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

Name of Child: S.K.
ODR #1803/10-11-KE

Date of Birth:
[redacted]

Dates of Hearing:
June 29, 2011
July 19, 2011
July 25, 2011
July 26, 2011

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Angela Murphy, Esquire Murphy & Murphy Law Offices 106 N. Franklin St. Suite 2 Pen Argl, PA 18072
Parkland School District 1210 Springhouse Road Allentown, PA 18104	Joanne Sommer, Esquire Eastburn and Gray 60 E. Court Street Doylestown, PA 18901
Date Record Closed:	August 16, 2011
Date of Decision:	August 23, 2011
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

Student[1] is an elementary-school-aged child enrolled in the Parkland School District (District). Student has autism and mental retardation as well as a seizure disorder.

Student's mother (Parent) requested this hearing under the IDEA, alleging that the District failed to provide Student a free, appropriate public education [FAPE] for the 2010-2011 school year[2] and requesting compensatory education for that year as well as a prospective residential placement in an approved private school for the 2011-2012 school year.

For the reasons presented below I find for the District.

Issues

1. Did the School District deny Student a free, appropriate public education [FAPE] during the 2010-2011 school year?

2. If the School District denied Student FAPE during the period in question is Student entitled to compensatory education and if so in what kind and in what amount?

3. In order to receive FAPE does Student require residential placement in the approved private school selected by the Parent?

Findings of Fact

Description of Student

1. Student is an elementary-school-aged pupil enrolled in the District. Student is eligible for special education under the classifications of autism and mental retardation[3]. [NT 179]

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[1] The decision is written without further reference to the Student's name or gender to provide privacy, and other potentially identifying details are likewise omitted.

[2] The initial complaint also alleged a denial of FAPE for the period April 2010 - June 2010, but the Parent withdrew that portion of her claim during the course of the hearing.

[3] Although speech/language impairment is also listed it is more parsimonious to attribute this to Student's cognitive disability.

2. Student's current cognitive and adaptive functioning has been assessed at less than the 1st percentile. [S-7]

3. Student has Lennox-Gastaut Syndrome [LGS], a seizure disorder. LGS is characterized by multiple types of seizures that are difficult to control with medication. LGS typically produces cognitive impairment with potentially progressive decline and significant behavioral and social difficulties. [NT 173-175, 310]

4. When Student arrived in Pennsylvania from the previous state of residence, seizure activity was severe, and atonic or drop seizures[4] were present. The previous district had placed Student in a Rifton chair to restrain Student and Student wore a helmet, measures to prevent injury from a fall during a drop seizure. [NT 193, 198]

5. The prior district reported that during the period between 2005 and 2008, Student's seizures had impacted retention of formerly acquired skills and the Parent reported that seizure activity had affected learning and retention. [NT 404; S-7]

6. The atonic or drop seizures stopped after Student's arrival in Pennsylvania and Student has not experienced a drop seizure in two years. Previously Student was experiencing up to 30 seizures per day but the level fell to several seizures a day and the episodes were not of the magnitude previously exhibited. [NT 119, 177-178, 198]

7. A regimen with a new medication was instituted in the summer of 2010 and after about a month on this medication Student was seizure free for the first time in Student's life. Student has remained virtually seizure-free from June 2010[5]. [NT 176-177]

8. The medication's mitigating the seizures resulted in Student's becoming more aware, active, inquisitive and engaged in surroundings both at home and in school. [NT 208-209]

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[4] A brief loss of muscle tone and consciousness causing abrupt falls. [NT 309]

[5] The Parent noted that some seizure activity started up again around the time of the due process hearing, but this seems confined to the home, as the daycare supervisor reported only one instance in April and there was a questionable episode at school. The private evaluator noted that medication resistance [decline in effectiveness] does tend to develop with generally prescribed seizure medication but there is insufficient data regarding the new medication being used with Student. [NT 311]

9. Student still occasionally has absence seizures which involve brief periods of staring and loss of responsiveness, and occasionally has grand mal seizures when very tired, febrile, overheated and/or stressed. [NT 178, 309]

10. Student receives before and after school care from a day care facility specializing in children with medical needs. [NT 40-41, 51-52, 190 – 191]

11. The Parent drops Student off at the daycare facility around 7:00 a.m. every morning and picks Student up around 5:30 p.m. Daycare staff puts Student on the District school bus each day and the school bus drops Student back off at the daycare each afternoon. There has always been an aide on the school bus assigned to Student. [NT 939]

12. The director of the daycare is aware that Student had some reported seizure activity in that setting in April 2011 that appears to be limited to one seizure, and has not seen Student have a seizure when filling in for staff. [NT 47, 56-57]

13. At the time of her testimony at the end of June 2011 mother reported that Student was having seizures at night and had one seizure at daycare after Student took a nap[6]. [NT 216]

14. Student may have had one seizure in school this year upon waking from a nap. The nurse was not convinced it was a seizure but based on the description mother is fairly certain that it was. [NT 217]

15. Student presents a flight risk at the daycare so direct supervision is required. Staff to child ratio is 3 children to one staff member. [NT 52-53]

16. The daycare director estimates that developmentally Student is at the toddler to preschool age but doesn't fit specifically into any group. [NT 60, 63]

17. Student does not communicate with words but does make sounds. Student requires assistance in accomplishing skills of daily living; for

[6] This may be the seizure referenced by the daycare supervisor.

example Student is not toilet trained but Student does eat with a fork. [NT 183-184]

