the meeting the advocate read a prepared statement informing the District that the Parents were unilaterally placing Student at Pathway. [P-18]
67. On Tuesday October 7, 2008 Student was moved into the residential placement at Pathway "late in the day" or "around 3:00 [pm]". [NT 673-674]
68. Thursday October 9, 2008 was a District holiday. [S-46]
69. On Tuesday October 14, 2008 the Parents received the IEP.
70. After returning home from [Redacted 2nd residential school], Student was uncooperative; he did not attend to his hygiene, and effectively slept all day long, refusing requests to participate in the household routine. He said things like: "My life is over" and "What does it matter?" Parents were deeply concerned about his safety and did not leave him alone. [NT 922-928]
71. Student did eat, however and did not refuse to visit schools or meet with the educational consultant, District psychologist, or Pathway interviewer[s]. [NT 925-926, 952-953]

72. Student saw his local therapist soon after he returned from [Redacted 2nd residential school]. Neither the Parents nor Student's therapist had him psychiatrically hospitalized. [NT 953, 956]
73. The District had at its disposal as a baseline for beginning to develop a program and placement the private BIA evaluation, which was performed a little over two years prior to Student's enrollment and as such not "expired". The evaluation, as written, satisfies the standards for evaluations under the IDEA. [S-3]
74. The Vantage program is a new program started at the beginning of the 2008-2009 school year. It has a maximum capacity of 42 students with about 13 staff. Three of the staff are mental health clinicians at a master's level. Vantage has a curriculum director, a program director, and offers all the major high school subjects using the District's materials, and its curriculum, exactly the same as in the high school but in a smaller setting. [NT 992-994]
75. At the time Student would have entered there would have been about 24 students in the program. [NT 995]
76. In addition to providing Student with academic classes on an interim basis, the District's proposed 60-day interim program for Student included counseling, speech/language therapy, and social skills development; for the 60-day diagnostic period, much of the information from [Redacted 2nd residential school] was to be adopted into the interim IEP. There was discussion of the possibility of a one-to-one staff for Student if he required it. [NT 899; S-15]

### 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, as one element of the burden of proof, 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 Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion analysis does not enter into play unless the evidence is in equipoise, that is, equally balanced so that by definition the party seeking relief has not presented a preponderance of the evidence.

In the instant matter, the evidence was not in equipoise. The Parents, by not presenting a preponderance of the evidence, nor even equally balancing the District's, can not prevail regarding the issue of tuition reimbursement for their unilateral placement.

Credibility: 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.<sup>12</sup> 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. As appropriate, credibility is addressed within the body of this decision.

District's responsibility for Student under the IDEA as a new enrollee: The IDEA 2004 is silent regarding a district's requirement to provide special education services to a student who comes from a private school out of state, and repeatedly references "public agency".

34 CFR § 300.304 Evaluation procedures provides:

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations

And further,

34 CFR § 300.323 When IEPs must be in effect provides,

(e) IEPs for children who transfer public agencies in the same State. If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either —

- (1) Adopts the child's IEP from the previous public agency; or
- (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320

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<sup>12</sup> 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).

through 300.324.

(f) IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency —

- (1) Conducts an evaluation pursuant to §§ 300.304 through 300.306 (if determined to be necessary by the new public agency); and
- (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324.

(g) Transmittal of records. To facilitate the transition for a child described in paragraphs (e) and (f) of this section —

- (1) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 CFR 99.31(a)(2); and
- (2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.  
(Authority: 20 U.S.C. 1414(d)(2)(A)-(C))

Previous Pennsylvania special education statutes had addressed the issue of students coming from other states and from private schools more specifically as follows:

22 PA §14.131. IEP.

(3) If a student with a disability moves from one school district in this Commonwealth to another, the new district shall implement the existing IEP to the extent possible or shall provide the services and programs specified in an interim IEP agreed to by the parents. The interim IEP shall be implemented until a new IEP is developed and implemented or until the completion of due process proceedings under this chapter.

