

*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

Child's Name: H.B.

Date of Birth: [redacted]

ODR No. 18081-16-17-KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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Dates of Hearing:

September 29, 2016; November 14,  
2016; December 8, 2016; December  
12, 2016; January 23, 2017; February  
8, 2017

Date of Decision:

March 21, 2017

Hearing Officer:

William F. Culleton, Jr., Esq., CHO

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> is a resident of the District named in this matter (District), and is enrolled in kindergarten at a private school (School) for the 2016-2017 school year. (NT 8-9.) Prior to enrolling in the School, Student was enrolled in an early intervention program under the auspices of the local intermediate unit. Student's Mother and Father (Parents) and the District participated in the transition to school age educational planning process. The District, at Parents' request, provided a re-evaluation report and conducted three meetings with Parents, offering successively revised iterations of the Individualized Education Program (IEP) for Student. The District has classified Student under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disability of Autism. (NT 8-9.)

Parents assert that the District failed to offer Student a free appropriate public education (FAPE) for Student's kindergarten year. Parents filed this due process request in August 2016, pursuant to the IDEA; section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504); and the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. (ADA).<sup>2</sup> Parents request reimbursement for one year's tuition and costs for Student's participation at the School, and the costs of private evaluations that Parents obtained unilaterally.

The District asserts that it offered Student a FAPE for Student's kindergarten year.

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<sup>1</sup> Student, Parents and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality.

<sup>2</sup>I exercise jurisdiction over section 504 claims pursuant to the Special Education Dispute Resolution Manual and Chapter 15 of the Pennsylvania Code, 22 Pa. Code §15.2 et seq. I assert jurisdiction over the ADA claims and decide them here only insofar as they are "derivative" claims that assert issues and request relief that is identical with the issues and relief requests advanced pursuant to the IDEA. 22 Pa. Code §14.102(a)(2)(xxx) (expressly incorporating 34 C.F.R. §300.516, including subsection (e) of that regulation); Batchelor v. Rose Tree Media Sch. Dist., 2013 U.S. Dist. Lexis 44250 (E.D. Pa. 2013); Swope v. Central York Sch. Dist., 796 F.Supp.2d 592, 600-602 (M.D. Pa. 2011). Therefore, the analysis in this decision will refer only to the IDEA and section 504.

The hearing was completed in six sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District failed to offer a FAPE to Student, and I enter the appropriate equitable relief.

### **ISSUES**

1. Did the District offer to provide a FAPE to Student for Student's kindergarten year in compliance with the IDEA?
2. Did the District provide Parents with appropriate opportunity to participate in educational planning for Student in compliance with all of the procedural requirements of the IDEA?
3. Is the School an appropriate placement for Student?
4. Considering the equities, should the hearing officer order the District to reimburse Parents for tuition and costs incurred on account of Student's participation in the School during the 2016-2017 school year?
5. Should the hearing officer order the District to reimburse Parents for the cost of the private educational evaluation by the private school psychologist, along with the cost of the private psychologist's participation in this matter to the extent provided under section 504?
6. Did the District offer to provide a FAPE to Student for Student's kindergarten year within the meaning of section 504?

### **FINDINGS OF FACT**

1. Student is [early elementary school-aged] and has been diagnosed with Autism Spectrum Disorder from the age of two. The District has classified Student with Autism as defined in the IDEA. (NT 8-9; P 2, 30, P 16.)
2. Student has a history of tested cognitive ability within the average to superior ranges. (NT 286, 396-397, 402-403, 733-734; P 30; S 33.)
3. Student has a history of delayed speech. The family is bilingual. (P 1.)
4. Student has a history of difficulties with attention to task, sensitivity to noise and avoiding larger group settings. Parents reported this as a concern when Student was two years of age, and again when Student was three years of age. Attention to task was identified as an educational need when Student was two years and ten months old, in an IU evaluation for

transition from the birth-to-three program to Early Intervention. In a private evaluation when Student was three years old, Parents reported that they withdrew Student from a nursery school due to the school's inability to obtain Student's attention to task. (P 1, 2, 3, 6, 7 pp. 11-13, 17.)

5. Student is highly distractible and hyperactive, and struggles with self-regulation, especially in group settings of more than two to three persons. Student has demonstrated short attention to task when playing with toys, but longer attention to computer screens and preferred activities. Student demonstrated significant elopement behaviors from unwanted demands. (NT 152, 155-156, 294, 357-358, 418-419, 426, 507-508, 518, 525-526, 649-652, 677-678, 748-749, 1038-1040; P 1, 2, 3, 6, 8, 9, 10, 13, 17, 19, 30, 45; S 31, 33.)
6. Although Student had a history of advanced ability to sight-read words, Student's reading comprehension was delayed, as were Student's speech and language, fine motor, adaptive and social skills. Student exhibited elopement behaviors that created risk of physical harm to Student. (NT 694-700; P 30.)

#### INTERMEDIATE UNIT SERVICES, STUDENT AGE TWO THROUGH FIVE

7. The local Intermediate Unit provided Student with early intervention services from age 2 to age 5 in a variety of settings. (P 2.)
8. At age three, Student transitioned from home based services to services outside the home, through placement in an autistic support classroom, along with speech and language services. (NT 148; P 2.)
9. Student made progress in one-to-one and small group settings, but little progress in larger settings. (NT 147-153; P 1, 2, 3, 5, 6, 8, 12.)
10. At age four, Student attended a developmental preschool with about eight peers and three staff. Student also attended a typical preschool for part of the week, with Therapeutic Staff Support services. Student attended a summer program in a class with about fifteen peers, again with Therapeutic Staff Support services. (NT 150-156; P 2.)
11. At age four years, ten months, Student had made significant progress in academic readiness and pre-academic skills in small settings with ABA methodology. Student had made little progress in language and social interaction. Student's clinician recommended a small group setting for Student so that Student could make progress in communication and language. (NT 147-153, 182-185, 1099; P 2 pp. 23-25; P 21.)
12. During the 2015-2016 transitional school year, Parents provided Student with a placement at their own expense in a clinical setting that provided one-to-one instruction utilizing the Verbal Behavior methodology, which utilizes a form of Applied Behavior Analysis. The program included natural setting learning opportunities with up to three peers. (NT 159-165, 618-623; P 20, 21, 22, 30.)

13. The local intermediate unit provided related services in the form of speech therapy and occupational therapy. (NT 164-165; P 30.)
14. In January 2016, the Verbal Behavior program provided a comprehensive treatment plan that included baseline progress information on various skills, including requesting; labeling; listener responding; matching; non-verbal initiation with peers; identifying the functions of items; “intraverbal” skills, including answering certain types of questions; remaining seated in a group of peers and following instructions; identifying phonetical sounds; tracing Student’s name and writing letters of the alphabet. (NT 604-616; P 21, 30.)
15. Student made some progress in communication and language when placed in the Verbal Behavior program, mostly in expressive rather than receptive language. (NT 604-616; P 2 pp. 23-28, P 13.)
16. At ages two through five, Student benefitted from services provided either directly, one-on-one, or in small groups of two to three persons. Student did not benefit significantly from services provided in settings with larger numbers of peers and staff present. (NT 147-165; P 2, 13.)