18. Student is a very social and friendly child, in mother's opinion not typical of autistic children, but is socially inappropriate. Student would go up to a stranger and sit in the stranger's lap. Student does smile and does laugh. [NT 186]

19. Parent believes Student wants to play with other children but isn't sure how to do that. Student will sit on the floor next to other children, but does not imitate what they're doing, rather becoming fixated on something while playing next to them. [NT 186]

20. Although Student will sit down with mother to have a story read, this doesn't last long as attention span is short although Student likes books. Student likes real TV programs rather than cartoon programs and is more receptive if a program or picture is real and concrete. [NT 187]

21. Student communicates wants and needs nonverbally by, for example, bringing a glass over to mother if student wants a drink or taking mother's hand and leading mother to where Student wants to go. At times student will "throw a fit" and cry and then mother has to figure out what Student wants. [NT 180]

22. At home Student is "a climber". Student will climb on furniture and want to jump. Student can walk upstairs but mother is right behind Student if it's more than three or four steps. Parent holds Student's hand to go down steps if there are more than one or two steps. [NT 188]

23. At home when Student is tired Student becomes agitated, and becomes angry and escalates when not getting Student's way. Student likes to throw things. Student kicks and has kicked while mother is changing Student's pull-up diapers. [NT 184-185]

24. Mother is able to calm student down on most occasions, using sensory tools such as a mini trampoline and joint compressions. [NT 185]

25. The Parent holds a Master's degree in education and certifications in special education K-12 and regular education pre-K-3 from another state. She previously taught students with learning disabilities and taught kindergarten, and is currently employed in the field of education in a non-teaching position. [NT 172-173, 392-395]

26. Parent has had difficulty accessing Provider 50 [also called Behavioral Health Rehabilitative Services or wraparound] services in Pennsylvania. [NT 203-205]

27. The Parent was provided with information about obtaining Provider 50 services and was offered the services of the IU's social worker to assist with that process. As of the conclusion of the hearing, the Parent has not contacted the IU or the District to facilitate this process. [NT 425-431, 520-521, 523-524]

Educational Programming April-June 2010

28. In the prior district Student was included in a regular education Kindergarten classroom for homeroom, circle time, music, recess, assemblies and some special activities. The rest of Student's educational programming was delivered in a self-contained special education classroom. [S-4]

29. Student's IEP in the previous state of residence called for speech and language therapy, occupational therapy, physical therapy and adaptive PE. There were self-help skills goals and a functional math goal. No behavior plan was included in the IEP. [NT 195, 202]

30. At a meeting convened prior to Student's starting in the District the IEP team, including the Parent, agreed that Student should be placed in a multiple disabilities class operated by the IU in a neighboring school district[7] pending completion of an evaluation by the District. [NT 196 – 197, 400, 506; S-5, S-6]

31. Because it was so late in the school year, the middle of April 2010, when student enrolled the District continued the IEP from the previous district. The Parent did not request any changes to the out-of-state IEP. [NT 197-198]

[7] In September 2010 the classroom moved to the School District.

District's First Evaluation

32. Student was reevaluated in Pennsylvania by a certified school psychologist [hereinafter IU psychologist] whose dissertation research involves identifying an optimal communication modality for individuals with mental retardation and/or autism. His professional assignment as a school psychologist has always been with multiple disabilities classrooms. Prior to working for the IU he supervised a low-incidence disabilities grant held by Lehigh University. [NT 625-627]

33. The IU psychologist has received trainings in ABA and Verbal Behavior, and has received specific focused training on conducting complex functional assessments. [NT 628]

34. The IU psychologist obtained data for Student's reevaluation through participation in the initial April 2010 IEP meeting, review of documents from the previous school district including a prior evaluation, direct formal classroom observation on three or four occasions (although he was in the classroom more often as part of his role), and collecting observational and ABLLS information from the classroom teacher and from the related services staff. [NT 629, 631-632; S-7]

35. The IU psychologist's reevaluation included a functional behavioral assessment [FBA]. After identifying the antecedents to Student's inappropriate behaviors he concluded that they served the function of escape/avoidance and recommended the development of a positive behavior support plan. [NT 632-633, 647; S-7, S-8]

36. The IU psychologist incorporated results of new physical therapy, occupational therapy and speech/language assessments into the final reevaluation report. [S-7]

37. The IU psychologist did not conduct standardized testing, concluding that Student would not be able to understand the directions for the test instruments. The evaluator from the previous school district likewise noted that Student "did not appear to have the prerequisite skills necessary" to engage in standardized testing. [NT 645; S-7]

38. The District's reevaluation was completed and the report provided to the Parent on or before June 17, 2010. On that date the IEP team met to review the evaluation and the proposed IEP, as well as the placement for the upcoming 2010-2011 school year in the ABA/Verbal Behavior program implemented in the IU-operated multiple disabilities classroom. The team discussed the options in the continuum of placements available and concluded that this represented an appropriate program in the least restrictive environment. The Parent approved the reevaluation report, the IEP and the placement. [NT 417-419; S-7, S-8, S-9]

39. During the meeting in June 2010, the Parent expressed her satisfaction with the program and placement thus far[8], and reported that Student had already shown progress in the two months in the District's classroom. Student was no longer restrained in the Rifton chair and the one-to-one aide was replaced with one-to-one instruction. The Parent was familiar with and approved of the ABA/VB/TEACCH program being provided. [NT 225, 405, 528]

Educational Programming 2010-2011 School Year[9]

40. The District provided the agreed-upon Parentally-approved program and placement during the 2010-2011 school year under the June 2010 IEP and under another IEP created in March 2011. [S-8, S-12]

41. The multiple disabilities class that Student attended during the 2010-2011 school year and proposed for the 2011-2012 school year has eight students and four adults, including an experienced special education teacher and experienced teacher assistants. The school has a full time nurse. The teachers and related services therapists establish a relationship with Student in order to facilitate learning; this important step is called "pairing" or "gaining instructional control". With children as impaired as Student pairing can take a longer time, but once the adult and the child bond, the child becomes more responsive to the educational interventions. [NT 650-651, 723-724]

[8] However, see footnote #2.

