

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

Student: ZG
Date of Birth: xx/xx/xxxx
Hearing Dates: March 16, November 16, November 20, 2009 and
January 8, 2010
ODR File No.: 9727-08/09AS

OPEN HEARING

School District: Council Rock School District

Parties:

Representatives:

Parent Attorney: Ilene Young
Law Firm of Ilene Young
50 East Court Street
Doylestown, Pennsylvania 18901

Council Rock School District

School District Attorney: Sharon Montayne, Esquire.
Sweet, Stevens, Katz & Williams, LLP
P.O. Box 5069
331 Butler Avenue
New Britian, Pennsylvania 18901

Date Record Closed: February 12, 2010

Decision Date: February 22, 2010

Hearing Officer: Gloria M. Satriale, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns the appropriate placement for Student, an eligible 17 year old Student, who resides with his Parents in the Council Rock School District (hereinafter District) and who has been identified with a variety of diagnosis including a specific learning disability, ADHD and Bipolar Disorder. The Student has attended private schools for the entire length of his schooling with the exception of four (4) days in the very beginning of his eighth grade year when he attended his home school in the District. At the request of his Parents, the District evaluated the Student and developed an Individualized Educational Plan (IEP), to which the Parents agreed, and the Student returned to the District for this brief period. Citing significant risk to the Student's emotional well being, the Parents removed the Student from the District and returned him to his previous private school. The within Due Process ensued seeking tuition reimbursement for the unilateral private placement. As the initial and subsequent offerings of a Free and Appropriate Public Education (FAPE) were appropriate to meet this Student's need, the Parents are not entitled to reimbursement for the tuition of the private school. I find in favor of the DISTRICT.

ISSUE

The sole issue presented for consultation is whether the Student is entitled to reimbursement for private school tuition and transportation to and from the placement. A decision on this issue must be framed in a three (3) part analysis:

1. Was the program and placement the District offered to the Student for the 2006-2007 school year appropriate?
2. If the program and placement the District offered to the Student for the 2006-2007 school year was not appropriate, was the placement unilaterally chosen by the Parents appropriate?
3. If the District did not offer the Student an appropriate program and placement for the 2006-2007 school year, and the placement unilaterally chosen by Parents was appropriate, are there equitable considerations that would serve to remove or reduce the District's responsibility to reimburse the Parents for the Students tuition for that school year?

FINDINGS OF FACT

1. The Student, whose date of birth is [Redacted], is an eligible Student under the category of emotional disturbance and specific learning disability in mathematic computation. NT 45-46; S-4 at 1, 22. P-4; at 1
2. Student has medical diagnoses which include: Bipolar affective disorder, depression, anxiety, attention deficit disorder, nonverbal learning disorder, asthma and gastro-esophageal reflux disease. P-6 and P-12 at 5; NT 454, 481-482.
3. At all times prior to relevant to this proceeding, with the exception of 9/1/06; 9/5/06 through 9/8/06, the Student was enrolled in and attended private school.

- First at the [Redacted private school] from first through seventh grade and next at the [Redacted 2nd private school] from seventh grade to the present. NT 84; 145
4. The Student was enrolled in the [Redacted 2nd private school] at all times relevant to this proceeding. NT 199
 5. During the Student's seventh grade year at [Redacted private school] he began to struggle behaviorally, emotionally and academically. NT 69-72
 6. Beginning in eighth grade (2005-2006 school year) the Student enrolled in [Redacted 2nd private school] . NT 69-72
 7. Student is currently in the twelfth grade and attends the [Redacted 2nd private school] in [Redacted state]. He began attending in the eighth grade during the 2005-2006 school year. NT 84
 8. Following the Student's first full year enrolled in the [Redacted 2nd private school] the Parents contacted the District and requested that the District fund the private placement. NT 94
 9. Following the District's refusal to fund the private placement, the Parents expressed their desire for their son to return to the District to attend school in the District and requested a re-evaluation. NT 94
 10. The District issued its initial Evaluation Report timely on August 15, 2006. S-22.