#### DISTRICT 2016 RE-EVALUATION, TRANSITION TO SCHOOL AGE

17. Parents participated in transition procedures for Student to transition to school age in the District’s kindergarten classes. Parents provided information and releases as part of this process. Parents informed District personnel that Student had a history of inattention and lack of organization, sensory needs and elopement. (NT 165-170; P 20, 23, 26, 27; S 15.)
18. District personnel received a progress report from the ABA/VB program that Student was attending, along with a “VB-MAPP” recording form that showed Student’s developmental progress from age four years, ten months to age five years, ten months, in the Verbal Behavior program. District personnel did not attempt to obtain additional records from the service providers for which they had releases. (NT 50, 604-616, 673-674, 722-724, 839-840; P 25.)
19. In April and May 2016, the District conducted a re-evaluation of Student, coordinated by a qualified certified school psychologist. The re-evaluation was based in part upon observations of Student in individual, one-to-one instruction or in small groups of no more than three peers with the support of a one-to-one attendant or aide. District personnel did not see Student in larger settings. (NT 36, 662-668; P 30; S 37.)
20. Parents advised the school psychologist of the fact that Student had been placed in several placements from age three to the date of re-evaluation, and that some placements had not been successful. (NT 672-673.)
21. The District’s school psychologist reviewed a progress report from the Student’s then-current placement in the ABA/VB program. (NT 722-724, 731, 814; P 21, 30.)

22. The District's re-evaluation was comprehensive, assessing all of Student's suspected educational needs. (NT 673-676, 700-701; P 30.)
23. The District's April 2016 re-evaluation report included a Functional Behavioral Assessment (FBA) based upon a behavior specialist's four observations of Student at home and at the ABA program in March 2016. (P 30.)
24. The District's school psychologist observed Student at the ABA program in March and April 2016, during testing sessions that lasted for several hours. The psychologist spoke to Parents and ABA clinician about the psychologists' observations, and both confirmed that the observations were typical of Student's behavior in the small setting. (P 30.)
25. The District's re-evaluation was based upon multiple strategies and assessments, including behavior rating inventories, autism scales, aptitude assessments; formative assessments, assessments of pre-academic and academic achievement, assessments of academic readiness skills, the FBA, an occupational therapy evaluation and a speech and language evaluation. (S 21.)
26. The District provided a re-evaluation report in April 2016 which found delayed adaptive and school readiness skills, including delayed phonemic awareness, vocabulary, reading comprehension, mathematics number sense and mathematics concept development. The re-evaluation report found below average expressive and receptive language skills, and delayed functional communication, especially initiation of communications. It found delayed social skills. (P 30.)
27. The re-evaluation report found that Student was experiencing problems with attention, executive functions, sensory processing and behavior regulation. (P 30.)
28. The District's April 2016 re-evaluation report identified Student with Autism Spectrum Disorder. It concluded that Student would not benefit from a regular education classroom without significant support. It concluded that Student demonstrated a degree of need that indicated likely benefit from instruction in an autistic support setting providing supportive, individualized and intensive intervention. (NT 702-703; P 30.)
29. The District's April 2016 re-evaluation report recommended that Student be placed in a structured small group setting with low teacher to student ratio for communication arts and mathematics. It recommended that Student's classroom be highly structured, with slight deviations introduced gradually to encourage adaptation and independence. It recommended gradual exposure to larger groups dependent upon success or failure. (NT 702-703; P 30.)
30. The District's April 2016 re-evaluation report recommended direct instruction focusing upon compliance, engagement, joint attention building throughout the day and following directions, with systematic interventions and targeted learning. It recommended direct social skills instruction. It recommended direct speech and language therapy and consult occupational therapy. (NT 702-703; P 30.)

31. Parents advised District personnel of the availability of data from the Verbal Behavior program for the 2015-2016 school year showing Student's achievement in the skills addressed by the VB-MAPP assessment. (NT 50, 189-190, 778; P 25.)

#### MAY 21, 2016 OFFERED IEP

32. On May 4, 2016, the District convened an IEP team meeting and provided a draft IEP. The Parents attended, along with Student's behavior specialists and Student's therapist at the VB/ABA program during the transitional year who were very familiar with Student, and had seen Student in a variety of settings. (NT 189-190.)
33. The IEP team discussed the draft and Parents' concerns at the May 4, 2016 meeting. Parents discussed Student's attention difficulties, Student's history of placements and varied degrees of success at each, and Student's progress at the VB/ABA program. Parents indicated disagreement with the District's offered placement combining regular education and supplemental special education support classrooms. Parents indicated their preference for a full time small setting with one-to-one support, and inquired about other conceivable service configurations, such as part-time District kindergarten and part-time verbal behavior programming. (NT 190-192, 778, 804; P 32.)
34. After the meeting, the District offered a revised draft IEP indicating a placement in a non-neighborhood District school that offered an autistic support program through a staff of experienced and qualified educators and educational leaders. (NT 85-86; S 37- S 41.)
35. The revised draft IEP offered Student a placement of supplemental autistic support; it left unclear the number of hours per school day in which Student would be educated in small group settings. (NT 126-129, 186-189, 196-198; P 32; S 25.)
36. The revised draft IEP specified that Student would not receive instruction with non-disabled peers for direct instruction in Communication Arts and Mathematics; however, it provided that Student would receive opportunities to be instructed with nondisabled peers for unspecified portions of those two subjects, whenever Student did not need direct instruction intervention in the autistic support classroom for what was being taught in those subjects. It provided for instruction with typically developing peers for up to 67% of Student's school day. (NT 126-129, 186-189, 196-198, 749-751, 814-816; P 32; S 25.)
37. The revised draft IEP provided for instruction in the regular education setting for other academic and special subjects, as well as for unstructured or schoolwide activities. The PENNDATA section of the draft IEP indicated that Student was to receive instruction in regular education settings for 4.3 hours in a 6.3 hour school day. (NT 186-189, 196-198, 749-751; P 32; S 25.)
38. The revised draft IEP did not offer to provide a one-to-one educational aide or attendant. (NT 196-198; P 32; S 25.)