[9] Essentially the same program elements are proposed for the upcoming 2011-2012 school year and are incorporated by reference into the discussion about the District's proposed program vs. the Private Residential School program.

42. As part of the school routine, Student receives instruction and assistance in personal hygiene, eating skills, and dressing skills. [S-8, S-12]

43. The Parent received daily forms from the school noting Student's activities as well as behaviors, whether Student needed prompts, was uncooperative and/or cooperative, and on task or not. In addition the Parent received progress reports following the quarterly reporting periods[10]. [NT 211, 992-995; S-23]

44. The Parent also received typed half page memo notes sent to all parents in regard to the types of activities the whole class did. [NT 213-214]

45. The teacher kept daily data on Student's progress toward IEP goals. [NT 1003-1008, 1039-1042; S-24]

46. The teacher continued to do ABLLS probes with Student to determine whether Student was acquiring new skills and to make certain that Student was retaining skills previously learned. These probes reflected progress in several areas and retention of skills already learned. [NT 1006-1008; S-16]

47. A certified school psychologist employed by the District [District psychologist] who also has extensive experience working in the mental health system as the director of clinical services for a Provider 50 agency observed Student in the classroom to make certain that the evaluation reports and IEPs were reflective of Student's functioning in the classroom and to verify that the IEP was being implemented. [NT 861-863]

48. The District psychologist observed ABA/VB techniques being implemented within the classroom. [NT 865- 866]

49. Student's behaviors in the classroom were comparable to that of Student's peers in that classroom and the District psychologist

[10] The progress reports for the 3rd and 4th quarters were delayed as the teacher's mother was dying and the teacher was taking some days each week to spend with her while also spending several days in the classroom every week so the children would have continuity.

observed only mildly inappropriate behaviors that were quickly and effectively redirected. [NT 861-863, 867]

50. The positive behavior support plan developed by the IU psychologist was utilized by all Student's teachers, aides and related services personnel, and the plan proved to be successful in redirecting Student to tasks. [NT 743-744, 746]

51. Student received the related services of occupational therapy, physical therapy and speech/language therapy. Each of the related service providers is certificated and qualified in her profession. Each sent progress reports to the Parent on a quarterly basis, and the related service providers also sent the Parent a copy of the progress notes taken each time Student received the particular service. [S-19, S-20, S-25, S-26]

52. Each related service provider testified and provided information about the progress Student has made during the 2010-2011 school year. [NT 801, 812-813, 826, 846-847; S-12]

53. Student's speech/ language therapist holds a Masters degree in speech pathology, has worked as a provider of services to autistic children and has completed her Instructional I certification in a Verbal Behavior/ ABA classroom. She has been trained in the delivery of the PECS system. [NT 718-721]

54. Student received 240 minutes of speech and language instruction per month on PECS during the 2010-2011 school year with the speech/language therapist except for November 30 through February when Student was receiving instruction in a communication study to which the Parent gave consent[11]. [NT 723, 725-730]

55. During the communication study, Student's speech and language sessions focused on receptive language and not the PECS; however during this time the speech/language therapist continued to work on

[11] Student was selected for the study because Student had no consistent use of an effective mode of communication and the Parent wanted Student to establish a consistent means of communication. The data showed that Student preferred the picture method of communication over the sign method. [NT 664, 669-673, 675-680, 685-695]

Student's IEP goals. Once the communication study was finished the speech/language therapist and the teacher again implemented the PECS with Student. [732-743]

56. During the 2010-2011 school year, Student was working on Phase One of six phases of the PECS program. Two staff members worked with Student in this phase with one acting as a prompter and one acting as the communicator. This phase involves teaching a child the beginning or foundational stages of communication such as simply picking up an item and handing it to the instructor and is very structured in its implementation. Data is taken to monitor progress. [NT 726-731, S-19]

57. The teacher and speech/language pathologist both worked individually with Student, introducing the PECS process and Student was making progress in Phase One of the program. [NT 731-732, 749-750; S-19]

58. During Phase One, materials are not sent home to the parents because the student must first learn to recognize the "give and get" concept of the program. While Student did not master Phase One during the 2010-2011 school year, Student made consistent progress which will be built upon in 2011-2012. [NT 730-732, 747-749]

59. Student also received speech/language work in a small group setting, engaging in activities designed to facilitate communication such as indicating a choice of materials by pointing. [NT 745-746]

60. The speech/language pathologist sent home regular progress notes to the Parent following each therapy session. [NT 212 – 213]

61. The Parent neither observed nor communicated with the speech/language pathologist working with her child during the 2010-2011 school year about working on a communication system for Student at home. [NT 747]