11. The District Evaluation Report (ER) consisted of a review of records provided by the Parent, observational information, teacher input, cognitive and achievement testing and social emotional data. S-4; S-22; P-1
12. The ER did not incorporate or reference reports produced by the Parents. P-13, S-4 at 1
13. The District ER was comprehensive and appropriate.
14. The District Evaluation Report (ER), dated August 15, 2006, is appropriate in that it contains appropriate cognitive and achievement testing, socio/emotional data, a review of educational records provided by the Parents, observational information, teacher input and educational recommendations. S-4. The Student has needs in the area of social skills communication, organizational planning, peer-to-peer conflict situations and an identified specific learning disability in math computation. Id.
15. Both Parents' experts agreed with the findings established in the District's ER. NT 442, 495.
16. Prior to completing the evaluation process in the District for the Student return to public school in the District , the Parents paid, in full, the next years tuition at the [Redacted 2nd private school]. The tuition was non refundable and in excess of \$28,000. NT 73-74; NT173; S 22

17. Following the issuance of the ER on August 15, 2006 a meeting to develop an IEP was held on August 31, 2006. NT93-94; S-5, P-2
18. The IEP which was developed addressed the needs of the Student as identified in the ER. S-4; S-22
19. The Parents agreed with the IEP. NT93-94
20. The IEP, dated August 31, 2006, is appropriate and contains measurable goals, specially designed instruction and modifications to the curriculum reasonably calculated to produce meaningful educational benefit. It is responsive to the needs identified in the ER report. The IEP contains measurable annual goals for math computation, communications skills, coping skills, peer-to-peer social skill development. The IEP also contains the provision for an FBA and additional assessments to be performed as the Student's needs may evolve and begins attendance in the school environment; SDIs to address distractibility, organizational needs, social skills development, health needs related to his asthma and weak visual processing skills. The IEP contains consultative services with the certified behavior specialist, speech therapist and occupational therapist. S-5.
21. The IEP provides for appropriate placement based on the needs of the Student for social skills development and special education instruction in for math calculation. S-5 at 13. The substance of the Student's, needs are appropriately met in the placement recommended by the District, notwithstanding the "label" of

- the placement. Social skills and organizational skills development are be provided throughout the day , generalized across environments and are easily integrated with appropriate related service supports. NT 637-640. Further, this special education placement provides for a small class size with a variable adult to student ratio on an as needed basis of 1:3. NT 639-640.
22. The Student's placement in the District constituted a combination of resource, autistic support and integrated learning support. S-5 NT691-692
23. The placement offered numerous opportunities for integration and socialization with typically developing peers, including the lunchroom. The Student interacted with other Students known to him from having gone to private school with them in the past. One to one support was available as needed for regular education settings and was provided for this initial period. NT 665; 667
24. The District began classes on Friday, September 1, 2006 S-1; NT633-634
25. The [Redacted 2nd private school] began classes in mid-September 2006. NT 139; S-3
26. School was in session on Friday, September 1 and again on Tuesday, September 5 through Friday, September 8, 2006 (September 4, 2006 was Labor Day). Student attended school for 4 school days. S-1 at 3; NT 633-634.

27. Friday, September 8, 2006 was the last day the Student attended school in the District. NT 633-634; S-1 at 3
28. The Student began to attend classes at the [Redacted 2nd private school] for the 2006-2007 school year on Tuesday, September 13, 2010. NT 139; S-3
29. The Parents did not notify the District of their intent to remove the Student from the District and their intent to place the Student privately prior to removing the Student from the District. S-7
30. No social, behavioral, emotional, academic or other difficulties were noted by the District during the time the Student attended school in the District. NT 145; 671
31. At no time prior to withdrawing the Student from the District did Parents make any inquiries, express concerns, or observe. NT 141
32. Notification that the Student would not return to the District was not received by the District until the Student had missed two days of school in the District and was already attending the [Redacted 2nd private school] Notice was received by the District on September 13, 2006. S-7
33. The actions of the Parent in continuing the Students enrollment in the [Redacted 2nd private school] at all times while seeking District placement; completing full payment for non-refundable tuition to the [Redacted 2nd private school] for the 2006-2007 school year while seeking District placement for the 2006-2007 school

year; removing student from the District after only four days attendance and without prior notice of intent to do so and without expressing concern with the progress of Students attendance in the District were unreasonable. NT 199 663-634 S-1; 173 S-22; S-7

34. A meeting was held on October 10, 2006 to address Parents concerns based on withdrawal and receipt of letter dated September 12, 2006. Both Parents attended the meeting. S-9.

