

**DELAWARE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING PANEL**

In the Matter of ) **ORDER**  
 (“Student”) )  
 Petitioner, ) Date of Order 5/25/16  
 v ) DE DP 16-23  
 BRANDYWINE SCHOOL DISTRICT ) Dates of Hearing: 4/14/16 and 4/15/16  
 (“District”) ) Date Mailed and Emailed:5/25/16  
 Counsel for Petitioner/Student: Lawrence Lee Wentz, Esq.  
 Counsel for District: Michael P. Stafford, Esq.

**DECISION AND ORDER**

INDEX OF NAMES FOR DECISION AND ORDER

ACTUAL NAME	REPLACEMENT NAME/TERM USED
	Student
	Mother
	Father
Brandywine School District	District
	Mother’s Certified School Psychological Examiner
	Residential Therapeutic Program
	Residential Therapeutic Program Counselor
	Boarding School
	Boarding School Dorm Master/Therapist
	District’s Educational Diagnostician
	District’s Coordinator of Special Education Services
	District’s Emotional Support Teacher
	District’s Therapist
	District’s Educational Psychologist
	District’s Director of Educational Services
	District Supervisor Special Programs

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**DECISION AND ORDER**

**A. SUMMARY**

Petitioner brought a due process case for tuition reimbursement alleging that Respondent District had not provided an evaluation or IEP timely and is entitled to reimbursement at a boarding school in Ohio. This decision finds that while the initial evaluation was not timely issued and Respondent District is responsible to reimburse Petitioner for the equivalent amount of tuition, fees, counseling, tutoring (the Tutoring Program) as if Student was a Day Student (and not a Boarding Student) at the particular school ending this semester. Petitioners are entitled to no reimbursement for allowance and the amount for boarding and living expenses under the IDEA. Ultimately, the IEP created was appropriate. This tribunal lacks jurisdiction for the other claims.

**B. PROCEDURAL BACKGROUND**

1. Student by Mother and Father filed this Due Process Hearing Request on February 29, 2016 with the State of Delaware Department of Education (“Complaint”).
2. In the Complaint, Petitioner alleged that District has denied Student a Free and Appropriate Public Education (“FAPE”) under the IDEA, Section 504 of the Rehabilitation Act and Title II of the ADA for District’s:

- failure to timely and properly evaluate Student;
- Failure to timely offer an appropriate IEP.

As relief Petitioner's sought:

- Reimbursement for tuition and costs and the private boarding school they enrolled Student;
- Declaratory Relief in the form of an adjudication that Student's Rights under IDEA and 504 were violated.

3. This Panel was appointed March 1, 2016;
4. District filed its Answer on March 15, 2016.
5. A hearing was scheduled and held on April 14, 2016 and April 15, 2016,
6. Counsel jointly requested an extension of timeline for a decision until May 25, 2016 so they could supply written closing. These were done and this is the decision.

### **C. TESTIMONY AND EXHIBITS**

In reaching this decision all of the two days of testimony including all witnesses and approximate 512 pages of admissible exhibits were considered. Rather than recite all of the same, for the sake of brevity only the relevant portions are set forth in the following section.<sup>1</sup>

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<sup>1</sup> In this decision, references to the transcript are cited as N.T. Date, page. Citations to Petitioners' Exhibit are cited as Student Exhibit # and citations to Respondent's Exhibit are done as District Exhibit #.

D. **FINDINGS OF FACTS**

1. At all relevant times to these proceedings, Student was 16 years of age and in the 10<sup>th</sup> grade.<sup>2</sup>
2. Student was last educated in any public schools when Student was in the first grade. At that point Student was identified as a “child with disability” as that term is defined in 20 U.S.C. §1401 (3)(A) and entitled to special education and or related services under the IDEA 20 U.S.C. § 1415 *et al.* <sup>3</sup>
3. After 1st grade, Student went to the Private School, a local Delaware day school that does serve children with learning disabilities and is easily commutable by parents. There were 5-6 students per class at Private School and Student went there for 2d and 3d Grades.<sup>4</sup>
4. For the 4<sup>th</sup> grades through part of 7<sup>th</sup> grades, Student was enrolled in a Private Parochial School also commutable to Parents. Student’s never fit there as indicated by Mother. Student’s psychological behavioral issues progressively worsened during Student’s time at the Private Parochial School. Student needed in house psychological treatment in the 6<sup>th</sup> grade at a Local Psychiatric Facility known as Local Psychiatric Facility and was receiving educational services there while still a Student at Private Parochial School. <sup>5</sup> Student attended Private Parochial School for part of 7<sup>th</sup> grade year until April, 2013.

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<sup>2</sup> N.T., 4/14/16 at 91

<sup>3</sup> N.T., 4/14/16 at 61 .Mother testified the special education provided by District was above and beyond that which Student needed. Neither Petitioner or District provided any information as to Student needs when Student was in the first grade.

<sup>4</sup> N.T. 4/14/16 at 62-65.

<sup>5</sup> N.T. 4/14/16 at 66-68.72.

5. The summer of Student's 7<sup>th</sup> grade year, Student was sent to the Therapeutic Program in Eugene Oregon<sup>6</sup> for 77 days. <sup>7</sup> Therapeutic Program was a program where therapeutic services were delivered to Student while camping type skills developed where the Student is removed from Student's typical environment and not allowed access to smart phones, computers etc....
6. Student last lived with or spent a solid contiguous week with parents in Delaware in the Summer of 2013.<sup>8</sup>
7. 77 Days after going to the Therapeutic Program, Student on or about October 2, 2013, Student went to Residential Therapeutic Program in Missouri.
8. Residential Therapeutic Program provided residential psychological therapeutic Services to Student in conjunction with educational services.<sup>9</sup>
9. Student spent far more time in Residential Therapeutic Program then the typical Residential Therapeutic Program Child <sup>10</sup>and Mother fearing her Student was becoming institutionalized<sup>11</sup> and seeing some improvement sought to enroll Student in District on August 20, 2015 for the 10<sup>th</sup> Grade.<sup>12</sup>

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<sup>6</sup> N.T. 4/14/16 at 73, 75-76.