62. The pediatric physical therapist who worked with Student in 2010-2011 holds a Master's degree in physical therapy from the Philadelphia College of Pharmacy and Sciences, is board certified as a pediatric physical therapist, and holds a Board of Clinical Specialists

certification through the American Physical Therapy Association. [NT 791-792]

63. Prior to beginning work with Student the physical therapist reviewed the reevaluation and consulted with the IU physical therapist who had evaluated Student the previous spring. [NT 792-993]

64. Student received individual physical therapy weekly for a minimum of 15 minutes per session, although the time usually added up to more than the 60 minutes per month specified in the IEP. [NT 795]

65. Physical therapy sessions included walking on a variety of surfaces such as grass, macadam, pebbles and cement; using a sliding board; using the rim of the playground structure as a balancing beam; climbing stairs. Gross motor skills are Student's strength, so the physical therapist focused on addressing deficits such as impulsivity, attention to tasks and body awareness for safety. [NT 796-797]

66. When Student's class was moved to a building that had only one floor, the physical therapist worked on Student's IEP goal of stair ascending and descending using steps to the auditorium stage; there were five steps as opposed to the eight steps referenced in the IEP. The classroom teacher called the Parent and informed her of this fact and Parent and teacher agreed that the IEP did not have to be revised on the basis of the change from eight to five steps. The physical therapist testified that Student mastered the five steps, and the quarterly report reflected five rather than eight steps. [NT 1002-1003, 1052; S-8]

67. The physical therapist provided progress notes to the Parent whenever she saw the Student. [NT 798; S-26]

68. The physical therapist also at tines implemented her treatment of Student in conjunction with a physical therapy assistant with many years experience with the IU. [NT 797-798]

69. The physical therapist assisted the teacher in imbedding skills acquired during physical therapy into Student's daily activities. [NT 799-800, 805]

70. Because of the need to instill safety awareness the physical therapist and the teacher collaborated on training Student to obey "stop commands" and the teacher took Student on daily walks around the building to practice. [NT 799-800, 1010]

71. The Parent did not ever observe physical therapy sessions or contact the physical therapist about her work with the Student. [NT 795, 799]

72. Student received occupational therapy from a Pennsylvania Certified Occupational Therapy Assistant [COTA] working under the supervision of a Registered Occupational Therapist [OTR] who is licensed in the state of Pennsylvania. When the COTA was out for surgery the OTR worked directly with Student, and the COTA and the OTR at times worked together with Student. [NT 815, 820, 837]

73. The OTR had worked with Student in the ESY program in the summer of 2010. [NT 837-838]

74. The COTA has eleven years experience with the IU and over twelve years experience in the field prior to that. She holds an Associate's degree in science. [NT 815-816]

75. The COTA's role is to integrate occupational therapy into Student's daily program, using sensory strategies as necessary. [NT 816-818, 822]

76. Student usually required hand-over-hand assistance to give Student motor memory and proprioceptive feedback when initiating an action after which Student could continue it with independence. [NT 825]

77. Treatment notes were written whenever the COTA or the OTR worked for any length of time with Student. [S-25]

78. The Parent did not observe the COTA working with Student and the Parent did not contact the COTA despite having the COTA's voicemail number and email address. [NT 821]

79. Despite the Parent's testimony about home behaviors, the daily communication sheets exchanged between the teacher and the Parent reflect only two occasions when the Parent reported difficulties

["crankiness"] with Student and one occasion when Student had cried for several hours the evening before. The Parent did not indicate the need for assistance from the District about home behaviors. [S-23]

District's Second Evaluation

80. The Parent requested a re-evaluation in November, 2010. The certified school psychologist [CPS[12]] assigned has over thirty years working in the schools, has supervised other psychologists and was the director of treatment at a mental health facility. She has extensive experience evaluating low incidence population students. [NT 1076-1079]

81. The CPS was assigned to the elementary school where Student's program is located so she had the opportunity to observe Student's class, including Student at least four times before she was asked to conduct Student's evaluation. There was nothing about Student's behavior in the classroom during these observations that caused her to have concern. [NT 1079-1081]

82. The CPS consulted with a psychologist who was a coworker of the Parent regarding instruments appropriate to use with Student. After this discussion the CPS chose the Wechsler Non-Verbal Test of cognitive abilities because the test is designed to measure cognitive ability non-verbally and having administered this instrument before to other students she believed that the instructions, presented in picture form as well as in pantomime form, would give Student the best opportunity to understand what Student was being asked to do. The CPS also selected the Differential Ability Scales to assess pre-academic skills. [NT 1083, 1086-1087]

83. The classroom teacher was asked to sit with Student during the assessments so that a familiar person would be there and to give reinforcers on the CPS's cues, a procedure considered best practice to use with students who are autistic. However, Student was not able to perform the tasks. [NT 1089, 1106-1107; S-10]

[12] This designation is used to distinguish this individual from the other three psychologists involved in this case: the IU psychologist, the District psychologist and the private evaluator.