39. The regular education classroom proposed for Student was expected to have 20 to 25 children, including some autistic support students, and several staff. The total number of people in the classroom could range from 28 to 31. (NT 214, 817-821, 829-830.)
40. District members of the IEP team based their placement recommendations in part upon a philosophy of “presumed competence”, through which they held that Student should be presumed able to learn in environments that challenge Student’s deficits or weaknesses, including larger classroom settings with typically developing children and instruction in age- and grade –appropriate curriculum. (NT 711, 848-852.)
41. District members of the IEP team based their placement recommendations in part upon their usual and customary process with regard to children entering their autistic support kindergarten program. This consisted of assessing the child in their environment with regard to readiness to participate in the general education classroom, and then moving the child to that environment when they assessed that the child was ready. (NT 914-915, 947-948, 1106-1113.)
42. The revised draft IEP offered four goals with multiple objectives addressing length and grammatical correctness of spoken sentences; vocabulary building; answering and asking “wh” questions; utilizing prepositional phrases; listening and reading comprehension; counting; mathematics concepts; maintaining time on task; and directing attention to peers. (NT 196-198; P 32; S 25.)
43. The revised draft IEP goals were not sequentially related to the more specific goals reported in the Verbal Behavior program, and did not derive baselines from that program’s reports. Goals did not have baselines, but the IEP offered to establish baselines in October of Student’s kindergarten year. (NT 74-76, 196-198, 725, 737-747, 836-837, 1099-1100; P 32; S 25.)
44. The revised draft IEP offered specially designed instruction and accommodations addressing attention; following directions; transitioning between activities; engagement in school; functional communication; working memory; independence; self-regulation; and testing accommodations. (NT 196-198; P 32; S 25.)
45. The revised draft IEP offered occupational therapy consultation services as supports for school personnel, but not as related services. Speech and language services were offered on a one-to-one basis, specified as a certain number of hours per year. This formulation made it difficult for Parents to understand the number of hours that would be delivered on a weekly basis. (NT 196-198; P 32; S 25.)
46. The revised draft IEP included a Positive Behavior Support Plan with two goals addressing transition to non-preferred activities and elopement. (NT 196-198; P 32; S 25.)
47. On May 4, 2016, the District issued a NOREP. The special education supervisor provided the May 4 NOREP to Parents by email on May 20, 2016. The NOREP indicated that consideration had been given to full-time placement in general education, but did not indicate consideration of a placement in autistic support full time or for a larger portion of the day than two hours. (NT 786-787; P 26; S 29.)



48. On May 21, 2016, Parents observed both the regular education kindergarten classroom and the autistic support classroom proposed for Student. The autistic support classroom was small, and Parents observed instruction being conducted with about three children. (NT 192-194, 245-246.)
49. Autistic support students were not present in the regular education classroom when Parents observed. (NT 192-194, 245-246.)
50. The curricular level of instruction in the autistic support classroom was below Student's current level of academic achievement, and Parents expressed this concern. (NT 192-194, 245-246, 417-418, 424-425, 486-490, 642-643, 654, 720, 737-747, 923-925; P 33, 41, 45; S 28.)
51. After observing classrooms on May 21, 2016, Parents met with the District's special education supervisor, who added both speech therapy hours and occupational therapy hours to the offered IEP, amending the draft during the meeting with Parents, at their request. (NT 196-201, 789-790; P 32; S 25.)
52. The supervisor explained that the related services were formulated on a yearly basis to allow flexibility in weekly delivery, but that delivery would be weekly as a general rule. (NT 69-70, 200-201.)
53. At the meeting on May 21 with the supervisor, Parents indicated their concern about the number of hours of inclusion that were proposed for Student for each school day. (NT 226.)
54. Parents discussed the revised draft IEP PENNDATA section indicating a plan for inclusion up to 67% of the school day, and they were told that some of that time would be lunch and recess. The District did not deny to Parents that it intended to place Student in inclusive settings up to 67% of the day during the one year term of the offered IEP. (NT 195.)
55. After meeting with Parents on May 21, 2016, the District's special education supervisor provided Parents with a copy of a revised IEP, and later sent a NOREP for their signature, which they received on May 23, 2016. (NT 188-198; P 32; S 25.)
56. The May 21, 2016 revised IEP added a statement of parental concerns and District personnel responses as recorded at the May 4, 2016 IEP team meeting. It added specially designed instruction and accommodations including provision of hand fidgets; assessment of prompting necessary for appropriate use of the bathroom; use of written prompts; limiting distractions; and provision of a peer buddy to address social skills needs. (S 25.)
57. The May 21, 2016 revised IEP offered increased hours of individual and group occupational therapy and speech therapy, as revised by the special education supervisor at the May 21, 2016 meeting with Parents, but it did not specify of the size of the groups. (NT 196-198; P 32; S 25.)
58. The May 21, 2016 revised IEP included an individualized elopement safety plan for Student. (S 25.)

59. The May 21, 2016 revised IEP continued to offer the same placement and inclusion language as the May 4, 2016 draft IEP had offered, with the same unspecified amount of time spent in general education, and the same PENNDATA statement indicating up to 67% of the school day spent in inclusive settings. (NT 126-129, 896; S 25.)
60. The May 21, 2016 revised IEP continued to offer the same goals as the May 4, 2016 draft IEP had offered, with the same deferral of the baselines. (S 25.)
61. The May 21, 2016 revised IEP provided for collaboration among teaching staff and revision of supports as needed without requiring a prior IEP team meeting. (NT 196-198; P 32; S 25.)

#### PRIVATE EVALUATION AND IEP REVISION IN JUNE 2016

62. Parents declined to sign the NOREP, requesting an informal meeting with District personnel, which was scheduled for June 20, 2016. (S 26.)
63. Parents indicated a preference to continue Student in Student's current placement, but asked to explore other conceivable placement configurations. (S 29.)
64. Parents obtained a private evaluation of both Student's needs and the proposed District program and placement. On June 6, 2016, the evaluator observed the general education and autistic support classroom environments that the District proposed for Student for about 40 minutes, the amount of time permitted by the District's supervisor of special education. (S 29, 30, 33.)
65. The private evaluator concluded that Student was properly classified with Autism, that Student needed speech and language, as well as occupational therapy. (P 34.)
66. The private evaluator concluded that Student needed placement in a small classroom setting with no more than eight students and "multiple hours" of one-to-one direct, ABA based instruction, rotation of instructors to encourage generalization, and constant adult supervision for safety. (P 34.)
67. The private evaluator concluded that a regular education kindergarten classroom with 18 children and staff would be too large for Student due to Student's exceptional level of distractibility and the consequent need to reduce stimuli in the instructional setting far below the levels that would exist in a regular education setting. (P 33.)
68. On June 20, 2016, the Parents and District personnel met to discuss the private evaluator's findings. The evaluator was present at the meeting and delivered her written report to Parents and District personnel at the meeting. (NT 42, 99; S 29, 33.)
69. Parents reiterated their concern about having Student in inclusive settings for large portions of the day because of Student's difficulties with distractibility, attention to task and self-regulation. Parents reiterated their concern about Student's elopement behavior. (NT 204-205.)