<sup>7</sup> It is noted that if the 77 days is counted backwards from the time Student was registered at Residential Therapeutic Program, October 2, 2013 that would mean that Student was sent to the Therapeutic Program in Eugene Oregon, on or about July 16, 2013. The point is that it is uncertain what the placements were from April, 2013 to May, 2013. Although it is noted that Student was treated by Residential Therapeutic Program as an 8<sup>th</sup> grader. There may have been educational services at the Local Psychiatric Facility in conjunction with Private Parochial School that allowed Student to finish at Private Parochial School. This gap is not important to the decision as both counsel agreed to treat this as a new evaluation.

<sup>8</sup> N.T. 4/14/16 at 141 and District Exhibit 1, D0011

<sup>9</sup> N.T. 4/14/16 at 81,83, 84. District Exhibit 42

<sup>10</sup> N.T. 4/14/16 at 87.

<sup>11</sup> N.T. 4/14/16 at 190-191

<sup>12</sup> N.T. 4/14/16 at 93-96

10. Prior to August 20, 2015, Mother and Father consciously made a choice not to get any special education services from District. No information was provided by either party at the hearing of these prior 1<sup>st</sup> grade services for Student. Both parties since August, 2015 consciously chose to treat this entire matter as an initial educational evaluation and it is believed their reason for same was that over 8-year-old information was too stale to be useful.
11. Mother on August 20, 2015 enrolled Student in District and made them aware that Student on that date was at a residential treatment facility at Residential Therapeutic Program. Mother, that date, signed and provided a consent to release to District information from Residential Therapeutic Program and Mother's Certified School Psychological Examiner.
12. At the time Mother initially went to school on August 20, 2015, she inadvertently led District to believe Student would be released from Residential Therapeutic Program and be at District the first day of School on August 31, 2015.<sup>13</sup>
13. Mother the evening of August 20, 2015, emailed District Mother's Certified School Psychological Examiner's April 21, 2015 Psychological Evaluation of Student and June 5, 2015 Addendum, a history of Student's educational placements, a letter of July 11, 2015 from a Dr. at Residential Therapeutic Program and a Student/ Family Information Form.<sup>14</sup> In that these were

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<sup>13</sup> N.T. 4/15/16 at 745, 420.

<sup>14</sup> Student's Exhibit 21

emailed in nontraditional business hours, these are treated as being received August 21, 2015.

14. Mother in estimating this possibility of Student starting August 31, 2015 at District at best, was overly optimistic and she did not immediately call District when Student's therapeutic progress had not progressed enough for Student to be released from Residential Therapeutic Program and start the 10<sup>th</sup> grade at District at that time.
15. However, despite Mother's failure to promptly notify school that Student had not progressed enough to be released from Residential Therapeutic Program, District's Director of Education on September 3, 2015 independently emailed District's Educational Diagnostician<sup>15</sup> who communicated with Mother at the time of enrollment August 20, 2015 and knew of Student's then therapeutic residential placement at Residential Therapeutic Program. District's Educational Diagnostician replied indicating a belief Student was not in school on September 4, 2015. Yet no call was made to Mother September 3, 2015 or September 4, 2015 to determine Student's whereabouts, psychological condition and when Student would be released from Residential Therapeutic Program. This was not reasonable and caused a delay.
16. From September 4, 2015 until September 14, 2015. District made an insufficient effort to confirm Student's whereabouts and status at Residential Therapeutic Program and District should have called Mother immediately and had they done so, it would have been reasonable to offer an initial

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<sup>15</sup> Parent's Exhibit 25

meeting with Mother no later than September 8, 2015<sup>16</sup>. Had they done so District would have learned earlier that it needed to make immediate and persistent and escalating requests to Residential Therapeutic Program. Rather than do this, District first learned of Student's status when it called and discussed disenrolling Student with Mother on September 14, 2015. Mother did not want disenrollment and at that time, but that Student needed an Individualized Educational Plan the first day Student arrived at District.

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17. District scheduled the meeting on October 5, 2015. This was too long a lapse of time.
18. District claims to have sent the BASC 2 raters to Residential Therapeutic Program as to Student's behavioral and Psychological needs on October 5, 2015<sup>18</sup>, and called Residential Therapeutic Program on September 14, 2015, but there are no substantiating documents in District's records which District admits is not typical.<sup>19</sup> However, there was no prohibition for District to send BASC 2s out earlier and more frequently later and no reason for them not to. This is especially so because there was no record of their initial sending.
19. District met with Mother on October 5, 2015.

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<sup>16</sup> The reason is that the change in placement from home to still needing residential treatment was the sort of change that should have caused District to act sooner rather than later as it means that they knew Mother's initial relay to them of psychological status was not accurate. Nothing prohibits more than one meeting of the sort that occurred on October 5, 2015.