84. The CPS was not able to derive a standard score on either of the assessments she used; it is her opinion that Student did not understand what Student was being asked to do. [NT 1084-1086, 1099-1103]

85. The Gilliam Autism Rating Scale and the ABAS, both standardized assessments, were completed by the Parent and the teacher. [NT 1087]

86. The CPS also consulted with the psychologist who had previously evaluated Student and who had worked with Student weekly during the communication study from November 2010 through February, 2011. He provided information about Student's communication and his behavioral observations during the spring of the 2009-2010 school year and the 2010-2011 school year. [NT 682-683]

87. In addition to doing direct observations of Student in her role as evaluator, the CPS asked yet another school psychologist to do a structured observation of Student so that there would be more than one set of eyes on Student and because that psychologist also was familiar with this low incidence population. The data from that observation was included in the evaluation report. [NT 1088-1089, 1090; S-10]

88. The classroom teacher provided information to the CPS which was incorporated into the re-evaluation report as was new or updated assessments from the related service providers. [NT 1010; S-10]

89. The CPS did not recommend that the behavior plan be changed. During the 2010-2011 school year, both before and after the evaluation, the CPS had observed Student in class and noted behavioral progress. Initially, the aides and teacher constantly prompted Student for all tasks, but by the end of the school year, the aides were able to pull back and Student was able to do tasks on Student's own. [NT 1093-1094, 1112]

90. The CPS also observed Student in the lunchroom. In the beginning of the year, Student might throw a cup. By the end of the year, Student had gained an understanding of the function of a cup and the CPS did not observe any throwing of utensils. [NT 1094]

91. The re-evaluation was completed, the report was provided to the Parent on February 8, 2011, and on February 24, 2011 the IEP team [Parent, teacher, IU supervisor, IU supervisor of the multiple disabilities program, and the District director of pupil services] met to discuss the draft report in detail. [NT 1012-1013, 1090-1091; S-10, S-12]

92. The Parent was an active participant at the IEP meeting, took notes and made suggestions, most of which were incorporated into the final IEP. The Parent did not request any revision to the goals and objectives proposed for the IEP. [NT 1012-1019, S-12, P-6]

93. The new IEP contained pre-reading and pre-math goals and the toileting goal was replaced with a feeding goal although Student would continue to practice toileting steps and skills daily. [NT 1053-1057; S-12]

Private Evaluation

94. The Parent was dissatisfied with the February 2011 reevaluation performed by the District and asked her coworker[13] who is a licensed psychologist and certified school psychologist[14] to evaluate Student in the home. After apparently being unsuccessful in eliciting information the psychologist advised the Parent that Student needed an evaluation by someone specializing in nonverbal children and referred the Parent to a facility in another part of the state. [NT 193-194, 492-494]

95. The Parent arranged for Student to be evaluated at the facility in another part of the state. The private evaluator provides assessments of children with complex medical, neurological and neurodevelopmental disorders. The private evaluator has participated in research with children with epilepsy. She has evaluated about 25 children with seizure disorders in the last three years. The private evaluator is not school-certified but performed the evaluation in conjunction with a second-year Fellow who is Pennsylvania school

[13] The same person with whom the CPS had consulted regarding testing instruments.

[14] This individual was present for most of the day at the second hearing session but was not called to testify. Neither was he present nor called to testify on either of the two subsequent sessions, and no request was made to schedule an additional date for his testimony in person or by telephone. The District requests that I draw a negative inference from his failure to testify but I decline to do so in the absence of any other information.

certified. Additionally the private evaluator received her doctorate from an APA accredited school psychology program and her Master's degree from a school psychology program. [NT 303-304, 307-308, 320-324; P-20]

96. For purposes of the evaluation the private evaluator reviewed medical reports provided by the Parent, the IU psychologist's reevaluation report, and the Achenbach Child Behavior Checklist [CBCL], a behavioral rating scale completed by the Student's classroom teacher. She did not review data collection sheets, progress reports or any other communication sheets generated by the District. [NT 305-306, 342-343]

97. The private evaluator did not observe Student in an educational setting. [NT 347]

98. During her testimony the private evaluator noted that Student overall had "difficulty with the testing environment, staying seated, directing [Student's] attention". Student had difficulty with "even the…basal items on the measures". Grapho-motor production was "generally scribbling" when the task was to draw a simple horizontal line and when shown "an array of...simple pictures [Student] had difficulty indicating, pointing, to the simple pictures upon prompt". [NT 313; P-3]

99. Student's attention varied from 30 to 5 seconds. For about every 30 seconds of sustained attention the private evaluator was able to get from Student, there had to be about two minutes of redirection. [NT 314-316; P-3]

100. Although the private evaluator presented standardized tests to Student, virtually all Student's scores were zero. The test protocols[15] for the Leiter revealed that Student scored a zero (0) on every subtest that was administered, resulting in scaled scores of one (1). Student also scored a zero (0) on the Beery Buktenica Test of Visual-Motor

[15] It is here noted that the private evaluator was resistant to providing testing protocols in compliance with a subpoena based on her concerns about protecting copyrighted test information, but did eventually provide the protocols. However, in deference to her concerns this hearing officer did not make the protocols part of the administrative record, limited their use to examination and cross examination of the witness , and ordered that they be shredded upon completion of the hearing session in which they were used.