(4) If a student with a disability moves into a school district in this Commonwealth from another state, the new school district may treat the student as a new enrollee and place the student into regular education and it is not required to implement the student's existing IEP.

(5) Every student receiving special education and related services provided for in an IEP developed prior June 9, 2001, shall continue to receive the special education and related services under that IEP subject to the terms, limitations and conditions set forth in law.

Although one might argue that in reauthorizing the IDEA in 2004 Congress intended to limit services to students already receiving special education, and therefore that the Commonwealth of Pennsylvania's dropping the above quoted provision reflected its recognition of same, the recent U.S. Supreme Court ruling in Forest Grove Sch. Dist. v T.A., changes or may change that application. In the instant matter, however, the District did not wait to begin an evaluation of Student , did not wait to find him eligible, and did not place him into regular education.

Tuition Reimbursement: Special Education Foundations:

Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

However, “The IDEA’s requirements regarding a FAPE are ‘modest’.” Z.W. v. Smith, C.A. No. 06-1201, 2006 WL 3797975, \*3 (4th Cir.), *quoting* A.B. v. Lawson, 354 F.3d 315, 325 (4th Cir. 2000). A student’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). Districts need not provide the optimal level of service, maximize a child’s opportunity, or even offer a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1998); Lachman, supra. What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). The purpose of the IEP is not to provide the “best” education. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993). Recently, the Eastern District Court of Pennsylvania reiterated, “districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” S. v. Wissahickon Sch. Dist., 2008 WL 2876567, at \*7 (E.D.Pa., July 24, 2008), citing Carlisle, 62 F.3d at 534, citations omitted.

See also, Neena S. ex rel. Robert S. v. School Dist. of Philadelphia, 2008 WL 5273546, 11 (E.D.Pa., 2008).

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. 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 (1<sup>st</sup> 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<sup>13</sup>, 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.

Appropriateness of the District's proposed placement:

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<sup>13</sup>The threshold issue for tuition reimbursement has just been decided by the United States Supreme Court in Forest Grove Sch. Dist. v T.A., cert. granted, 129 S.Ct. 987, 109 LRP 13478 (January 16, 2009). The majority opinion held that a student does not have to have already received special education services from a district prior to tuition reimbursement being considered if the district has failed to offer FAPE.



With regard to the first prong for tuition reimbursement under Carter, the District clearly and in a most timely manner offered Student an appropriate interim educational program and placement to address his disability classification.<sup>14</sup> Although arguably the District could have placed Student in regular education until it completed a thorough evaluation, it did not take this route. Instead the District gathered relevant prior information, performed a brief assessment of academic levels, and proposed an interim special education placement for a 60-day diagnostic period. Given the Parents' concerns that Student have a small educational setting, the District offered a new program with about two dozen students and a high staff ratio; the staff included mental health professionals. The placement also addressed the Parents' concerns that Student receive coursework that would go toward his accessing college.

The District could have passively accepted the [Redacted 2nd residential school] IEP but instead it tried to work with the Parents to create an appropriate plan, drafting the document in the presence of the mother and the advocate. Instead of working diligently with the District to craft an IEP that would benefit Student, the Parents placed Student back into residential before they received the completed IEP draft. Once having received it, and during this hearing, the Parents made no substantive challenge to the District's IEP, including present levels, goals, specially designed instruction or supportive services. The IEP seemed not to be a major concern overall. The Parents were largely non-critical of the amorphous [Redacted 2nd residential school] IEP which Pathway continues to implement. In fact, the mother testified that she was less concerned about program modifications by [Redacted 2nd residential school] than in the fact that [Redacted 2nd residential school] addressed communication with her. The Parents' major concern was having Student enrolled in a private residential placement.