70. Parents spoke about the VB-MAPP from the then-current program at the June 20 meeting. (NT 244.)
71. District personnel indicated that they would assess whether or not Student needed more time per day in the autistic support classroom after Student entered the program, and that the amount of time in autistic support could be adjusted as a result of that assessment. (NT 227-228.)
72. During the June 2016 meeting, District personnel described the Competent Learner Model of teaching autistic support classes, which utilizes techniques from Applied Behavior Analysis, but also provides an emphasis on teaching the child to generalize skills learned in the one-to-one instructional setting. (NT 94-98, 205-207, 1106-1113, 1173; S 36.)
73. At the meeting, Parents provided the District with additional reports from current service providers that concurred with the private evaluator's conclusion that Student needed a small instructional setting due to Student's distractibility. (NT 244; P 35; S 33.)
74. Parents inquired about a number of different conceivable configurations of Student's time, and were not insistent upon retaining Student at the then-current year ABA/VB program or any other program. (NT 207-208, 231-233, 247-248, 253, 255-258, 348; S 26.)
75. The District presented an elopement plan to be part of a revised IEP. (S 32.)
76. The District offered to revise the May 2016 IEP to add specially designed instruction and accommodations, including additional adult coverage of school exits; daily communication with Parents; multisensory teaching; accommodated computer access; and social skills instruction. (S 32.)
77. The District offered to revise the May 2016 IEP to add supports for school personnel including enhanced consultation and training among relevant disciplines. (S 32.)
78. The District did not offer to utilize the VB MAPP data provided by Student's current program, but indicated that Student's teachers would utilize assessments within the Competent Learner Model that would measure Student's progress similarly. (NT 73-76.)
79. The District indicated to Parents that Student would be assigned to an experienced and qualified autistic support teacher. (NT 245.)
80. District personnel indicated to Parents that paraprofessional support was routinely available in the autistic support program to which Student was assigned. Paraprofessionals were not assigned to be solely responsible for each student, but were responsible for up to two students as needed by each. Paraprofessionals would be available to attend students in general education as needed, and such support would be faded according to the individual child's needs. (NT 801-802, 824-829.)
81. District personnel promised to make an effort to provide a revised IEP by the week after July 4, 2016, but the District did not deliver the revised IEP at that time. (NT 112, 208.)
82. On or about July 21, 2016, after receiving Parents' July 19, 2016 "ten day notice" of intent to place the Student in a private school for kindergarten, the District provided Parents with

a revised IEP reflecting agreements and offers that had been made on June 20, 2016, along with a Notice of Recommended Educational Placement/Prior Written Notice (NOREP). (P 35; S 32.)

83. The June 2016 revised IEP continued to place Student in supplemental autistic support, defined as providing special education supports and services during more than 20% and less than 80% of the school day. (S 32.)
84. The June 2016 revised IEP continued to state that Student would spend an unspecified amount of time in regular education for Communication Arts and Mathematics instruction, whenever Student did not need direct instruction in the autistic support classroom for those subjects. (NT 57-58, 229-231; S 25, 32.)
85. The June 2016 revised IEP continued to provide for instruction in the regular education setting for all other academic and special subjects, as well as for unstructured or schoolwide activities. (S 25, 32.)
86. The June 2016 revised IEP continued to contain contradictory and confusing statements regarding the offered placement. The PENNDATA section of the June 2016 revised IEP indicated that Student was to receive instruction in regular education settings for 5 hours in a 6.3 hour school day, implying that the amount of time that Student would require direct instruction in the autistic support classroom would be less than two hours per day, and that most of the day would be spent in the general education setting. In contrast, however, the percentage calculation of time in regular education was stated to be 21%. Contradicting this percentage, the check-box in the PENNDATA section indicated that Student would spend between 40% and 79% of the school day in general education settings. (NT 60-61, 229-230; S 32.)
87. School District personnel did not at any time indicate to Parents that the PENNDATA entries in the IEP were erroneous due to clerical error until after Parents had placed Student at the School. (NT 106, 805-806.)
88. The June 2016 revised IEP indicated that District educators would gradually increase Student's time in regular education without assuring that they would first convene an IEP team meeting. (NT 57-58; S 32.)
89. The June 2016 revised IEP indicated that student would receive instruction in social skills and behavior strategies in an unspecified setting, implied but not stated to be an autistic support setting. (S 32.)
90. The June 2016 revised IEP added paraprofessional support in general education settings, with language indicating that supports would be faded, without IEP language assuring that District educators would first convene an IEP team meeting. The paraprofessional would not be assigned solely to Student, but would be available for a number of students as needed. (NT 258-263; S 32.)
91. In general it was discussed at the meeting for revision of the IEP on June 20, 2016 that the IEP team would be in constant communication about changes to the program, including

Parents. However, it was not promised that Parents would be consulted prior to such changes. (NT 55-57, 61-69; S 32.)

92. The June 2016 revised IEP added paraprofessional support for transitions within the school building, with the paraprofessional holding Student's hand during those times. (S 32.)
93. The June 2016 revised IEP continued to offer the same goals as the May 4, 2016 draft IEP had offered, with the same deferral of the baselines. Not all of these goals were appropriate in view of Student's level of functioning at the time. (NT 429-436; P 21; S 25, 32.)
94. The June 2016 revised IEP added specially designed instruction and accommodations, including additional adult coverage of school exits; daily communication with Parents; multisensory teaching; accommodated computer access; and social skills instruction. (NT 56-57, 59; S 32.)
95. The June 2016 revised IEP continued to offer related services by stipulating a yearly number of hours. (S 32.)
96. The June 2016 revised IEP did not specify group sizes for speech therapy and occupational therapy sessions. (S 32.)
97. The June 2016 revised IEP continued to offer the Positive Behavior Support Plan that had been offered in May 2016, with the same behavior goals and objectives. (S 25, 32.)
98. Student's kindergarten year would have been the first year in which Student's assigned autistic support classroom implemented the Competent Learner Model of instruction. (NT 130, 135-136, 1107; P 45.)
99. Student's assigned autistic support and regular education teachers would have had access to a behavioral service provider with expertise in Applied Behavior Analysis techniques, and Student's assigned special education teacher is trained and experienced in ABA techniques. (NT 111-112; S 38.)
100. On July 22, 2016, the District issued a NOREP placing Student in supplemental autistic support. The NOREP indicated that consideration had been given to full-time placement in general education, but did not indicate consideration of a placement in autistic support full time or for a larger portion of the day than two hours. (NT 808-809; P 36.)
101. On September 8, 2016, the School offered an IEP to parents. It offered a revised goal for attending, as measured by Student's ability to sit for up to 30 minutes while attending to task, from a baseline of 10 minutes. This goal projected greater attention to task than the goal provided in the District's offered revised June 20, 2016 IEP that addressed the same skill; in that goal, the baseline was sitting for 5 minutes, with a goal of sitting for 10 minutes. (S 32; P 41.)
102. The offered IEP found Student to be ineligible for ESY services. (S 32.)
103. In July 2016, Student's was unlikely to benefit appropriately from educational services provided to Student in large classrooms of fifteen or more students, due to

Student's distractibility and difficulties with self-regulation. (NT 304-306, 356-357, 524, 529-533, 558-573, 584, 616-618, 626-628; P 34, 45; S 21 pp. 22-23.)