<sup>17</sup> N.T. 4/14/16 at 350-351, 373, Cf. Petitioner's Exhibit 25, p.136, see also N.T. 4/15/15 at 373, 420

<sup>18</sup> N.T. 4/14/16 at 353

<sup>19</sup> N.T. 4/15/16 at 423,



20. District was placed on actual notice that Residential Therapeutic Program was not cooperative no later than October 5, 2015 (from Student's Therapist at Residential Therapeutic Program's failure to participate that date despite call<sup>20</sup>) and would have known earlier had they acted promptly on September 3, 2015 to schedule a meeting with Mother and Residential Therapeutic Program.<sup>21</sup> After this point the attempts to get information from Residential Therapeutic Program should have been regarded as urgent and any lack of cooperation of Residential Therapeutic Program relayed to Mother as soon as possible. This did not occur.
21. Also on October 5, 2015, District knew from Mother Student would be attending a different school other than the residential therapeutic facility at Residential Therapeutic Program after the Semester at Residential Therapeutic Program as of December 31, 2015 and needed a new educational placement at the start of January, 2016.
22. Mother's email to District of November 4, 2015 inquiring as to status should have acted as another prompt to District. However, it was unreasonable to take 10 days for District to respond to Mother about this.<sup>22</sup> District could have noticed Mother of either a trip to Residential Therapeutic Program to induce Residential Therapeutic Program's cooperation or informed Mother of Residential Therapeutic Program's lack of cooperation and enlisted her

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<sup>20</sup> . N.T. 4/14/16 at 376. Student's Residential Therapeutic Program therapist testimony that therapist was not contacted and this is not regarded as credible

<sup>21</sup> While it is acknowledged that District worked with Residential Therapeutic Program counselor for scheduling. This does not excuse the meeting occurring only on October 5, 2015 as acting earlier would have led to greater scheduling opportunities. Also, there was no prohibition for more than one meeting with Mother

<sup>22</sup> Student's Exhibit 27.

support as it did after the December 15, 2015 meeting. Not doing so promptly was not reasonable.

23. On November 14, 2015 the District merely replied to Mother's November 4, 2015 email that it was collecting information, it did not say Residential Therapeutic Program was nonresponsive as to the BASC 2 raters and, merely said that they were starting from scratch and that they were "working on it." It is against this back drop, that Mother's November 23, 2015 letter must be measured.

24. Mother's November 23, 2015 letter is adequate notice to District such as not to vitiate her entire claim for reimbursement.<sup>23</sup>

25. There is in an intra district email of November 14, 2015 as a part of District's Exhibit 21, page D88 which indicates there was a question in District as to when Student would start in January. This shows some relay of the date by Mother and since there were no relevant communication between Mother and District between this and October 5, 2015. This supports a finding that Mother on October 5, 2015 communicated that Student would be out of Residential Therapeutic Program at the end of December 2015. It is unexplained why a meeting was not called earlier about this or the start date as relayed memorialized in District's record as well as a relay to Mother of the difficulties gaining information from Residential Therapeutic Program.

26. Within 2 hours of an intra district email of November 14, 2015, District's Educational Psychologist issued an initial opinion that District's Educational

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<sup>23</sup> Student's Exhibit 7

Psychologist found the Psychological Examination of Student submitted by Mother on August 20, 2015 as “very thorough” and only needing teacher ratings (the BASC 2’s)<sup>24</sup> and that District Educational Psychologist called Residential Therapeutic Program about these before Thanksgiving and was told only that Residential Therapeutic Program was on vacation and then did not leave a message for Residential Therapeutic Program to call back.<sup>25</sup> This is not reasonable both as to why it took until November 14, 2015 to find that the study was reasonable and why no message was left with Residential Therapeutic Program.

27. District as of the morning of August 21, 2015 had Mother’s Certified School Psychological Examiner report for Student. While it is unclear when this was sent to District’s Education Psychologist, the quick 2-hour response supports the very nature that District could and should have acted sooner.
28. Student is able to be educated while living at home. Student’s disability does not trigger the need for a boarding school. This was testified by the Residential Therapeutic Program counselor<sup>26</sup> and supported by District’s witnesses. District’s Therapist, who had treated children with Reactive Attachment Disorder (a disability suffered by Student) very credible testified as to the special challenges and how to mitigate them with involvement of the Family in therapy on an ongoing nature.<sup>27</sup> That is a boarding school is not required by the circumstances of this case. Boarding School is a boarding school in Austinburg, Ohio.

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<sup>24</sup> Student’s Exhibit 28

<sup>25</sup> N.T. 4/15/16 at 665

<sup>26</sup> N.T. 4/14/16 at 257

<sup>27</sup> N.T. 4/15/16 at 565-566.

29. Mother on behalf of Student applied to Boarding School on November 9, 2015. Student was accepted at Boarding School on December 2, 2015, Mother became financially committed for Student for January through June 2016 on December 8, 2015 when she paid that period's tuition.<sup>28</sup>
30. There is no proof from District that financial commitment on December 8, 2015 was not necessary.
31. Boarding School with the counseling supports and tutoring and for merely the limited period ending this semester<sup>29</sup> is reasonably calculated to lead to educational benefits for Student. However, after that period, there is no proof that it can do so and should not be regarded as the Stay Put.<sup>30</sup> Boarding School does have small classes and there are counseling and tutoring in the program. However, these are all educational components and there is no need for a boarding component and the two can be segregated with the educational component only being compensable as appropriate and the boarding cost not being compensable as not required in this case.
32. Mother on November 23, 2015 wrote District a letter indicating Student would attend Boarding School as District had not acted quickly enough and that she would be requesting tuition reimbursement from District. This was sufficient notice to District.

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<sup>28</sup> Parent's Exhibit 9. N.T. 4/14/16 at 118-120.

<sup>29</sup> Presumably ending June. 2016 and not a summer session.

<sup>30</sup> Boarding School does not modify its curriculum to the special needs of a Student in the same manner as an IEP and as such and in light of Student coming home this summer and Mothers continued desire for a public school option, and the finding that the IEP was late but appropriate, Boarding School has limited utility.