Although neither the Parents nor Student's therapist[s] in [Redacted state] and Pennsylvania deemed it necessary that Student be psychiatrically hospitalized, this hearing officer has no doubt that the Parents were sincere in their concern about his anxiety regarding needing a school placement. However, the type of "crisis" situation or "emergency" situation referenced in the record is not the responsibility of a school district. Inpatient hospitalization, partial hospitalization, outpatient psychotherapy several times weekly, aggressive medication management, and/or wraparound services form the continuum of services available in a mental health crisis. In this matter, the Parents and their advocate, and surprisingly the treating mental health professional[s] did not seem to have thought outside the "education" box to address the crisis. Nor did anyone seem to think that Student may have needed some time home with his family to regroup rather than being sent to a third boarding school in three years.

Student returned home on September 5<sup>th</sup>. Student enrolled in the District on September 17<sup>th</sup>. The District held an IEP meeting 5 calendar days from enrollment, on September 22<sup>nd</sup>, at which time it offered an interim program/placement. The District conducted a brief assessment on September 23<sup>rd</sup>, 6 calendar days from enrollment. On September 30<sup>th</sup>,

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<sup>14</sup> Even if the District's proposed program/placement were not found to be appropriate, the District would have been entitled to a reasonable rectification period of at least 60 days to make changes. The earliest reimbursement would have begun would have been on or about December 14, 2008.

13 calendar days after enrollment the District convened another meeting with the Parents. On October 7<sup>th</sup>, 20 calendar days after enrollment, the District convened an IEP meeting with the Parents to draft an IEP for the interim period. At the end of this meeting the advocate read a prepared statement informing the District that the Parents were unilaterally placing Student at Pathway.<sup>15</sup>

Appropriateness of the program and placement unilaterally selected by the Parents: Since the District fulfilled its obligation to offer Student an appropriate program and placement, the second prong of the Carter analysis does not have to be reached. If such an analysis were necessary, attention is drawn to the findings of fact which lead to the inevitable conclusion that the Parents provided not a scintilla of evidence to support their position that Student required then, or ever required, residential placement to address his disability classification of autism. No child could ask for a more committed set of Parents who at all times sought out what would be best for their son. Unfortunately, as they were leaving [Redacted state] and at every subsequent step along the way to the present, the individuals on whom they depended for advice and guidance were all associated with the private systems of education and mental health and not the world of public special education. The Parents did not have Student evaluated by their [Redacted state] public school district. They sought out an author of a book on Tourette's Syndrome<sup>16</sup> who referred them to another individual, both of whom recommended [Redacted school], a private school. The Parents then had Student evaluated at BIA, a private assessment facility. They then sought out the advice of an educational consultant, an individual who thought within the box of private placements. It is hard for this hearing officer to imagine how this consultant could have believed that removing a young teen aged male student with social and relational difficulties from a loving family, and putting him in a closed environment with other youth with problems, would ever prepare him for independent functioning and meaningful work in the larger community. The educational consultant referred the family to two private residential schools. The founder of the first, [Redacted residential school], interviewed Student and accepted him, but eventually believed her assessment of his needs was incorrect. Coming from the perspective of a private boarding school she and her consulting psychiatrist recommended another private boarding school. The next school, [Redacted 2nd residential school], was a private boarding school with more family-type supports built in. Student was successful there but when an out-of-character incident occurred the staff recommended another residential setting be found. The literature of [Redacted 2nd residential school] emphasizes providing respite for families. The associate director of [Redacted 2nd residential school] has no history of professional employment outside [Redacted 2nd residential school]'s walls for the last 22 post-graduate years and not surprisingly recommended that with which he was familiar. Again the educational consultant became involved and, in a remarkably brief time according to Pathway, Student was accepted into Pathway's residential program.

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<sup>15</sup> Note these are calendar days. Weekends and religious [Jewish] holidays are not subtracted. The period encompasses thirteen school days. [S-46]

<sup>16</sup> Professional mental health or special education credentials are not in the record.