Integration as well as on the Peabody Picture Vocabulary Test. [NT 317, 358-361, 363-364, 640-641]

101. Because insurance would not pay for scoring and interpretation of the Vineland [a questionnaire filled out by adult responders familiar with the individual] the private evaluator did not obtain adaptive behavior functioning information about Student from the school setting and therefore had only the Parent's reports to rely upon. [NT 367]

102. Overall, the private evaluator found severe impairment in verbal and non-verbal cognitive functioning, severely impaired receptive language, globally impaired verbal expressive language, and severely impaired grapho-motor and visual-motor skills. The private evaluator estimated Student's overall level of functioning to be below one year to the two year old level. [NT 317-318]

103. The private evaluator did not review the June 2010 IEP and could offer no opinion as to whether it proposed an appropriate program or placement for Student. [NT 342-343]

104. The private evaluator agreed that the IU psychologist's evaluation of June 2010 was appropriate. [NT 341]

105. The private evaluator noted that her findings about Student's functioning were consistent with the District's February 2011 evaluation report that she reviewed subsequent to her own evaluation. [NT 319]

106. The private evaluator did not review the March 2011 IEP generated from the classroom data and the evaluation report. [NT 345, 352]

107. The findings of the private evaluator regarding Student's level of overall functioning at about the one-year old level were consistent with the estimate of the daycare provider and the IU psychologist. [NT 60-63, 318-319, 375, 641]

108. The private evaluator agreed that Student's educational programming had to be geared toward Student's developmental level. [NT 375-376]

109. The private evaluator opined that an ABA/VB program such as that provided by the District would be necessary for Student to be educated successfully. [NT 383-384]

110. The private evaluator noted that it was important for the Parent to be implementing a Verbal Behavior or ABA program in the home setting. The Parent did not request that the District provide her with training in these approaches and there is no evidence that she implemented these techniques in the home setting.[16] [NT 374-375]

111. The private evaluator opined that community based instruction such as that being delivered by the District was important for Student. [NT 376]

112. The private evaluator opined that children like Student, "with moderate or severe cognitive delays may acquire little or no communicative speech". [P-3]

113. Although the report of the private evaluator was not provided to the District until after the request for a due process hearing, the District was already implementing many if not all the educational strategies the private evaluator had included in her report. [NT 868-870, 1091-1093]

The Residential Placement Requested by the Parent

114. The first time the teacher learned that the Parent was dissatisfied with Student's progress was in November 2010 at a parent/ teacher conference to discuss the first quarter progress reports. [NT 1008-1009]

115. Although at the end of the 2009-2010 school year the Parent had expressed satisfaction with Student's progress after only two months in the District, by October 2010 the Parent had begun

[16] When the Parent obtains Provider 50 services the Behavior Specialist Consultant and a Therapeutic Staff Support worker can set up this programming, train the Parent and monitor implementation. Alternatively the District can provide the Parent with this training.

investigating other programs for Student and came upon the Private Residential School to which she now wishes Student to be sent on a residential basis. She filled out an application to the school on October 21, 2010. [NT 72, 221-222; P-19]

116. The Private Residential School is based on the Waldorf philosophy of Curative Education and Social Therapy advocated by Rudolf Steiner. All house parents and teachers at the Private Residential School must complete a four year course of study in the Waldorf philosophy which includes a belief in reincarnation, the existence of Atlantis and the karma inherent in individuals. [NT 133-135]

117. The District psychologist visited the Private Residential School and reviewed the literature regarding the efficacy of the Waldorf philosophy for teaching children such as Student, and could find no research supporting the validity of Curative Education and Social Therapy as an educational program for Student. [NT 874]

118. During his visit to the Private Residential School the District psychologist did not see evidence that any behavior plan was being implemented, saw no evidence of individualized programming, saw no use of picture schedules or any other type of structured communication system, and observed no ABA programming. [NT 885-888]

119. When the District psychologist asked the representative of the Private Residential School who testified at the hearing and who also led the tour of the school about ABA programming and behavioral interventions, the representative said that behaviors are addressed by establishing a relationship with the students. [NT 890]

120. When asked by the district psychologist about how generalization of skills was taught and practiced, the representative replied that they "wait for that magical moment". [NT 891-892]

121. Based on his review of District records, his observation of Student in the District's class and his observation at the Private Residential School the District psychologist concluded that not only would a residential placement be inappropriate for Student, but that

the Private Residential School in particular would not be an appropriate placement because it could not implement the District's IEP or the recommendations of the private evaluator. [NT 892-895]

122. The Parent was unaware of the philosophical basis of the Private Residential School, and did no research about the Private Residential School other than that it was a residential setting. [NT.445-447]

123. The Parent visited the Private Residential School sometime in October 2010, and Student visited there with the Parent during the first week of December 2010 as well as in May 2011. [NT 221-222]

124. The Parent filled out an application for the Private Residential School in October 2010 and testified that in October 2010 she "definitely wanted" Student placed there. The Parent informed the District that she wanted student placed in the Private Residential School. [NT 220-221, 225]

125. At the time of the December 2010 visit to the Private Residential School the Parent was impressed that when she returned to pick her child up after lunch Student was "sitting on the bench with the kids all around" and "eating lunch." Student was "calm and content and smiling". Mother testified that she had not seen student that calm and felt this was amazing. [NT 223]

126. During the May 2011 visit, mother videoed the child doing a Maypole dance with other children. Student was smiling and laughing. Mother felt that Student was communicating the message that Student "fit" and mother again thought it was amazing. [NT 223]

127. The Parent observed Student in the District during one of the first few days Student was enrolled in the District; she watched circle time and table time for about 45 minutes, and did not stay longer than that. The Parent has not done any observations in her child's classroom, but has "popped into the classroom to drop things off or pick student up" three or four times. [NT 206-207]

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in "equipoise," as otherwise one party's evidence would be preponderant. *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). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District,* 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parent requested this hearing and was therefore, assigned the burden of persuasion pursuant to Schaffer and also bore the burden of production. The evidence was not in equipoise, as the District's evidence was preponderant, and therefore the Schaffer test on burden of proof did not apply.