33. Mother's failure to produce Student for District or inform them of when Student would be home did not justify the delay or effect District as they could have asked Mother about this and failed to do so.
34. Mother did not adequately consider local private day schools in particular Private School where Mother knew could provide meaningful educational benefit to Student. Student had been there in the past. <sup>31</sup>
35. On December 15, 2015 there was an eligibility meeting attended to by Mother and the appropriate District personnel where all agreed that Student required an IEP and special education services and at this meeting the Mother and District agreed to an IEP meeting to devise an IEP on January 11, 2016.<sup>32</sup>
36. Also, on the date of December 15, 2015, District first spoke to Residential Therapeutic Program officials<sup>33</sup> and District and Mother sent out the Teacher surveys (BASC 2s) <sup>34</sup>and Transition information requested by District. This was completed and returned on or about December 31, 2015.
37. District on the meeting of December 15, 2015 indicated a desire to go out to Residential Therapeutic Program to Mother who indicated it was too late as Student would start at Boarding School. <sup>35</sup>
38. In January 5, 2016, District informed Mother it wanted to go out to the Boarding School Mother not only refused to supply consent for District to observe Student at Boarding School (and thereafter asked that they not be

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<sup>31</sup> N.T. 4/15/16 at 741-743. Mother regarded Private School as not the real world.

<sup>32</sup> District Exhibit 28

<sup>33</sup> District Exhibit 32

<sup>34</sup> District Exhibits 31 & 32

<sup>35</sup> N.T. 4/15/16 at 683-684

allowed on campus), but she also told Boarding School and Residential Therapeutic Program not to cooperate with District and did not retract this revocation until January 13, 2016 despite knowing there was an IEP meeting on January 11, 2016.<sup>36</sup> When Mother did retract this she only did so for purposes developing an IEP in the 2016 - 2017 school year and only approved a trip for District to see Student at Boarding School in the Spring of 2016.

39. The IEP meeting took place on January 11, 2016 and despite notice<sup>37</sup> Mother failed to attend<sup>38</sup> and has failed to provide proof at this hearing any input to this IEP except as to file this matter.
40. Mother on January 11, 2016 indicated District could observe Student in Spring and consented to Residential Therapeutic Program's and Boarding School release of information for the 2016-2017 school year.
41. There is insufficient information to indicate that Student needs a one on one and sufficient credible District testimony that Student should not receive a one on one as it would not assist Student's education, but would detract from it, by encouraging dependence as well as the potential for Student feeling stigmatized. The Residential Therapeutic Program counselor's expression as to a one on one need was not credible especially since counselor testified that Student does not need a one on one at Boarding School.

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<sup>36</sup> N.T. 4/14/16 at 132-133, District Exhibit 55

<sup>37</sup> N.T. 4/15/16 at 686.

<sup>38</sup> District Exhibit 52, D197

42. The IEP of January 11, 2016 arrived at in Mother's absence is appropriate as to setting, hands on learning opportunities, small group instruction and in its assessment, and treatment of both Behavior-Self Regulation Social Skills, Time on Task and Task Completion, Organizational Skills, as well as Behavioral Consultation and Counseling for Student.<sup>39</sup>
43. The Emotional Support classroom as testified by District's Emotional Support Classroom Teacher and District's Therapist and other District personnel is appropriate for Student.<sup>40</sup>

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<sup>39</sup> District's Exhibit 53

<sup>40</sup> N.T. 4/15/16 486-598.

**E. DECISION**

As a general matter, School District has the burden of proof that it has satisfied its obligations under the IDEA. District failed to meet its burden of proof that it provided an initial evaluation to Student without undue delay. District knew of Student's particular behavioral and psychological needs as of August 21, 2015<sup>41</sup> as Mother informed them Student was in Residential Therapeutic Program, a residential treatment center in Missouri. While there may have been initial confusion as to whether Student would be in District's School on the first day of school, August 31, 2015, District should have known no later than September 3, 2015 that Student would not attend District unless Student had an Individualized Education Plan and issued a Permission to Evaluate no later than September 8, 2015. Yet District failed to establish from September 3, 2015 onward that it acted without undue delay, in arriving a determination that Student qualified for services under the IDEA. It was reasonable to offer a permission to evaluate on or before September 8, 2015.

The forty-five (45) school day deadline for school to make a determination as to whether or not Student qualified for services under the IDEA ended on November 17, 2015 and as of that date, there was no commitment to Student/Parent that special education services would be provided at all. This was not made until December 15, 2015 after Petitioners had made the financial commitment. This is more than a mere procedural violation without effect as it denied Student of a choice of a public school with special education services.

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<sup>41</sup> Mother enrolled Student on August 20, 2015 and emailed the information to District the evening of August 20, 2015.



While this entitled Student to compensatory services, to the educational services at Boarding School a boarding school in Ohio (as well as counseling and the Tutoring Program), District is not responsible for living expenses or the board (which can be separated as Boarding School accepts Day Students).

The educational expenses are compensable for this semester only as they supply education to Student. The boarding expenses do not and equity dictates that they not be borne by District. Mother withdrew access to information from District gaining information from Residential Therapeutic Program and Boarding School while the IEP was being developed between January 4, 2016 through January 13, 2016 and neither parents attended the IEP meeting of January 11, 2016 despite knowing of same. These conscious and purposeful act have consequence as follows. Starting with the end of this semester, they act to estop Parents in equity from complaining of the appropriateness of the IEP and program ultimate offered to Student until and unless additional information for Student and access to Student for evaluation if requested by District is allowed. Lastly, the IEP that was developed was January 11, 2016 and program were appropriate and reasonably designed for Student to make meaningful educational progress. That is the IEP of January 11, 2016 shall go into effect at the end of the semester at the time of the Complaint and lasts until January 11, 2017.

**F. RATIONALE**

As a general matter, District had the burden to prove that they complied with their obligations under the IDEA. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 527 (3d Cir. 1995). The Parents have a right to reimbursement for their unilateral placement of Student at Boarding School, a private boarding school if there was a violation of the IDEA and that the private school placement was appropriate.” T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 582 (3d Cir. 2000) (citing *Florence Cty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 15 (1993)). This is a tuition reimbursement case. In considering the parents' tuition reimbursement request, there is the following 3-part test:

1. Has District failed to provide FAPE to Student;
2. Whether the parental placement in a private school is appropriate; and
3. Whether the equities warrant reimbursement, be it partial or in full.