35. Parents returned the NOREP, issued on August 31, 2006, on November 23, 2006, after the Student had participated in the District program and placement. S-10.

36. On April 13, 2007 (middle of 2006-2007 9th grade school year), the Parents committed to paying \$29,735.00, in non-refundable tuition for the Student's 10th grade school year. S-22 at 6. The full amount was paid in full by August 3, 2007. Id. at 2.

37. On September 26, 2007, at the start of the following school year, the Student's 10th grade year, Parents requested that the District develop an offer of a FAPE for the 2007-2008 school year. S-12.

38. A neuropsychological by Dr. Mary Lazar was completed on or about February of 2006 but was not provided for the District to consider until the following school year in October of 2007. The District did not have the opportunity to consider

- this information when conducting its initial ER or developing its first offer of a FAPE. S-13.
39. Attempts to contact the Parents to schedule the IEP meeting were made on October 3, 4, 8 and 17, 2007. S-14.
40. On October 29, 2007, an IEP meeting was held for purposes of developing an updated offer of a FAPE pursuant to Parents' request. S-13. The IEP team considered the IEE by Dr. Lazar.
41. A revised IEP and NOREP were issued to the Parents on October 29, 2007. S-13
42. A follow-up IEP meeting was held in which both Parents attended on December 7, 2007. S-27.
43. The District conducted an occupational therapy evaluation, completed by the local Intermediate Unit #22, in February of 2008. S-16 at 2. No direct services were recommended. Id. at 5.
44. The District conducted a speech and language evaluation in February, 2008. S-16 at 6. No direct services were recommended. Id. at 7.
45. The District made approximately 14 different attempts to contact the [Redacted 2nd private school] to schedule an observation during the 2007-2008 school year. On February 21, 2008 an observation was scheduled but the Student was absent

- from school on that date. On April 1, 2008 an observation was conducted by Dr. Barnes and Dawn Trautwein. S-15; NT 727, 729.
46. After the observation and consideration of both the OT and Speech evaluations, no changes to the IEP were recommended. Parents were notified on April 2, 2008. S-16 at 1 and S-28.
47. No IEP meeting has been requested and the Parents have not requested that the District develop an offer of a FAPE since their request on September 26, 2007. NT 731-732.
48. On April 18, 2008, (middle of the 2007-2008 10th grade school year) the Parents committed to paying \$31,520.00, in non-refundable tuition for the Student's 11th grade school year, 2008-2009. S-22 at 2. The full amount of \$32,015 was paid in full by July 30, 2008. Id at 1.
49. The Student continues to struggle with time management, organizational skills, essay writing, patient instruction, understanding boundaries, self-control, voice modulation, and perseveration. NT 170-172, 195-197.
50. Parents requested a due process hearing seeking tuition reimbursement from February 12, 2007 through the end of the 2006-2007 school year; and for the 2007-2008 and 2009-2010 school year. NT 13.

51. The parties waived a Resolution Meeting. A due process hearing was conducted in this matter on March 16, 2009 (Hearing Officer DeLauro), November 16, 2009 (Hearing Officer DeLauro), November 20, 2009 (Hearing Officer DeLauro), and January 8, 2010 (Hearing Officer Satriale).

a. Exhibits were submitted on behalf of the Parent as follows:

March 16, 2009: P-1, P-2, P-4, P-6, P-8, P-9, P-10, P-11

November 16, 2009: P-5

November 20, 2009: P-16, P-13, P-12, P-7

January 8, 2010: P-10

b. Exhibits were submitted on behalf of the School District as follows:

March 16, 2009: SD-2, SD-3, SD-7, SD-9, SD-9, SD-10,
SD-13, SD-18, SD-24

November 16, 2009: SD-4, SD-5, SD-12, SD-13, SD-27,
SD-22

January 8, 2010: SD-1, SD-8, SD-8, SD-9, SD-26, SD-6,
SD-14, SD-15, SD-28, SD-16

DISCUSSION AND CONCLUSION OF LAW

The Right to a Free and Appropriate Public Education and Burden of Proof

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “free appropriate public education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). In Pennsylvania, the Commonwealth has delegated the responsibility for the provision of FAPE to its local

school Districts. School Districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP “must be ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the Student’s ‘intellectual potential.’ ” Shore Reg’l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir.2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)). In assessing whether an individualized program of instruction is “reasonably calculated” to enable the Student to receive meaningful benefit, the progress noted must be more than a trivial or *de minimis*. Board of Education v. Rowley, 458 U. S. 176, 73 L.ed.2d.690, 102 S.Ct.3034 (182); Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999)

A Parent who believes that a school has failed to provide a FAPE may request a hearing, commonly known as a due process hearing, to seek relief from the school District for its failure to provide a FAPE. 34 C.F.R. § 300.507. In Pennsylvania, the hearing is conducted by a Hearing Officer. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 527 (3d Cir.1995).

As the moving party, the Student bears the burden of proof in this proceeding. The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education provision of FAPE is upon the party seeking relief, whether that party is the disabled child or the school District. Schaffer v. Weast U.S. ___, 126 S. Ct.528, 163L. Ed.2d 387 (2005). In Re J.L and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) Because Student’s Parents seek relief in this administrative hearing, they bear the burden of proof in this matter., i.e., they must ensure that the evidence in the record proves each of the elements

of their case. The U.S. Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., Student's Parents) must lose because the party seeking relief bears the burden of persuasion. Schaffer v. Weast, U.S. , 126 S. Ct.528, 163L. Ed.2d 387 (2005); L.E. v Ramsey Board of Education, 435 F. 2d 384 (3d Cir.2006) Of course, where the evidence is not in equipoise, one party has produced more persuasive evidence than the other party.

Tuition reimbursement claims by Parents of children with disabilities are subject to the well-settled test as set forth in the United States Supreme Court's decisions in Florence County School District Four v. Carter, 510 U.S. 10 (1993) and School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985). In Burlington, the Court established that Parents do not have an automatic, unfettered right to tuition reimbursement for Parents' unilateral placement of their child in a private school. Rather, it is only when the Parents prove that (1) the District has failed to offer FAPE, and (2) the private school selected by the Parents is appropriate, and (3) relevant equitable considerations favor reimbursement. *See Carter, supra; Sinan L., et al. v. School District of Philadelphia*, 2007 WL 1933021 (E.D. Pa. 2007); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 248 (3d Cir. 1999). If it is determined that the District did in fact offer the Student an appropriate program and placement, no further inquiry is necessary and the Parents' request for tuition reimbursement must be denied. *See* 20 U.S.C. § 1412(10)(C)(ii) (LEA does not have to pay tuition reimbursement for unilateral placement chosen by Parents if LEA made an offer of FAPE in timely manner before private enrollment); *See Also Sinan L., supra, at 11* (after Court found District's proposed program and placement to be appropriate, Court did not consider the appropriateness of Student's private placement or equitable principles.)

Only if there is a finding that the District failed to offer the Student an appropriate program should the aforementioned second and third prongs of the analysis then be considered. *See Carter*, 510 U.S. at 15-16; *Sinan L.*, *supra*, at *5, *quoting Burlington*, 471 U.S. at 374; *Rairdan M., By and Through Kerry M., v. Solanco School Dist.* 1998 WL 401637, *4-7 (E.D.Pa. 1998) (if District's IEP is deemed inappropriate, then Court moves to second prong of test and must decide if private placement is appropriate; if private placement is then deemed appropriate, Court moves to third prong of test and considers equities).

Was the program and placement the Council Rock Area School District offered to The Student for the 2006-2007 school year appropriate?

To satisfy the first prong of the tuition reimbursement test under *Burlington-Carter*, Student must establish that the School District did not offer FAPE. Having been found eligible for special education, the 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).

As previously noted, a Student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996)). The

IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational progress is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in Polk held that educational benefit “must be gauged in relation to the child’s potential.” This was reiterated in later decisions that held that meaningful educational benefit must relate to the child’s potential. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); S.H. v. Newark, 336 F.3d 260 (3rd Cir. 2003) (District must show that its proposed IEP will provide a child with meaningful educational benefit). The appropriateness of an IEP must be based upon information available at the time a District offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. Delaware County Intermediate Unit v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993); Adams v. State of Oregon, 195 F.3d 1141 (9th Cir. 1999); Rose supra.