#### PARENTS' DECISION TO PLACE STUDENT UNILATERALLY IN THE SCHOOL

104. Parents were aware of and considering the School for a future educational placement when Student was four years of age. (NT 209, 254; P 2 p. 24.)
105. In early July, Parents sent messages and made telephone calls requesting the revised IEP whose delivery had been promised by July 4; however, they received no response to these inquiries about when they could expect to receive the revised IEP. (NT 113, 803.)
106. In July, Parents inquired into the availability of a place in the program of the School, and were told that there was one place available, and that the Parents would need to commit to enrolling Student in the School by August 1, 2016 in order to secure the remaining place. (NT 209-210, 347-348.)
107. On July 19, 2016, Parents sent their ten day notice of intention to place Student in the School and seek tuition reimbursement from the District. (P 35; S 32.)
108. Parents received the revised June 2016 IEP on or about July 21, after Parents sent their ten day letter. (NT 42, 116, 204, 210, 231; P 35, 36; S 32.)
109. Parents reviewed the IEP and found that the language offering placement, the nature of paraprofessional support in the general education classroom and the goals without baselines had not changed materially; therefore, they concluded that they would need to engage the District in further discussions in order to seek further changes, and that this would take several weeks or months. (NT 231-233.)
110. On or about August 5, 2016, Parents signed a contract with the School and presented a deposit. On the same date, Parents filed a request for due process seeking tuition reimbursement from the District. (NT 371; P 37, 38.)
111. The contract with the School gave Parents until August 15 to revoke the agreement. (P 37.)
112. Parents have paid the full tuition charged by the School for the current school year, along with costs. (NT 349, 370-371.)
113. In September 2016, Parents enrolled Student in the School. (NT 211.)

#### EDUCATIONAL SERVICES PROVIDED BY THE SCHOOL

114. Student currently attends kindergarten at the School, which is a Pennsylvania licensed private school for children with autism. (P 43.)

115. The School teaches Student in a classroom setting with eight peers and five staff. This setting is less restrictive than the ABA/VBMAPP program that Student attended in the previous year, and can serve as an intermediate step from the previous year program and the District's autistic support program as offered by the District. (NT 212-213, 215-216, 257-258, 284, 294, 352-362, 383-384, 514, 532-533.)
116. Student is taught by teachers with Pennsylvania certification. The School's related services providers are also Pennsylvania certified. The program is staffed by board certified behavior analysts. (NT 285, 298, 310, 350-352.)
117. Student has an IEP developed by personnel at the School with parental input. The Student's IEP goals for reading comprehension, listening comprehension, as well as multiple speech/language and occupational therapy goals provided baselines derived from recent testing results of private assessments obtained by Parents. (NT 277, 1048-1052; P 41.)
118. Student receives at least two hours per day of intensive ABA-based instruction, and related services such as speech and occupational therapy are available. (NT 271, 281, 283, 285, 311-312; P 41, 43.)
119. The School provides opportunities for Student to participate in some informal and classroom settings with typically developing, but substantially older, children, as well as with same age typically developing peers. (NT 213, 278-279, 288, 302-305, 315-319, 353-354; P 43, 45.)
120. The School provides opportunities for Student to participate in informal and classroom settings with typically developing children, utilizing a grade level curriculum appropriate to Student. (NT 213, 278-279, 296, 302-305, 315, 353-360; P 43.)
121. Student made significant progress during the current school year at the School Student transitioned rapidly and easily to its program. During the 2016-2017 school year at the School, Student demonstrated increased ability to interact with peers and typically developing, older students. School personnel were looking forward to increasing Student's exposure to larger, less supported settings with typically developing peers. Student is making academic progress as well. (NT 287-288, 295, 301, 358-361, 426-428.)

## CREDIBILITY

122. Parents have seen Student in educational or training settings such as community based athletic and artistic programs where the group of peers being instructed at any one time was large. (NT 148-159.)
123. In February 2016, Parents reported during intake for a psychiatric evaluation of Student that they were uncertain as whether or not Student would be attending a District kindergarten, and that they were discussing this option with District personnel. (P 24 pp. 3-4.)

124. Parents reported Student's attention and self-regulation difficulties to the District in the parent questionnaire that they returned as part of the transition-to-school age process in February 2016. (P 27.)
125. Parents' expert evaluator observed Student in small settings and observed the placement proposed for Student by the District. The evaluator observed the District's proposed autistic support classroom twice, and the general education classroom where Student would have been instructed for an increasing proportion of the day. The District's supervisor of special education limited the time for these observations. (NT 417-426, 470; P 34, 45.)
126. Parents' expert evaluator observed Student in the School on two occasions. The evaluator saw direct instruction in Student's classroom as well as inclusion activities in which Student participated. (NT 426-428.)
127. The evaluator's second observation at the District's autistic support classroom was performed for purposes of testifying in this due process matter. (NT 521-523.)
128. Parents' private psychologist-evaluator did not perform a comprehensive psychoeducational evaluation due to the short time allowed between her retention and the June 20 scheduled IEP meeting. (NT 711-712.)
129. Personnel at the School observed Student and Student's distractibility on a daily basis and were able to gauge Student's readiness to attempt programming in larger school settings. (NT 283-284, 295.)
130. Student's behavior specialist observed Student in a variety of settings both large and small. (NT 554-556, 558-563, 580-581.)
131. Student's speech therapist during the year preceding Student's transition to kindergarten observed the Student in the clinical setting and attempts to generalize to more natural settings. (NT 1022, 1026-1027, 1037-1038, 1041.)
132. Student's therapist in the ABA program in the year preceding Student's transition to kindergarten was familiar with Student's needs through daily sessions with Student on a one-to-one basis. (NT 592, 596-597.)
133. The District's re-evaluation report references eight evaluations or IEPs that Parents provided to the District; these span a period of August 2013 to January 2016. (P 30.)
134. The District's April 2016 re-evaluation report acknowledged Student's attention and self-regulation difficulties, as well as Student's measured progress in speech, language, academic, behavioral and social skills in the Verbal Behavior program during the 2015-2016 school year. (P 30.)
135. The District school psychologist did not see the District's Competent Learner Model program implemented in the autistic support classroom to which Student was assigned. (NT 719.)



136. No District personnel observed Student in a setting as large as the regular education classroom to which Student would have been assigned. (NT 719, 751-752, 816, 830, 995-996.)

## CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>3</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>4</sup> that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance

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<sup>3</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>4</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

of the evidence in support of Parents' claim, or if the evidence is in "equipoise", the Parents cannot prevail under the IDEA.

## CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I reach the following credibility determinations.

Considering the testimony in light of the documentary evidence, I find all of the witnesses to be credible. However, I assign lower weight to the opinions of District witnesses that the placement proposed by the District was appropriate for Student, for three reasons. First, none of the District witnesses observed Student in settings as large as the District's proposed regular education setting. Second, most of the District witnesses had never seen Student at all<sup>5</sup>. Third, none of the District witnesses had seen the proposed District autistic support classroom implement the new Competent Learner Model of instruction, not necessarily due to any lack of diligence on their parts, but because it was new to that classroom in the current year. Therefore, I must discount their opinions as to the appropriateness of the District's offered placement due to a lack of sufficient factual basis.

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<sup>5</sup> This is not a criticism of these witnesses; Student had not entered the District and most had no opportunity to meet with Student. Nevertheless, this fact reduces the weight of their opinions on appropriateness of the placement for this Student.

The two District witnesses who did observe Student were unable to see Student in large settings, due to the circumstances of their evaluations. This lack of data concerning Student's ability to learn in large settings necessarily undercuts the opinions of the witnesses. In addition, these witnesses gave almost no importance in their testimony to the extensive evidence that Student had failed to make significant educational progress in large settings, much of which Parents had made available to them before they formulated their opinions.