The Parents are not at fault here; in the first instance and the two subsequent incidences of private residential placement they thought they were doing what was best for their child. Of note however is that the record is devoid of any testimony regarding Student's being unmanageable at home after middle school or after his first year at [Redacted residential school], or after his time at [Redacted 2nd residential school]. He lived at home through middle school. His father was looking forward to having him home during high school. There was no testimony that when he came home for summers he was unmanageable. In fact he returned to [Redacted residential school] after his first summer vacation doing quite well. He returned from [Redacted 2nd residential school] after his second summer home more willing to engage and cooperate. Student's distress upon his being forced to leave [Redacted 2nd residential school] was clearly painful for the Parents to observe, but this period of remorse and readjustment was not unexpected, and carried out in somewhat adolescent fashion.

The question must be asked: Did Student's being enrolled in boarding school create the need for Student to be enrolled in boarding school? Alternatively, was it the residential aspect of boarding school that caused him to "fail" in boarding school? Student's experience at [Redacted 2nd residential school] illustrates that after a summer about which the Parents provided no negative details he returned better functioning than when he left the school, only to get into conflict with a peer over a video game. The problem behavior at [Redacted 2nd residential school] arose during the residential portion of his week. Problems with homework and assignment completion, with laundry and cleaning chores, and with time management including balancing gaming with less preferred responsibilities are issues that parents of adolescent males and females address on a daily basis. Difficulties around residential life created by residential life are not indicators of the need for residential life. This hearing officer acknowledges that as a student with Asperger's Student may have more than average difficulty with transitions, doing non-preferred activities and moderating his rigid ideas about how he wants to spend his time. It is also acknowledged that Student left [Redacted 2nd residential school] because of a violent potentially serious incident, although the Parents testified credibly that this kind of behavior was unusual for him. For parents needing support in dealing with difficult youth, some considerably more difficult than Student, community-based mental health services in the form of "wraparound" or "Behavioral Health Rehabilitative Services are available regardless of parental means or income."<sup>17</sup>

One can only wonder how Student would be doing now if he had stayed at home, attending public schools with special education supports designed to address his disability. He did well in [Redacted state] in public school. His feeling out of place as

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<sup>17</sup> "Wraparound" services are Behavioral Health Rehabilitative Services (BHRS) available provided medical necessity exists to individuals up to the 21<sup>st</sup> birthday and include: Behavior Specialist Consultant services (BSC) involving analysis of the triggers and functions of behaviors, design of a behavior modification program in the form of a treatment plan to be implemented across all settings in which the individual participates, teaching the adults how to implement the plan, and monitoring the implementation of the plan with revisions as needed; Mobile Therapy services (MT) both individual and/or family carried out in the home setting; and Therapeutic Staff Support services (TSS) involving one-to-one assistance in the school, home or community settings. Medical Assistance Bulletin, January 1, 1994

he was about to enter middle school is not a foreign notion for even neurotypical children that age, and putting him with other students “like himself” certainly did not promote community integration or confer upon him his absolute right under federal and state law to be educated with non-disabled peers in the least restrictive environment appropriate to meet his educational needs. Their initial instincts regarding Student’s educational needs were sound; their recoiling from the notion of a boarding school for ninth grade was perhaps their better judgment. At this point the Parents have bought into the belief that Student requires a private placement, and a residential placement. However, the Parents have not met their burden of proof that Student requires a private school, or a residential setting.

Notice is drawn to the 1981 decision in Kruelle v. New Castle County School Dist., 642 F.2d 687, 693 (3<sup>rd</sup> Cir. 1981), to the effect that the:

[a]nalysis ... focus[es] ... on whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.

In this case, Student’s social and emotional needs are related to his medical diagnosis and educational classification of Asperger’s Disorder or Autism, but are clearly severable from the learning process. Student does not require residential placement to enable him to derive meaningful educational benefit from a special education program. Student has average intelligence, he is academically on target, and his adaptive skills are as good as those of the average adolescent male living at home or in a college dormitory. The Parent’s closing argument noting that a small number of children with emotional problems require the restrictiveness of residential programming is not adopted: The type of residential institutions contemplated in cases such as Kruelle are largely 24/7/365 placements. In contrast, Student completed his education through middle school with day programming; Student came home for two full summers in a row during the time he was in boarding school; Student is most likely home again this summer.<sup>18</sup> The need for residential placement for emotional disturbance does not cease during the summer; in contrast, boarding schools send students home for the summer.