IDEA

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* The purpose of the IDEA is to ensure that all children with disabilities are provided FAPE which emphasizes special education and related services designed to ensure meaningful academic, social, emotional, and behavioral progress. *Forest Grove Sch. Dist. v. T.A.,* 129 S.Ct. 2484, 2491 (2009); *Breanne C. v. Southern York Cty. Sch. Dist*., 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (referencing *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 394 (3d Cir. 1996) (finding that to confer meaningful educational benefit, an IEP must be designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social, and emotional domains); *See also*, *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). An IEP and its benefit must be judged in relation to the child's potential. *Penn Trafford Sch.Dist. v. C.F.*, 2006 WL 840334 (W.D. Pa., March 2006); *M.C. v. Cent. Reg'l Sch. Dist.*, supra. and a District cannot be held responsible under IDEA for a student's failure to generalize certain skills learned in school to the home environment, *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143, 1150(10th Cir. 2008). The statute guarantees 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).

Credibility of Witnesses

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).

I found no reasons to question the credibility of the witnesses who appeared on behalf of the District. They were well-qualified and experienced professionals who had week-to-week if not day-to-day experience with Student in the school setting, and whose testimony was corroborated by extensive documentation.

Daycare Provider: This individual provided limited testimony but I relied upon her report that Student displayed only one seizure incident in the daycare setting, and noted that her estimate of the developmental level at which Student currently functions is congruent with the findings of the psychologists who assessed Student.

Private Evaluator: The private evaluator's credibility was diminished when she responded to the question "What is the significance that you were able to actually test [Student], and the school could not?" by opining at length about the importance of using standardized test instruments and such being the gold standard for assessing individuals. In owning the attribution of being able to "actually test" Student, she is unquestionably elevating form over substance. Although she put standardized tests in front of Student, and attempted over and over to redirect Student's attention and focus on task demands, Student obtained a raw score of zero on virtually all subtests. It is one of the anomalies of test construction that in some instances a zero (0) raw score on a subtest can result in a subtest scaled score of one (1) and that the scaled scores can be added and produce a standard score (IQ). The fact that the private evaluator may have derived a "score" does not mean that the

Student was tested. Rather, this hearing officer[17] finds the evidence clear and unequivocal that Student was "untestable" [18] i.e., not capable of understanding standardized test directions and demands as well as not able to attend and focus. Putting test materials in front of Student and obtaining a zero response that is not based upon a clear incorrect response choice is not testing, and the results are far less useful than foregoing testing in favor of observations. Nevertheless, insofar as her recommendations were congruent with those put forth by the IU and District psychologists who evaluated Student her testimony will be credited. However, I find that her opinion that Student requires a program outside the District at this time is unsupported by any facts at her disposal.

Private Residential School Representative: Although the representative of the Private Residential School who testified by telephone was amiable, his assurances that the Private Residential School could provide the various services about which he was questioned were not credible. It is notable that only having seen Student twice, and not having reviewed the most recent evaluations or the most recent IEP, this individual believed he could provide such assurances.

The Parent is a devoted advocate for her child, and the stress of relocating to a new state, acclimating in a new job and interacting with a new group of people educating her child is acknowledged. However, her not recalling conversations with her co-worker who attempted to test Student in the home, her not thoroughly researching the Private Residential School prior to deciding to send her child there, her seeming passivity in dealing with the Provider 50 system, her asserting with no foundation that Student did not have an aide on the bus to and from school and the daycare, her expressing dissatisfaction with the District's program only two months after praising it, and the slim reed upon she rested her belief that her child "fit" in the Private Residential School presented credibility issues that diminished the weight of her testimony.

[17] Holding a Pennsylvania license in psychology and Pennsylvania school certification

[18] It should be noted that being "untestable" does not mean that an individual cannot be assessed and evaluated. Particularly with young children, an experienced examiner can assess gross and fine motor skills, speech/language levels, approximate cognitive ability, social relatedness and emotional functioning through formal observation and then develop a comprehensive picture of strengths and deficits needed for planning interventions.

Discussion

The gripping, and frankly initially persuasive, opening statement provided on behalf of the Parent set expectations that this hearing would be about a child with a seizure disorder so rare, severe and pervasive that only 24-hour a day educational programming could confer FAPE. However, by the conclusion of the hearing, it had become clear that during the 2010-2011 school year the child had experienced only one seizure at the daycare center and another possible seizure at school. Additionally and perhaps even more surprising was the fact that the Parent was not requesting placement in a school housed in a medical facility needed to control seizures and render the child amenable to learning, or in a school with a 24-hour a day physician in attendance, or even a school specializing in educating students with autism and severe cognitive disabilities, but rather a school with no more medical availability than the District placement offered, and with considerably fewer daily direct specialized services for educating children with Student's specific profile.

Another puzzling aspect of this hearing was that based upon the recommendations of the private evaluator, the Parent spent considerable effort making the point that the Student required ABA programming in order to receive FAPE and criticizing the District's ABA/Verbal Behavior program because it was not strictly one or the other but combined both approaches, but then virtually disregarded the lack of ABA/VB programming at the Private Residential School. This hearing officer accepts and understands the rationale behind the District's multifaceted program and notes that in contrast to the District witnesses' detailed and credible descriptions of the ABA/VB program provided to Student, the representative from the Private Residential School responded in a rather low key and somewhat hesitant tone, when asked, that the school used ABA techniques when appropriate. Moreover, it was quite difficult to discern exactly what scientifically-based peer reviewed methodologies the Private Residential School would use to educate Student, and this hearing officer was left with serious doubts as to whether the placement was able to implement Student's detailed IEP and provide even an approximation of meaningful educational benefit.