Much, but not all of the evidence as to the appropriateness of the District's offered program consisted of the opposed testimony of the two school psychologists – the private evaluator produced by the Parents, and the District's school psychologist. I had concerns about the testimony of each. The Parents' private evaluator presented an evaluation of Student within two weeks, due to the Parents' wish to have information in that period of time. Consequently, the evaluator's testing and evaluative strategies were not as comprehensive as is customary in educational evaluations, and her criticism of the District's proposed goals and modifications seemed so lacking in basis that for the most part they amounted to a mere repackaging of Parents' criticisms. The School psychologist similarly presented little factual basis to conclude that the District's proposed program was appropriate – the school psychologist even endorsed an early proposal to include Student for the majority of the day in regular education at the beginning of the new school year, apparently contradicting her own previous recommendations in the Re-evaluation Report. In short, I received with caution these opinions on the ultimate question in this case, since they appeared to be based upon inadequate facts.

Nevertheless, I found that the Parents' evaluator, a highly experienced professional, well versed in the process of psychoeducational evaluation, presented a firm basis for her opinion that Student was, at the time of the District's offer, too distractible and hyperactive, too challenged by

issues of self-regulation, to be able to gain significant benefit from a regular education classroom setting, even with supplementary aids and services. In this clinical observation, which stands on its own merit due to the evaluator's depth of experience and training, the evaluator was supported by the great preponderance of the evidence. Moreover, the evaluator herself made every effort to see the competing placements at issue in this matter, thus rounding out a solid factual basis from which to draw her expert judgment that the Student was, essentially, not ready to benefit from inclusion.

On the contrary, the District's school psychologist drew all of her inferences about Student's likely struggles with attention and self-regulation from her observation of Student and that of another, highly credible behavior analyst hired by the District for purposes of completing the re-evaluation in this matter. Both observations took place in a one-to-one setting; neither observed the extreme distractibility and hyperactivity that the record preponderantly proves. I conclude that the District evaluators' opinions about Student's readiness for inclusion are less persuasive than the opinion of the Parents' private evaluator to the contrary.

## TUITION REIMBURSEMENT

Although the parent is always free to decide upon the program and placement that he or she believes will best meet the student's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private placement<sup>6</sup>.

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<sup>6</sup> The weight of judicial authority in this Circuit holds that tuition reimbursement is available under section 504, and that the Burlington-Carter tests are equally applicable to section 504 claims for tuition reimbursement. See, 34 C.F.R. §103.33(c)(4); Lauren G. v. West Chester Area Sch. Dist., 906 F.Supp.2d 375, 390-391(E.D. Pa. 2012). Therefore, I so conclude. It follows that the ADA provides the same remedy. 42 U.S.C. §12133 (providing same "remedies, procedures and rights" for ADA claims as are available under section 504). See, Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996), overruled on other grounds, A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (2007)(allowing ADA claim for same remedies as available under section 504).

Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district’s program legally adequate? Second, is the parents’ proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3<sup>rd</sup> Cir. 2007).

#### FIRST PART OF THE BURLINGTON-CARTER TEST: FAILURE TO OFFER OR PROVIDE A FAPE

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE is “special education and related services”, at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to provide a FAPE, the child’s IEP must specify educational instruction

designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S. Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a “basic floor of opportunity” for the child. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the program and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Applying these standards to the above findings and the record as a whole, I conclude that the District failed to offer a FAPE to Student prior to Student's kindergarten year. The offered program was not reasonably calculated to provide meaningful benefit for five reasons. First, the offered placement was not appropriately individualized to meet Student's unique needs as discussed below. Second, the autistic support classroom as proposed in the IEP was not reasonably calculated to provide Student with meaningful functional, academic and social skills benefit. Third, the offered goals were not related to Student's then-current levels of achievement. Fourth, the offered related services were described inappropriately. Fifth, the District did not provide the "serious consideration" required by governing law to the appropriate level of restrictiveness for Student's individual needs, consequently denying Student a reasonable opportunity for educational benefit. Combined, these problems rendered the IEP not reasonably likely to provide educational benefit.

## PLACEMENT

The District's placement offer was substantially unrelated to Student's unique educational needs. From the beginning of the legally prescribed transition-to-kindergarten period, the District was on notice that the Student continued to struggle with an unusually high level of distractibility, hyperactivity, sensory seeking and overall inability to self-regulate. Yet the District offered a placement that addressed only minimally addressed the Student's likely need for highly structured and small classroom settings, from the beginning to the end of Student's kindergarten year.

Parents placed the District on notice of Student's unique constellation of educational needs by providing District personnel with unlimited access to Parents' numerous providers; presenting documentation of Student's progress in various settings; answering multiple District questionnaires and behavior inventories; bringing their most knowledgeable providers to IEP and

informal meetings; and obtaining a private assessment of Student's functioning in small and large settings, conveyed in a written report and through the evaluator's participation in an informal meeting.

The evidence of record is more than preponderant that Student's attention difficulties, hyperactivity, sensory seeking and self-regulation difficulties required a small, highly structured setting at the beginning of kindergarten, and for a substantial part of the ensuing school year. The Parents provided compelling evidence that Student had never succeeded in a setting larger than twelve, and had made significant progress in settings smaller than that. Parents' private evaluator, based upon years of training and experience, advised the District's educators that Student's attention and other difficulties, combined with deficits in verbal comprehension, required the reduced distraction and increased structure of a small classroom setting. The District's own re-evaluation, citing Student's unique needs, recommended instruction in a small, highly structured autistic support classroom with supportive, individualized, intensive academic and behavioral interventions. It recommended close proximity and direct instruction in joint attention building skills throughout the day, along with direct instruction in social skills, beginning with expansion of play skills. Considered in full, the record demonstrates that the District's emphasis on general education for substantial portions of the school day failed to account for Student's educational needs for structure and reduced environmental distraction.

Instead of a full time placement in the District's available, small and structured autistic support classroom, the District offered a placement that would start Student in general education from the first day of school, with unclear provision of supplementary aids and services, for the major portion of Student's day. Moreover, this offer was not definitive as to the number of hours that Student would be in such a setting. Nor did the offer provide Parents with any assurance that



Parents would be able to have any meaningful influence over decisions to increase Student's time in regular education settings. Indeed, the District's initial and subsequent placement offers, which directly contradicted the Parents' input and that of three educators, all of whom were qualified and well-acquainted with Student's history and current functioning, suggested that Parents' input would not be given substantial weight with regard to placement.

District educators testified that they had adopted the educational philosophy of "presumed competence" in making this decision. Quite literally, this philosophy as they explained it requires adherents to "presume" that a child is able to succeed in a less restrictive placement. From this testimony I can only conclude that the District's educators utilized this presumption to determine how much regular education to offer to Student. But the IDEA does not authorize districts to utilize presumptions about children in making an offer of FAPE<sup>7</sup>. The result in this case was that the offer of placement was not tailored to meet Student's unique needs for a small, structured environment.