No mental health professional testified on behalf of the Parents in this matter, although the Parents testified that they placed Student in Pathway on the advice of Student’s doctors. In a case addressed in *SEA 1390* (Pa. 2003) there were mental health professionals whose opinions were part of the record. The Appeals Panel made this important distinction:

[R]ecommendations of health or mental health care providers are not educational recommendations. They are health and mental health

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<sup>18</sup> The mother testified in the previously referenced ESY hearing that the Parents wanted him home for the summer.

recommendations that may impact an educational program and must be considered by the educational providers but educational providers are not required to incorporate such recommendations except to the extent that they are required for FAPE.

Equities:

The equities favor the District. Since the District fulfilled its obligation to offer Student an appropriate program and placement, and the program and placement unilaterally chosen by the Parents is inappropriate, the third prong of the Carter analysis does not have to be reached. If such an analysis were necessary, attention is drawn to the fact that the Parents called and visited Pathway before they contacted the District, they rejected the District's program and placement, via a prepared statement read by their advocate at the end of an IEP meeting before they received a copy of the IEP or the NOREP, and Student was back in a private residential setting that very day. This hearing officer fully acknowledges the Parents' concern about Student's anxiety and possible depression as he awaited a school placement. Notably however the Parents were in contact with Student's local therapist and apparently there was no medical necessity for psychiatric hospitalization to stabilize him.

Student returned home on September 5<sup>th</sup>. The Parents contacted Pathway School on September 10<sup>th</sup>, 5 calendar days after Student's return home. Student and his mother visited Pathway on September 15<sup>th</sup>, 10 calendar days after Student's return home. Student enrolled in the District on September 17<sup>th</sup>, 12 calendar days after Student's return home. On September 19<sup>th</sup> or September 20<sup>th</sup>, the Parents hired an advocate, 14 or 15 calendar days after Student's return home. On September 29<sup>th</sup> Student had a preadmission screening at Pathway, 24 calendar days after Student's return home. On October 1<sup>st</sup>, 26 calendar days after Student's return home, Pathway staff held an internal case conference at which it was decided to accept Student for a 60-day diagnostic process. On October 6<sup>th</sup>, 31 calendar days after Student's return home Pathway informed the Parents that Student was accepted for the diagnostic period. On October 6<sup>th</sup> Student had a Health and Safety Assessment at/by Pathway. On October 6, 2008 the director of external affairs generated an enrollment memorandum to alert staff to Student's possible admission the next day. On October 7<sup>th</sup>, 32 calendar days after Student's return home Student was moved into the residential placement at Pathway about two hours after the IEP meeting. Student was residing at Pathway 20 calendar days after he was enrolled in the District.

The record makes it very clear that the Parents were not considering anything less than a residential facility for Student, on their own terms and within their own timelines. Parents' actions can compromise their entitlement to tuition reimbursement. In re the Educational Assignment of C.S., SEA 1658 (2005), "where the parents have predetermined that they will place their child in a private school regardless of the district's ability to program for the child, the equities favor the district." Pennsylvania's federal court in the Eastern District established that when parents have decided before the District is even afforded the opportunity to offer and provide FAPE to place the child in a

private placement, a claim for tuition reimbursement must fail. See Lauren V. v. Colonial School Dist., 49 IDELR 13 (E.D.Pa. 2007).

#### Order

It is hereby ordered that:

1. In the fall of 2008, the District offered an appropriate program and placement to Student .
2. The placement chosen by the Parents was not appropriate.
3. The equities favor the District.
4. The District is not required to reimburse the Parents for Student's tuition [educational portion and residential portion] for the period from October 8, 2008 through January 23, 2009.

July 2, 2009

Date

*Linda M. Valentini, Psy.D.*

Linda M. Valentini, Psy.D.  
Hearing Officer