Districts need not provide the optimal level of service, maximize a child’s opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998); Lachman, supra. In creating a legally appropriate IEP, a School District is not required to provide an optimal program, nor is it required to “close the gap,” either between the child’s performance and his untapped potential, or between

his performance and that of non-disabled peers. In Re A.L., Spec. Educ. Opinion No. 1451 (2004); See In Re J.B., Spec. Educ. Opinion No. 1281 (2002)

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). Under the IDEA Parents do not have a right to compel a school District to provide a specific program or employ a specific methodology in educating a Student. M.M. v. School Board of Miami - Dade County, Florida, 437 F.3d 1085 (11th Cir. 2006); Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988) If personalized instruction is being provided with sufficient supportive services to permit the Student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” Polk, Rowley. The purpose of the IEP is not to provide the “best” education. 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). (See also Board of Education v. Murphysboro v. Illinois Bd. of Educ., 41 F.3d 1162 (7th Cir. 1994) (Under the IDEA a District must follow the procedures set forth in the act, and develop an IEP through procedures reasonably calculated to enable the child to receive educational benefits. Once the District has done this the court cannot require more; the purpose of the IDEA is to open the door of public education to handicapped children, not to educate a child to his/her highest potential), citing Rowley, 458 U.S. at 206-07.) More recently, the Eastern District Court of Pennsylvania ruled, “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).

The starting point for the determination of the appropriateness of an offer of a FAPE is the initial Evaluation from which the needs of a Student are identified. In order for an evaluation to be determined to be appropriate, it must meet the requirements of 34 CFR § 300.532. More specifically, the ER should: 1) utilize a variety of assessment tools and strategies to gather relevant functional and developmental information about the Student, including information provided by the Parents; 2) assess the Student in all areas related to the suspected disability; 3) be sufficiently comprehensive to identify all of the Student's special education and related services needs; and 4) utilize technically sound instruments to assess the relative contribution of cognitive, behavioral, physical and developmental factors. See In Re the Educational Assignment of L.-M. B., Special Educ. Op. No. 1795 (2007).

The District ER, conducted by Dr. Thomas Barnes, dated August 15, 2006, is appropriate and contains appropriate cognitive and achievement testing, socio/emotional data, a review of educational records provided by the Parents, observational information, teacher input and educational recommendations. See S-4. The Student has needs in the area of social skills communication, organizational planning, peer-to-peer conflict situations and an identified specific learning disability in math computation. *Id.*

Dr. Barnes addressed the issue of using the term non-verbal learning disability during his testimony. He explained that it is not a category of disability under the IDEA, nor does it even exist in the DSM-IV. NT 581. Furthermore, such a term has no educational utility in that it does not provide any proscriptive guidance. NT 584-585. The categories that are available under the IDEA, as well as the actual testing and data are what provide educators with information on learning needs.

Significantly, both of Parents' expert witnesses indicated that the evaluation completed by Dr. Barnes was appropriate. Dr. Lazar indicated that Dr. Barnes findings were consistent with her own. NT 442. Dr. Leonard Silk also indicated that the District's report was comprehensive and appropriately addressed the emotional disturbance concerns. NT 495.

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting the child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the Student will make educational progress. Implementation of an appropriate IEP does not guarantee that the Student will make progress.

The District's proposed program for the Student promulgated in the IEP meets all of the required standards to be deemed appropriate and individualized to the Students needs so as to be "reasonably calculated to achieve meaningful progress".

The IEP the District offered to the Student for the 2006-2007 school year¹ contains in appropriate detail within its “four corners” each element mandated by the IDEIA: a statement of the present levels of educational performance and needs; a statement of measurable annual goals, including benchmarks/short-term objectives, related to meeting the Student’s needs; a list of the special education (specially designed instruction) and related services and supplementary aids and services to be provided to him; a statement of the program modifications or supports that will be provided to him; a statement of additional supports for school personnel such that the Student can advance appropriately toward attaining the annual goals and be involved and progress in the general curriculum; and an explanation of the extent, if any, to which he would participate with nondisabled peers. *See* 34 C.F.R. § 300.320(a); S-5.