#### AUTISTIC SUPPORT CLASSROOM

The District's proposed autistic support classroom was not reasonably calculated to provide Student with meaningful functional, academic and social skills benefit, for three reasons. First, the IEP made it unclear that Student would be in that classroom for a sufficient number of hours to benefit from direct instruction. Second, the level of functioning of the Students assigned to that classroom varied, and there were so few students in the classroom that there was no assurance that Student would be taught at the level of functional and academic achievement that the Student had already attained. Third, the classroom was scheduled to start implementation of a new instructional

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<sup>7</sup> In this conclusion, of course, I do not presume to criticize this philosophy as applied to other areas of teaching, for example, in creating classroom environments intended to encourage generalization of skills. The law does not address any such other uses. But it clearly requires that an IEP and placement address the actual needs of the child, without resort to non-factual presumptions. 34 C.F.R. §300.324(a)(1)(iv).

methodology, and there was no way to tell whether or not this new methodology would be implemented with fidelity in the beginning months. In short, the classroom proposed for Student did not offer a clear and predictable instructional program to Student, and thus was not reasonably calculated to provide a FAPE.

## IEP GOALS

The District offered the same IEP goals in three IEP iterations from May to July 2016. These goals were not coordinated with, nor did they build upon, the detailed progress reports of the Student's transition-year ABA/VB program that Parents provided to the District. District educators offered goals that proposed learning skills that Student had already mastered in the ABA/VB program. Conversely, goals were offered that appeared to reach beyond what Student reasonably could be expected to achieve within the annual IEP period. While District educators posited that they could take a skill mastered in the essentially one-to-one setting of the ABA/VB program and teach Student to generalize that skill, thus providing meaningful progress in that skill, the IEP goals as written did not reflect that this was the aim. Although the goals as written were measurable, 34 C.F.R. §300.320(a)(2)(i), they lacked baselines that could have been derived from the ABA/VB program's progress reports. The District's decision not to offer such baselines underscores that the offered goals were unrelated to Student's then-current levels of achievement as reported by the program that preceded Student's entry into kindergarten.

## RELATED SERVICES

The IEP, as proposed originally, failed to address the Student's need for paraprofessional support. As amended, it provided for paraprofessional support in transitions between areas of the

school and in general education settings. However, this offer was inappropriate for two reasons. First, it did not specify the level or duration of such support to be provided in the regular education setting. Second, the revision provided a revised offer only at the last minute for Parents, in mid-July, when they needed to decide within a week whether or not to place Student unilaterally. Thus, this offer was both too little and too late to be a meaningful revision to an already deficient IEP.

The offered IEPs provided for total hours of related services in hours per IEP year. This formulation, while it adequately conveyed the quantity of services, did not convey that quantity in smaller units of time, such as weeks. It is important for parental participation to convey how much service is promised per week, or at least per month, so that parents can ensure that the service provides appropriate continuity and avoids the pitfalls of regression that are common in populations identified with autism during gaps in service. Given the centrality of speech therapy to the array of services that Student needed at the time in question, it was particularly inappropriate to use the hours-per-year formulation for Student's IEP.

## LEAST RESTRICTIVE ENVIRONMENT

The District's primary defense in this matter is that it was obligated, both legally and educationally, to provide Student with an education in the least restrictive environment, right from the start of Student's school age career. While the District is legally obligated to offer its services in the least restrictive environment as defined by law, it is not obligated to eschew more restrictive environments where a child needs them in order to derive educational benefit.

The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled, "to the maximum extent appropriate ... ." 20 U.S.C. §1412(a)(5)(A). The United States Court of Appeals for the Third Circuit has construed this

language to prohibit local educational agencies from placing a child with disabilities outside of a regular classroom, if educating the child in the regular education classroom, with supplementary aids and support services, can be achieved “satisfactorily.” Oberti v. Board of Ed. Of Bor. Of Clementon Sch. Dist., 995 F.2d 1204, 1207 (3d Cir. 1993). Each public agency must assure that a continuum of alternative placements is available, including special classes, resource rooms, supplementary services and special schools. 34 C.F.R. §300.115.<sup>8</sup> The Court in Oberti noted a “tension” within the IDEA between the strong congressional policy in favor of inclusion, and the law’s mandate that educational services be tailored to meet the unique educational needs of the child. Oberti, 995 F.2d above at 1214.

Children with disabilities may not be removed from the regular educational environment unless “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A). In determining placement, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs ... .” 34 C.F.R. §300.116(d). Removal is not permitted if the sole reason is “needed modifications in the general education curriculum.” 34 C.F.R. §300.116(e).

While the District is obligated to give serious consideration to a general education placement, it is not obligated to provide such a placement if that would deny the child a FAPE. R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1008-1009 (5th Cir. 2010); see Oberti, 995 F.2d above at 1214 (“tension” noted between the LRE requirement and the FAPE requirement). In this case, I conclude that the District’s insistence on substantial inclusion of Student in general

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<sup>8</sup> This continuum assumes a mandate to educate the child in “the school that he or she would attend if nondisabled.” 34 C.F.R. § 300.116(c). State regulations require school districts to ensure that “children with disabilities have access to the general curriculum ... .” 22 Pa. Code § 14.102(a)(ii).

education from the beginning of Student's kindergarten year and throughout that year misled it to offer a placement that was not reasonably calculated to provide Student with educational benefit, within the meaning of the IDEA.

Moreover, in this case, the District failed to give serious consideration in this matter to providing a full continuum of opportunities for meaningful inclusion. Parents repeatedly suggested that the District provide Student with full-time autistic support, or in the alternative with part-time kindergarten, so that Parents could enroll Student in continued ABA/VB programming. Parents also asked for consideration of other conceivable hybrid placements that would provide more supports to Student during fixed periods of the school day. The District's only response was that they would consider that later, once the Student was enrolled in its kindergarten classes. The NOREPs recounting the options considered omitted any mention of consideration of full-time placement in autistic support, nor did it indicate consideration of the Parent-proposed third configuration of services. The evidence is preponderant that the District did not seriously consider this parental input or anything other than the dichotomous choice of full time regular education and part time regular education in District classrooms, with increased time in regular education at the discretion of staff.

In sum, and for reasons set forth above, I conclude that that the District's final offer was not reasonably calculated to provide Student with non-de minimis educational benefit and meaningful educational benefit<sup>9</sup>. Its final offer, conveyed in mid-July, was only a minimal attempt to amend a program that failed on its face to address Student's unique needs by individualized

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<sup>9</sup> Parent asserts that the District's finding of ineligibility for ESY services also renders the offered program a denial of a FAPE. I do not so conclude, because Parents failed to show by a preponderance of the evidence that the District had any evidence that ESY services were needed. As Student had not entered their program, the District had no opportunity to develop their own data, or to assess the various factors mandated for consideration by Pennsylvania Code Chapter 14 regulations. Parents failed to show that the District should have found eligibility based upon data available to it from earlier private and Intermediate Unit programming.

specially designed placement, goals and related services. I conclude that the District failed to provide Student with a FAPE as Parents had requested.