Forest Grove School District v. T.A., 557 U.S. 230, 246-47. This is referred to as the *Burlington/Carter*<sup>42</sup> test.

In this case, while it is found that District did violate FAPE as of the time parent financially committed to the tuition, the parental placement is appropriate for a short period, and the equities favor a partial reimbursement, measured by a day school placement for this semester only as measured by the cost at Student’s present school for Day

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<sup>42</sup> developed in part from Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359 (1985) as modified by Florence County School District IV v. Shannon Carter, 510 U.S. 7 (1993).

Students and counseling and tutoring under the Tutoring Program at Boarding School.

1. The District Did Not Timely Provide FAPE.

While Student was formerly classified as a child with a disability, both counsel argued this case falls under the legal analysis of the request for an initial evaluation. This is appropriate as Student had been educated outside of District, with no request for District assistance or supply to District of information about Student for over 8 years.

Accordingly, the issue is did District perform an initial evaluation quickly enough for Student in this case? Both parties correctly argue the applicable length of time is forty-five (45) school days.<sup>43</sup> They differ in when they argue it starts to run. Student argues the 45-day period starts the first day of School as Mother expressed the need for an evaluation in her email of August 20, 2015 prior to the start of school. Whereas, District argues that it is not Mother's request but a particular type of request for evaluation issued with informed, written consent and prior written notice that triggers the start of the 45 school day period and this did not occur until October 5, 2015.

While we agree with the District that what is required is specific sort of request that starts the 45 school day deadline and this is more than a parental request as done by Mother August 20, 2015, the District must act without undue delay in the

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<sup>43</sup> Student was not timely reevaluated from 1<sup>st</sup> grade onwards as a consequence of Parents' choice. That is there was a waiver of their rights to reevaluations under 14 DE Admin. Code § 925.3.2 and annual IEPs under. 14 DE Admin. Code § 925.23.1 as the same were not requested within 2 years as required by 14 DE Admin. Code § 926.11.8.

creation of this request for the following reasons. 14 DE Admin Code §. 925.2.0-925.2.3 says:

## 2.0 Initial Evaluations

2.1 Initial Evaluations General: Each public agency shall conduct a full and individual initial evaluation in accordance with 5.0 and 6.0 before the initial provision of special education and related services to a child with a disability under these regulations. The initial evaluation shall be completed in a manner which precludes undue delay in the evaluation of students.

That is there is the additional overriding, requirement of there being no undue delay for District to issue permission to evaluate properly.<sup>44</sup>

Our construction of consent requirement means that what is requested has to be specific enough so the metes and bounds of the information is not unrestricted but is described and the District give Parent notice of what it is requesting and why with at least 10 days' prior notice or waiver of the same. While it is true that Mother requested an

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<sup>44</sup> While Districts argument as to what sort of consent trigger leads to the start of the 45-day period, they had to issue this sort of consent without undue delay. Districts other argument though is based on the correct statutory interpretation. 14 De.Admin Code Sec.925. 2.2 (emphasis added) says:

Request for initial evaluation: **Consistent with the consent requirements in 1.0**, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

2.3 Procedures for initial evaluation: ***Within forty-five (45) school days or ninety (90) calendar days, whichever is less, of receiving written parental consent, the initial evaluation shall be conducted; and the child's eligibility for special education and related services must be determined at a meeting convened for that purpose.***

14 Del.Admin Code Sec.925. 1.0 (emphasis added) says:

1.1 Parental consent for initial evaluation: The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability shall, after providing notice consistent with 14 **DE Admin. Code 926.3.0 and 926.4.0**, obtain informed written consent from the parent of the child before conducting the evaluation.

14 **DE Admin. Code 926.3.0** is the code provision describing prior written consent and says:

3.1 Notice: Written notice that meets the requirements of 3.2 shall be given to the parents of a child with a disability no less than ten (10) school days before the public agency:

3.1.1 **Proposes to initiate** or change the **identification, evaluation**, or educational placement of the child or the provision of FAPE to the child; or.....

The manner of giving notice is set forth in 14 Admin. Code Sec. 926.3.2 (emphasis added) as

3.2 Content of notice: The notice required in 3.1 shall include:

3.2.1 A *written* description of the action proposed or refused by the agency; and

3.2.2 A *written* explanation of why the agency proposes or refuses to take the action; and .....

evaluation effectively on August 21, 2015, her email was not specific, and to make it specific then fell on District.

This analysis merely is the sort of favored, statutory construction that all words of a statute are interpreted to have an effect. That is there is not unfettered discretion for District to decide when the 45 days starts to run. Rather it has to start after a reasonable period after a Parent request an evaluation.

There was undue delay in this case. In this case Mother requested the initial evaluation before Student was in school and it is believed when she initially went to District to enroll Student she inadvertently led District to believe that Student would be in school on the first day of school, August 31, 2015. However, this does not provide an excuse for the entire period District did not act. On September 3, 2015, as a part of a routine check, the District's Director of Education Services asked the District Educational Diagnostician (who worked at the school Student was supposed to attend) where the District was in this case and the Educational Diagnostician responded that Educational Diagnostician did not believe Student was in School.

It is reasonable that if District's Educational Diagnostician on September 3, 2015 did not believe Student was in School, a telephone request for Mother to clarify this should have been done promptly done by Educational Diagnostician or reported to Educational Diagnostician. Mother likely would said that there was a change and Student was still in Residential Therapeutic Program and that Student could not start without an IEP. A call such as this does not take much time. Had it been done, it would have been apparent to District that their assumption that they could observe Student as Student's behavioral and psychological needs had progressed to the point of not needing therapeutic residential

treatment was mistaken and Student's psychological and behavior still required in patient treatment, and that Mother wanted Student to remain enrolled in District. From there, District should and would have known that it needed to meet with Mother sooner rather than later and even if it took 5 days to offer such a meeting to Mother, the meeting and permission to evaluate reasonably should have been offered done by September 8, 2015. If this had been done the 45 school days taking judicial notice of the school calendar attached to as "A" expired on November 17, 2015.