Specifically, the IEP contains measurable annual goals for math computation, communications skills, coping skills, peer-to-peer social skill development. The IEP also contains the provision for an FBA and additional assessments to be performed after Student begins attendance in the school environment; SDIs to address distractibility, organizational needs, social skills development, health needs related to his asthma and weak visual processing skills. The IEP contains consultative services with the certified behavior specialist, speech therapist and occupational therapist. S-5.

The proposed District classroom placement for the Student likewise appropriately met his needs. Although, retrospectively and only in testimony at the Due Process Hearing and not at the time, the Parents object to the placement of their son in an “autistic support” classroom, I find the focus should be on the substance and not the form.

¹ An analysis of the appropriateness of the following IEP is not necessary as once FAPE is established the analysis under Burlington/Carter ceases.

The District's proposed placement for the Student was in a part-time autistic support room for only the four core curriculum classes. For his remaining courses and lunch, Student would be in the regular education setting. At the Due Process hearing, [Redacted name], the classroom teacher, testified to the specifics of the autistic support room. She testified that the autistic support room is not restricted to students with autism, but rather that the class is for students with social and emotional difficulties. NT 691-692

The class is designed to teach all four core subjects, along with study skills and social skills. NT 637, 645. [Redacted name] testified that for the 2006-2007 school year, she had nine students in her class, but she specified that at any given time there may be fewer students in her class. NT 639. [Redacted name] described her class as "a small class where distractions are minimized." NT 643. All of the students in the class were highly intelligent. NT 638. She indicated that all of her students had difficulty with organization, and consequently, she had built teaching organizational skills into her study skills class period. NT 644.

[Redacted name] further testified regarding the specific goals that were part of the August 31, 2006 IEP, and how those goals were implemented. See S-5 p.9.; NT 640-642. [Redacted name] testified that she collects data toward progress for each one of the goals and how each of the SDI's that were included in the August 31, 2006 IEP were implemented. *Id*; See S-5 pp.10-11; NT 642-645. She testified that there are normally three certified teachers in the classroom, including herself. NT 640.

[Redacted name] also testified that her class receives additional services from a special instructor in social skills, a speech therapist, and a certified behavior analyst. The recommendations for an appropriate program by the Parents expert mirrored each of the elements of the August IEP. The Parents' Psychologist, Dr. Lazar recommended a

placement in a “small structured classroom with low student to teacher ratio.” NT 412.

She further clarified that she recommended a classroom with eight to ten Students in it. NT 413. Dr. Lazar further recommended that Student receive instruction in organization.

Id

Regarding placement, the District’s Evaluation of Student found that he needs a smaller educational environment; instruction in social skills, math calculation skills, behavioral strategies to maintain auditory attention, and flexible instruction to allow for his behavioral outbursts. *See* S-4, p20. The ER recommended that Student be placed in an environment where distractions can be minimized, and where accommodations could be made for Student’s high-intensity outbursts. Further, the Evaluation recommended that Student be educated in a smaller class with a low student to staff ratio. *Id.* at p 21. The testimony of the Parents expert supported these findings. NT 442; 495

As testified to by the classroom teacher, the core components of the autistic support classroom, together with the other components of the students placement (regular education, and itinerant learning support) matched each need of the Student as established by the District ER and the testimony of the Parent’s Expert, Dr. Lazar and was a structure reasonably calculated for successful implementation of the goals and objectives of the IEP.

To the extent the District was afforded the opportunity to implement this IEP, the IEP was properly implemented from all indications established in the testimony. Notwithstanding the specific agreement of the team that a period of time “to get to know” the Student would be necessary followed by a reconvening of the team to assess and potentially revise the IEP and placement, the parents withdrew the student after only (4) days in the district. The Parent’s actions of withdrawing the Student after such a brief

time thwarted the ability of the team to fulfill this agreement. NT93-95 Nor did the District have a reasonable period to make any assessments from the implementation of this IEP or to institute the process of collecting baseline data, develop hypotheses, make revisions and chart progress or lack thereof and then have a reasonable rectification period. Even if there were problems with the IEP or the implementation of the IEP during that short time, the best persons to determine that would have been the Students Parents as the Student had never before been served by the District². The Parents, not only consented to the IEP and the placement, but did not observe the Student at any time while he attended the District, nor were any concerns raised regarding the IEP or placement simultaneously with the Students attendance. NT93-94

There were no deficiencies this Hearing Officer could find that would render the District's offered program and placement inappropriate.