The District offered an appropriate program.

Student arrived in the District toward the end of the 2009-2010 school year, heavily medicated and impaired in all areas of functioning including gross

motor skills. The Parent indicated dissatisfaction with the educational program offered her child in the previous state of residence, although there was no evidence put forth, nor was any necessary, about that actual program itself. During the District's first two months of programming for Student progress would be expected to be slow, and consist of Student's becoming acclimated to the new school setting as well as a new daycare program and a new home. Although the Parent initially alleged that Student's April-June 2010 program did not provide FAPE, she withdrew that portion of her complaint during the course of the hearing. In fact, in June 2010 the Parent had expressed her satisfaction with the Student's program and placement.

Student's medication was changed such that when Student returned to school in September 2010 there was a dramatic difference in Student's presentation. Student did not appear heavily medicated, Student was alert and curious, and Student's ambulation was improved. It was at this point that Student began to become available for learning in the District's program. The Parent puts forth the opinion that Student's improved presentation and heightened response to learning was an artifact of the medication change and not because of the District's programming. I reject this position as, although no doubt a medication change was beneficial, the District's program offered the setting and the tools in which Student could begin to make use of the benefit of enhanced awareness and engagement.

Although under the IDEA children are not entitled to "everything that would be desired by loving parents", the District in this case offered Student a program that met and exceeded the standard for appropriateness. Although an IEP must be "reasonably calculated" to produce "meaningful educational benefit" and does not represent a guarantee of progress, Student in fact did make progress. Progress must be gauged in relation to an individual child's potential, and when children learn under the multiple impairments that Student possesses, progress may be incremental.

Residential Placement Is Not Appropriate for Student and the Residential Setting Preferred by the Parent is Inappropriate

It is fairly common in special education due process hearings for families to seek out the very best educational placement for their disabled child and sometimes the parentally-chosen placement offers more services, or even better programming, than the public school offers. In those cases hearing officers need to apply the standard of whether what a school district offered was appropriate, not more or less appropriate, than the parental preference.

In the instant matter, this is not at all the case. Viewed in light of Student's disabilities Student is making meaningful educational progress in the District's program which is excellent, and offers far more than the Private Residential School that the Parent prefers.

For sake of argument, were Student not making progress, the next appropriate step would not be a residential placement, but rather a more restrictive day placement. Also for sake of argument, if Student were now, or becomes in future in need of, a residential facility the Private Residential School addressed in the hearing is not appropriate. Among other things, the Private School is not highly structured, it is not set up to implement Student's IEP with fidelity, it almost certainly would not provide intensive ABA/Verbal Behavior programming, and its physical setup would not lend itself to guarding against the Student's constant elopement risk.

Dicta:
The Parent is understandably concerned that Student's behavior at home does not reflect the gains the District sees at school. Since the Parent has not participated in the school program, and has not observed Student in the school program, the rudimentary elements of parent training have not been established. No doubt mother's status as a new employee in a new position in a new state has left little if any room for taking time off from work to participate in Student's school program to observe and learn. The Parent has attempted to obtain home-based services through the behavioral health system, and she is strongly encouraged to use every means at her disposal to acquire these services for herself and her child. A Behavior Specialist Consultant (BSC) can serve as a bridge between school and home/community, develop a positive behavior support plan for home/community that is consistent with ABA and Verbal Behavior techniques the teachers use at school, teach mother to carry out the home/community plan and ensure that the mother and the babysitter and other caregivers implement the plan with fidelity. The child also, given descriptions of home behaviors, would most likely qualify for home/community Therapeutic Staff Support (TSS) for several hours a day and possibly some hours on weekends as well, to implement the behavior plan and transfer skills to the mother and other caretaker(s). It is also highly likely that once the child is registered in the relevant county MH/MR Office, the child would qualify for an Intensive Case Manager who would assist mother in accessing supportive services such as Respite Care. Student and mother are an ideal family for successful integration into the educational

system, the developmental disabilities system and the behavioral health system resources.

Conclusion

The IDEA authorizes hearing officers and courts to award "such relief as the Court determines is appropriate" 20 U.S.C. § 1415(h)(2)(B). In this case, I find that the District offered Student FAPE for the 2010-2011 school year, and therefore Student is not entitled to compensatory education.

The IDEA 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. 20 U.S.C. § 1412(a)(10)(C)(ii). I find that the program the District offered for the coming school year is appropriate, and that Student does not require residential placement in order to receive FAPE. I therefore will not order the Student to be placed at the Parent's preferred Private Residential School at public expense.

After hearing testimony covering four days and a number of witnesses, I find that the Parent has not met her burden of proof in this matter as the District's persuasive evidence was preponderant. The District offered Student an appropriate program for 2010-2011 and has proposed an appropriate program for 2011-2012, and the Parent's choice of a prospective program in a residential private school is inappropriate.

Order

It is hereby ordered that:

1. The School District did not deny Student a free, appropriate public education [FAPE] during 2010-2011 school year.

2. As the School District did not deny Student FAPE during the period in question Student is not entitled to compensatory education.

3. Student does not require residential placement in the approved private school selected by the Parent in order to receive FAPE.

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

August 23, 2011
Date

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