Moreover, it is unclear why District did not get an opinion in writing sooner from its equivalent to Mother's Certified School Psychological Examiner as to whether Mother's Certified School Psychological Examiner's report sent was sufficient. The first record of said District employee being contacted and prompted for District's Educational Psychologist's opinion was on November 14, 2015 and what District's Educational Psychologist said two hours after the prompt was that the report was sufficient and District's Educational Psychologist needed the BASC 2 teacher evaluations which had been sent out allegedly but no written record of the same, over a month before.

Residential Therapeutic Program's alleged initial failure<sup>45</sup> to supply BASC 2 teacher evaluators cannot be serve as an excuse for District's omissions as evidenced that District was able to identify Student as a child with a disability on December 15, 2015 without this information. More importantly there is no proof that as at or prior to this Petitioner Mother/Father/Student caused a lack of cooperation from Residential Therapeutic

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<sup>45</sup> While there remains the problem as to when these were initially sent out and this does not appear relevant as it took about 2 weeks to get them back from Residential Therapeutic Program from the determination that Student required an IEP and if anything if contact by District and Mother had been made before winter break when educators become scarce, perhaps the joint contact would have triggered a quicker response.

Program. To the contrary, Mother and the District's Director of Education with another District Employee all successfully contacted Residential Therapeutic Program that same date December 15, 2015 made the same request for information and the end result was that Residential Therapeutic Program provided it in about 2 weeks and in time for the 30 days for District to have the IEP meeting. 34 C.F.R. § 300.323(c).

It is believed that District when it met with Mother October 5, 2015 knew that Student would be released at the end of December, 2015 and need educational services January 4, 2016 ( the first day in the new year of school) and had it met sooner with Mother it would have known this sooner as it is believed that while Mother accepted the delay initially she quickly grew to the point where she and Father made the joint decision to remove child at the end of Residential Therapeutic Program's semester which was the end of December. This was why the discussion on October 5, 2015 with Mother and District turned to transferable credits at the end of the Residential Therapeutic Program semester as credits become transferable when a child transfers, meaning Student would not be in Residential Therapeutic Program after the end of December and would need educational services the first natural school day after a winter break, January 4, 2016.

For the same reasons as above, District did not timely evaluate Student under its Child Find Obligation. See, e.g. A.W. v. Middletown Area Sch. Dist., 2015 U.S. Dist. LEXIX 9775( M.D. Pa. January 28, 2015).

This brings us to District's argument that this was a procedural violation without effect. That is not accepted as there is a damage. District's delay effectively precluded Petitioner from the option of choosing public school knowing there would be special education services. Between November 17, 2015 and December 14, 2015, District

obligated itself to no special education services even to make a determination as to what sort to provide. Moreover, a procedural violation in this Circuit has included a District's failure to comply with its Child Find duties. D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012)

Now while it is acknowledged that District has 30 days from determining that Student is eligible for Special Education Services to have an IEP, it should be noted that the information that was lacking the BASC 2's were made available in about two (2) weeks once District's Director of Education and Mother became involved in the request. Both the IEP and initial evaluation could have been done in a manner as to give the Parent a public school option.

As to Mother's deadline as to when she made payment, there is insufficient proof that was a fictitious, a self-imposed deadline. However, the undue delays by District made it so that Student would not have a public school option the first school day after release from Residential Therapeutic Program. The IEP meeting was set for January 11, 2016 which means there would be know special education services the first school day after Student was released from Residential Therapeutic Program January 4, 2016.

The unique combination of the above make this a situation where some sort of reimbursement is due. This brings us to the second question as set forth in the next section.

2. The Parental Selection of Boarding School was Appropriate.

Boarding School for now and this semester only is appropriate. The educational program there alone (as segregated from the boarding aspect) is designed for Student to make meaningful educational progress during the honeymoon period of this



semester. There are small classrooms, therapy is provided through the Dorm Master who is also a counselor.<sup>46</sup> There is a difference however, between tuition costs, books (if separately charged) fees necessary for enrollment, therapy costs and tutoring costs through the Tutoring Program which District should bear these from January 4, 2016 to the end of the semester in question only **and** a Student allowance, the costs of boarding and feeding student, which should be borne by parents. This is dealt with under the next section.

3. The Equities in this case point to Partial Reimbursement as the Appropriate Remedy

While District's omission can justify some placement, it did not dictate that Student attend a residential boarding school about 400 miles away. Nor is that reasonably necessary. Student's Residential Therapeutic Program therapist testified that Student could live at home and attend a School at home with Parents with supports. Mother considered a local school where Student could live at home Private School where Student had attended and could return to had Mother applied, but she chose not to even though she indicated it was on a short list for an insufficient reason. The only advantage seen from Boarding School over Private School is Boarding School's proclamation that every student who graduates<sup>47</sup> has an admission to college. However, that should not be the only determinative nor is the same mandated. Indeed, Mother admitted that sending Student where the education demands were high Private Parochial School was a mistake. The same possibly could be said of Boarding School (but the more likely scenario is that the assistance there as explained by Dorm Master

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<sup>46</sup> N.T. 4/14/15 295-296, 310-311

<sup>47</sup> The Dorm Master estimated that about 75% graduate.

will get Student through this honeymoon period much in the same way Student was doing better in Student's initial enrollment at Private Parochial School than Student was towards the end) and this is one of the reasons, this award is limited as to time.<sup>48</sup>

Additionally, the lack of geographical proximity of Boarding School to parents can make the therapeutic treatment of Reactive Attachment Disorder with Student and parents together live and not by skype, as recommended credibly by District's therapy less likely, rather than more likely. For this reason, Mother's refusal to allow District even on the premises of Boarding School while the IEP was being developed, and the lack of need of a residential boarding school, the development of an appropriate IEP (albeit late), the equities favor that District not be required for reimbursement of Student's allowance, food and any boarding costs for Boarding School and the compensatory period being temporary.