Having established that the District's program and placement offer to the Student for the 2006-2007 school year represented a FAPE³, the first prong of the *Burlington-Carter* test is met rendering the District absolved from responsibility for tuition for the unilateral private placement. Hence, it is not necessary to examine the second and third prongs of the test regarding the appropriateness of the [Redacted 2nd private school] and an assessment of the equities⁴.

² The Student received services some years earlier while attending private school, but as that is not the relevant time frame at issue, the analysis is contained to the summer of 2006 on.

³ As the legal analysis is concluded with the determination of FAPE as of August 31, 2006, the facts relating to events subsequent are not discussed (findings of fact #'s 38-50)

⁴ It seems important to note that even if the Parents had met the first two prongs of the *Burlington-Carter* test, they would nonetheless fail the analysis under the third prong dealing with an examination of the Equities. The actions of the Parents and the timing of those actions appear somewhat disingenuous and seem prima facie unreasonable. The credibility of the Parents is diminished by several factors including, but not limited to maintaining the Students enrollment at the [Redacted 2nd private school] at all times while seeking a placement in the District and in fact maintaining enrollment even when the Student began to attend the District; failing to notify the District of any perceived difficulties with the IEP or placement wither at the time of the IEP meeting or during the Student's first days attending the District; committing to the obligation to pay non-refundable tuition payments and in fact making those payments while pursuing a

It should be noted that, independent of the *Burlington-Carter* standard, the IDEA and its implementing regulations explicitly impose additional limitations on tuition reimbursement for a unilateral placement of their child in a private school placement. Specifically, the IDEA provides that tuition reimbursement may be reduced or denied if:

(1) At the most recent IEP meeting that the Parents attended prior to the removal of the child from the public school the Parents did not inform the IEP team of

(a) Their concerns about the District's proposed placement,

(b) That they were rejecting the placement proposed by the District, and

(c) Their intent to enroll their child in a private school at public expense;

(2) The Parents did not give the District written notice of their concerns about the District's proposed placement, that they were rejecting the District's proposed placement and their intent to enroll their child in a private school at public expense at least ten business days prior to the removal of the child from the public school; or

(3) Upon a finding of unreasonableness with respect to the Parents' actions.

See 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa) and (bb) and (III); 34 C.F.R. § 300.148(c) and (d)(1)(i) and (ii) and (d)(3).

The events and supporting testimony and documentary evidence in this matter demonstrate that the Parents likewise fail the parameters of an analysis of entitlement to tuition reimbursement under IDEA. As discussed previously, even accepting Parents

District placement; allowing the District only four days to meet the Student's needs and failing to provide prior notice of intent to withdraw. Note also In re the Educational Assignment of C.S., Special Ed. Op. No. 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."

testimony that concerns regarding placement were expressed during the IEP meeting, the Parents and team specifically agreed to give the proposed placement a reasonable period, such that the district could come to know the Student and then the team would revisit all aspects of the plan. The fact that the Parents did not continue to raise concern or request modification during the first (and only) days of attendance undercuts the now asserted urgency of the Parents placement concerns. NT 102-103; 106-107;108-111;175;484-489 Further, the record clearly establishes that the Parents did not timely respect the placement nor notify the district of their intent to remove the Student from the District and “their intent to enroll”⁵ the student in a private school at public expense. These facts combined with the fact that the Parents continued tuition payments for the 2006-2007 school year while working with the District lead to a determination of unreasonableness on the part of the parents.

CREDIBILITY OF WITNESSES

Hearing Officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision should be based solely upon the substantial evidence presented at the hearing. 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). Quite often, testimony or documentary evidence conflicts; which 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

⁵ The student was already enrolled at the [Redacted 2nd private school] .

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 witness". *Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIZ 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 witness will be appearing in person.