Judicial Notice is taken of "B". Now Counsel within 30 days are to prepare a form order (without prejudice to appeal). I am merely asking for a calculation as to an amount based upon the following sort of computation. Under Exhibit B the tuition for a day school student at Boarding School is for 2016-2017 is \$15,600 and the tuition for a boarding school student such as Student is \$44,600 or about 35% of that for Boarding School. In the form order, the parties are to set forth the amount for a day student for 2015-2016 for the period of January 4, 2016 until the end of the present semester and add this to the counseling costs and tutoring/ Tutoring Program costs paid by Petitioners. To make this easier, I am providing the following estimate which

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<sup>48</sup> Another and more important reason is that the IEP and program developed is appropriate for Student to make meaningful educational progress and the late preparation of the same does not thwart Petitioners from having this option come the end of this semester at Boarding School.

can serve as an example. Parent's paid \$26,125 for Boarding School tuition for the applicable period. If the increases of Boarding School and Day School are at the same rate, the compensable tuition would be  $\$26,125 \times 15,600/44,600$  or \$9,167 for the same period. This is compensable as is the \$100 application fee, the \$1,000 surcharge, the \$225 charge for Counseling for 1<sup>st</sup> semester prorated, the \$600 charge for Tutoring Program/tutoring prorated for 1<sup>st</sup> semester, the \$1500 for counseling 2d semester and the \$4000 for Tutoring Program/ tutoring in 2d semester. These total \$16,592. Now I do not have privy to the costs in 2015 -2016 and that is why I am ordering you to do a form order and to provide the necessary releases with Boarding School so both counsel have access to the same. If counsel choose to use my calculation above, it shall be considered as without prejudice to either party appealing on the merits.

It is uncontroverted that at some point between January 5, 2016 and January 13, 2016, Mother retracted the authorization of Residential Therapeutic Program to discuss Student with District and would not allow District even on the grounds of Boarding School. This was right before the IEP meeting of January 11, 2016 which Mother failed to attend despite notice. Mother then on January 11, 2016 said that District could view Boarding School in Spring for the next year. Mother's reason is she wanted Student to adjust. However, there is no reason District could not on site review the curriculum at Boarding School without impairing student's adjustment. Moreover, how did taking District's access to Residential Therapeutic Program have any effect on Student's adjustment to Boarding School. Moreover, when asked by District on December 15, 2015 about District going to Residential Therapeutic Program Mother pointed the District to Boarding School. Mother only retracted this withdrawal of permission in an email sent January 13, 2016. These with the IEP and

program provided by District constitute a basis to adjust the tuition as well as limit the time span. Other tribunals have adjusted the amounts awarded to not allow boarding costs under equitable principles. Scarsdale Union Free School District v. R.C. and K.C.o/b/o R.C., 60 IDELR 195 (S,D,N.Y February 4, 2013)

That brings us to the matter of Mother missing the IEP meeting on January 11, 2016, it is believed that an additional appropriate remedy for this is to find that it is inequitable for Mother to simply miss the meeting. Moreover, in light of the information that was reasonably available to District as of that date, the IEP although late is appropriate and FAPE.

This IEP provides for small group instruction, measurable goals based upon Student's education needs caused by Student's disability in an appropriate Setting, Setting C where Student is service in a regular classroom less than 40% of the day. These encompass Student's need for behavioral regulation and social skills, task completion and, organizational skills. It provides for behavioral consultation individually delivered daily and Counseling twice weekly.

The Residential Therapeutic Program therapist testified that Student did not require a residential setting and could live at home with supports. Moreover, as to Residential Therapeutic Program's therapist recommendation as to a "one on one" this was contradicted by therapist's own testimony that Boarding School was satisfactory despite the lack of a one on one. Moreover, District credibly testified that a One on One was not appropriate due to a risk of stigmatization and its greater promotion of dependence on the part of Student.

Lastly, District's Therapist and the teacher in the Setting where Student would have been had Student attended District all confirmed that the actual setting was a Classroom with 9 students, 2 paraprofessionals, the Teacher, a separate highly qualified content teacher instructor rotating in for content courses, opportunities for hands on learning, opportunities for placement in regular classrooms. Nothing presented indicates that Student requires more to make meaningful educational progress.

Now as to the remedy, District remedy is a finding that the IEP is appropriate. Here is why. District's did the IEP when Mother withdrew their access to Student. Any professional can only make a decision based in the information it has and that is what District did on January 11, 2016. Now this may have been late and a remedy applied for the lateness, but it was done so there is no reason it should not be applicable at the end of this semester at Boarding School.

4. Petitioner's Request that District be found to have violated Section 504 and for Declaratory Relief, and for Attorney Fees.

This panel does not have jurisdiction over 504 matters or Title II of the ADA so this relief is denied for a lack of subject matter jurisdiction without prejudice to bring the same to the appropriate tribunal.

This Panel is not a court and as such the determination of attorney fees are explicitly left to the court under 14 DE Admin. Code § 926.15.3.2. The same should be done with costs.

As to the Petitioner's request for Declaratory Relief, this is denied as no proof as to the necessity of the same has been provided and the relief awarded was carefully tailored to the unique facts presented.

**V. ORDER.**

1. Petitioners are ordered to provide District's and its counsel a release so that it can determine how much of Petitioner's payment to Boarding School was for tuition and fees, counseling and tutoring for Day Students from the period of January 4, 2016 until the end of the semester at Boarding School that was in session as of the time the Complaint was filed as opposed to board, allowance, and food. The parties shall prepare a form order as to the amount of tuition and fees, counseling and tutoring for Day Students from the period of January 4, 2016 until the end of the semester at Boarding School which District is liable within 30 days.

2. Effective the end of Boarding School's semester in place at the time of Complaint, the IEP drafted January 11, 2016 shall remain in place until January 11, 2017 unless modified pursuant to the IDEA. This does not prevent Petitioners' from providing additional information and the same being considered by a future tribunal if appropriate. However, absent new information provided by Parent in a timely and appropriate manner this remains in place.

This is a final order and pursuant to 14 Del. Admin. Code §§ 926.16.1 and 926.16.2, any party aggrieved by the findings and decision may appeal to the Family Court in and for the State of Delaware or the United States District Court for Delaware if done within ninety (90) days of this decision.

So Ordered this 25<sup>th</sup> day of May, 2016.

/s/Gary R. Spritz  
Gary R. Spritz, Esq.

/s/Harold M. Tarriff  
Dr. Harold M. Tarriff

/s/Jon Fletcher  
Jon Fletcher



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A

# September 2015

## Concord High School / Calendar

Sun	Mon	Tue	Wed	Thu	Fri	Sat
	1st Day of School (Grades 1-5, 6, 9, and 12) and Orientation Day Pre-K and Kindergarten	All Students Attend School	7:30am Underclass Picture Day		PK-12 School Closed (Offices Open) Schools Closed, Offices Open	
	PK-12 Schools & Office Closed - Labor Day	6:30pm Lancashire - Open House (Grades K-2)	6:30pm Carrcroft - Open House (Grades K-2) 8:30pm Harlan - Open House 6:30pm Lancashire - Open House (Grades 3-5) 6:30pm Lombardy - Open House (Grades K-2) 6:30pm Mt. Pleasant Elementary - Open House (Grades K-2) 7:00pm Bush - Open House	6:30pm Carrcroft - Open House (Grades 3-5) 6:30pm Mt. Pleasant Elementary - Open House (Grades 3-5) 6:30pm Springer - Open House (Grade 6)		
	PK-12 Schools Closed (Offices Open) - Rosh Hashanah	1:00pm Senior Portrait Make-Ups 6:30pm Claymont - Open House 7:00pm Brandywine - Open House	1:00pm Senior Portrait Make-Ups 4:30pm Brandywine Community School - Open House 6:30pm Hanby - Open House 6:30pm Lombardy - Open House (Grades 3-5) 7:00pm Forwood - Open House (Grades 3-5)	5:30pm District Music Vendor Night - Claymont Elementary 6:30pm P.S. duPont - Open House 6:30pm Springer - Open House (Grades 7-8) 6:30pm Talley - Open House (Grade 6) 7:00pm Forwood - Open House (Grade K-2)		
			PK-12 Schools Closed (Offices Open) - Yom Kippur	6:30pm Talley - Open House (Grades 7-8)		10:00am Homecoming v. MPHS
		7:00pm Mount Pleasant High School open house	7:00pm Concord - Open House		PK-12 Schools Closed (Offices Open) - Professional Development	

# October 2015

## Concord High School / Calendar

Sun	Mon	Tue	Wed	Thu	Fri	Sat
		7:00pm Mount Pleasant High School open house	7:00pm Concord - Open House	1	PK-12 Schools Closed (Offices Open) - Professional Development 16	
4	5	6 Grades 6-12: 1st Marking Period Interim Grading Ends	7 19	8 20	9 21	10
11	12 22	13 23	14 Grades 6-12: 1st Marking Period Interim Distributed 8:00am PSAT Day for 10th and 11th Grade Students 24	15 25	16 PK-12 School Closed - Parent/Teacher Conferences (Offices Open) <del>26</del>	17
18	19 26	20 27	21 Underclass Picture Make-up Unity Day - Unite Against Bullying - Wear Orange 28	22 29	23 30	24 8:00am 5K Run/Walk - Together We Can Make a Difference - Hanby MS
25	26 31	27 32	28 33	29 34	30 35	31

# November 2015

Concord High School / Calendar

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2 36	3 37	4 38	5 Grades 6-12: 1st Marking Period Ends 39	6 Grades 6-12: Schools Closed - Staff Professional Work Day (Offices Open)	7
8	9 Grades 6-12: 2nd Marking Period Begins 40	10 41	11 Schools & Offices Closed - Veterans Day	12 42	13 43	14
15	16 44	17 Grades 6-12: Report Cards Distributed (1st Marking Period) 45	18 7:00pm Parent Meeting Winter Sports	19 7:00pm Fall Gala Concert	20	21
22	23	24	25 PK-12 Schools Closed: Professional Development Day (Offices Open)	26 PK-12 Schools & Offices Closed (Thanksgiving Holiday)	27	28
29	30			7:00pm Noises Off (School Play)		

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**B**

SEARCH ...

# Day Students

## 2016 - 2017 Tuition

Day Student: \$15,600

[REDACTED] County Resident Scholarship: \$10,000

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SEARCH ...

# Domestic Boarding Options

## 2016 - 2017 Tuition

Domestic Boarding Student Tuition and Fees: \$44,460

Student Expense Account: \$500

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DELAWARE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING PANEL

IN THE MATTER OF: )  
Student ) )  
 ) DE DP 16-23  
Petitioner, )  
 )  
v. )  
 )  
BRANDYWINE SCHOOL DISTRICT )  
 )  
Respondent. )

**ORDER FOR RELIEF**

AND NOW this 22d day of June, 2016, pursuant to the Decision of the Hearing Panel dated May 25, 2016, it is hereby ORDERED that within 30 days of the date of this Order, Respondent Brandywine School District shall reimburse the Petitioners, Father (name redacted by Hearing Officer) and Mother, (name redacted by Hearing Officer), in the amount of \$18,356.98.

/s/ Gary R. Spritz  
Gary R. Spritz

/s/ Harold M. Tarriff  
Harold M. Tarriff

/s/ John Fletcher  
Jon Fletcher