Although the testimony of all the witnesses was carefully considered, the credibility of the following witnesses will be specifically commented upon here:

Mother: Clearly one could not hope for a more dedicated and loving mother and this Hearing Officer is profoundly admiring of this Parent's relentless pursuit of necessary medical treatment for her son. It is also clear that the Parents as a couple, were seeking what they were led to believe was the best possible program to address the Student's educational needs. However, what is also clear is that the Parents had little if any intention of returning him to the District during the 2006-2007 school year in question. Their lack of genuine participation in creating the August 2006 IEP and the ensuing implementation coupled with the abrupt withdrawal of the Student without prior notice as well as their continued enrollment of the Student in his private school at all times during the Parents involvement with the District suggested that they were not acting in good faith, and this Hearing Officer did not find the mother's statements to the contrary credible⁶

⁶ It is noted that this Hearing Officer did not witness the testimony of the mother as this matter was assigned to another Hearing Officer at the time; however extensive contemporaneous notes of the Hearing Officer made at the hearing were reviewed as well as the notes of testimony of Mother's testimony. Additionally, this Hearing Officer conferred with the prior Hearing Officer regarding this issue.

District's Expert: The District's expert, who is the primary author of the ER, has been employed by the District for nine years and is a Doctoral level, Certified School psychologist who also holds a Master's Degree in Applied Behavior Analysis. He has significant experience in administering and interpreting psychological tests. Overall, this Hearing Officer found his testimony to be well balanced and to provide insight and a foundation to this Student's needs and the interventions necessary for him to make meaningful progress.

Parent's Expert: This Hearing Officer also found the testimony of the Parents expert⁷ to be credible, however her usefulness to this hearing is limited as the purpose of the evaluation was to "obtain more definitive diagnostic clarity" P-4 at 1 and did not evaluate based upon diagnostic eligibility under IDEA. However, with respect to the delineation of recommendations for treatment and educational supports, the report and testimony were congruent with those of the District.

Classroom Teacher: The testimony of the classroom teacher thoroughly outlined the topography of her classroom, the overriding instructional needs of the classroom cohort and explained the additional supports available to all her students and to this Student. The teacher is a certified Special Education Teacher with 30 credits attained toward a Masters Degree. The classroom teacher demonstrated a clear understanding of the needs, goals and objectives for the student and the nexus between those goals and objectives and the supports of her classroom. She also demonstrated a clear direction to integrate her skills with those of her colleagues in regular education and administration in order to pull

⁷ The witness was admitted as an expert over the objection of the District. The Motion was made at the time of *voire dire*, but the ruling reserved by the Hearing Officer originally assigned to hear this matter. The Objection was pending at the time this Hearing Officer assumed responsibility for this matter. This Hearing Officer, following a review of the testimony and notes of the former Hearing Officer, overruled the objection and admitted the testimony as expert testimony. The expert is a Doctoral level Licensed and Certified School Psychologist with significant experience with neuropsychology. It is also noted that this

together the proper combination and level of support necessary to meet this Student's needs at the time he was presented to her.

CONCLUSION

The District's offer of FAPE in the IEP and NOREP dated 8/31/06 was legally sufficient to raise to the level of FAPE in that it was reasonably calculated, based upon all of the information available to the District at the time, to provide meaningful benefit to the Student. The IEP contained measurable goals intended to address the student's needs as identified in the District's ER. The IEP was agreed to by the parents at the time of the meeting and was not questioned at any time during the District's implementation of the same. To the extent that the IEP may have required revision to more fully address the needs of the student the District was not afforded a reasonable opportunity to collect baseline data and develop hypothesis and execute revisions. Consequentially, the first prong of the *Burlington-Carter* analysis has been met by the District. Conversely the Parents have failed to sustain their burden of establishing a lack of provision of FAPE.

ORDER

- The program and placement offered to the Student in the 2006-2007 school year was appropriate and constituted.
- The District is not responsible to reimburse Parents for payment of tuition to the unilateral private placement.

Hearing Officer did not hear the testimony and notation of the prior Hearing Officer were thoroughly reviewed.

Dated: February 22, 2010

Gloria M. Satriale

Gloria M. Satriale, Esq.,
Special Education Hearing Officer