#### PARENTAL PARTICIPATION

I conclude that the District failed to provide Parents with the opportunity to participate in educational planning for Student in one respect. The evidence shows preponderantly that the District offered a placement that did not specify the amount of time that Student would spend in regular education at the beginning of the year and throughout the year. Rather, the IEP reserved to the District all discretion to determine the amount of general education time. The IEP also failed to provide that any change in the Student's placement would be preceded by an IEP team meeting with parental participation. I conclude that this constituted a denial of parental participation in educational planning in the circumstances of this case, where the amount of general education time was crucial to the appropriateness of the placement, and where it was clear beyond cavil that Parents had an overriding concern with that very aspect of the IEP.

#### DISTRICT ARGUMENTS

The District argues that much of the continuum of service that Parents demand is inherent in its programs and therefore that, by offering to enroll Student in the classrooms that it proposed, it has offered virtually all that Parent desired, and therefore has offered a FAPE. The evidence is to the contrary, preponderantly. The IEPs and NOREPs do not explicitly address the fundamental issues that Parents expressed with regard to placement, and the other IEP deficiencies, described above, are not cured by resort to the District's customs and practices.

Parent has argued consistently that any service not explicitly appearing in the IEP and NOREP is not to be considered part of the offer of special education services. I would not interpret the IDEA as requiring so explicit and comprehensive an offer. At some point, it becomes unreasonable to require educators to spell out in an IEP every aspect of the services that they provide. I do not find language in the IDEA that goes that far.

Nevertheless, parents cannot be forced to risk a unilateral placement based upon guesswork. There must be a reasonably clear and complete description of the services being offered. Services explicitly referenced in the IEP must be explained sufficiently that the parent has a clear understanding of what the District proposes to provide to the child. I interpret the term “reasonably calculated”, Shore Reg'l High Sch. Bd. of Ed., 381 F.3d above at 198, to include this minimal level of clarity in the IEP upon which parents must rely in deciding whether or not to enroll their child in a District program.

In this matter, the District’s offers were not “reasonably calculated” because they were not reasonably clear. The placement language was facially contradictory. The PENNDATA percentages of time in regular education were repeatedly incorrect, creating confusion in Parents’ minds about how much of the general education placement they would be agreeing to if they should enroll Student in the District. Nowhere in any of the IEP revisions presented to Parents was a definitive statement of how much general education and special education time would be provided, even at the start of the school year. Paraprofessional services set forth in the IEP were explained orally as a 2:1 ratio of students to paraprofessionals, rather than the 1:1 allocation implied in the explicit IEP language. Related services were stated in yearly terms so that Parents could not know how much of related services would be provided per week. The new Comprehensive Learner

Model was unintelligible to Parents<sup>10</sup> and was not referenced in the IEP. Nowhere was it indicated that the IEP goals would be related to Student's level of achievement. In short, the IEPs were not specific<sup>11</sup> enough to allow Parents to make an informed choice between the District's offered program and other options.

## SECOND PART OF THE BURLINGTON-CARTER TEST: THE PRIVATE SCHOOL IS AN APPROPRIATE PLACEMENT

I turn to the second part of the three-part Burlington-Carter analysis for tuition reimbursement requests. I conclude that the private placement chosen by the Parents for Student is appropriate.

A unilateral placement does not have to be the equivalent of that provided by a competent local education agency under the IDEA. Even a private placement's failure to meet state education standards is not a bar to tuition reimbursement. 34 C.F.R. §300.148(c); Lauren W. v. DeFlamminis, 480 F.3d 259, 276-277 (3d Cir. 2007). The private placement only needs to provide significant learning, confer meaningful benefit, and provide the least restrictive environment appropriate to address the Student's needs. Munir v. Pottsville Area Sch. Dist., 2013 U.S. App. Lexis 15129 (3d Cir. 2013); Lauren W., above at 276-277. I conclude that the School meets these requirements.

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<sup>10</sup> Thus, I do not conclude that the District is precluded from choosing the educational methodology that it finds to be appropriate. K.C. v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 813-814 (E. D. Pa. 2011)(agency right to select own methodology); see Leighty v. Laurel Sch. Dist., 457 F. Supp. 2d 546 (W. D. Pa. 2006)(IDEA does not deprive educators of the right to apply their professional judgment). Rather, I find that the selection of this methodology had an effect on Student and Parents, in that it reduced the likelihood of Student's success under the circumstances, and rendered the nature of the placement unclear and confusing to Parents.

<sup>11</sup> Parents make much of the IEP references to fading of supports and prompts. While I conclude above that the references to gradual changing of the restrictiveness of placement was fatal to the District's offer, I do not so conclude with regard to fading of prompts on a day to day basis. Nothing in the IDEA requires such micromanagement of educational services.



A preponderance of the evidence in this record proves that the School is providing services that are reasonably calculated to provide Student with significant learning. The School is appropriately licensed and staffed. It teaches a curriculum that is consistent with Pennsylvania core standards. It has provided Student with assessments of Student's needs and current levels of functional, developmental, academic and social functioning. It has provided a private Individualized Education Program with measurable goals, many of which begin with baselines derived from Student's ABA/VB program progress reports from the previous school year. Student's educational needs are being addressed.

The evidence is preponderant also that these services have provided Student with significant learning and meaningful benefit within the intent of the IDEA, in the short and early portion of the school year for which data was available to be introduced into evidence in this matter. Witnesses who oversee Student's program and see Student every day testified without contradiction that Student has acclimated well to the program, and is starting to display awareness and motivation for social interaction. Parents' private evaluator reported that the School's program was meeting Student's needs.

The question of least restrictive environment was at the heart of the disagreement here between Parents and the District. I have concluded that the District's offer of services was inappropriate in view of this child's needs, in large part because it proposed to move Student to general education too soon and too fast, as Parents have proven by a preponderance of the evidence. Conversely, I conclude that the Parents' choice of setting for this child provides, for the current school year, an appropriate degree of restrictiveness, while also providing opportunities for Student to generalize skills in interaction with typically developing peers.

The evidence shows preponderantly that the School provides many and varied configurations in which its students are able to interact with typically developing peers, including both older students and same-age students. These opportunities are highly structured, with high staff-to-student ratios, to enable children with Student's level of social awareness to expand their social skills gradually, in accordance with their abilities to learn and generalize skills. Student has taken part in such activities and has demonstrated growth in the social skills being taught and generalized.

In addition, the evidence shows that the School offers opportunities for instruction in small general education settings. While Student is not deemed ready to benefit from such experiences, Student is considered a possible future candidate.

### THIRD PART OF THE BURLINGTON-CARTER TEST: THE EQUITIES

The last part of the Burlington-Carter test authorizes the hearing officer to apply equitable considerations to either reduce or deny tuition reimbursement, otherwise authorized by the IDEA. While the IDEA provides guidelines for equitable circumstances in which such a modification of tuition reimbursement would be appropriate, the language of the applicable regulation indicates that such a determination is within the discretion of the hearing officer. 34 C.F.R. §300.148. Exercising that equitable discretion, I find no reason to reduce or deny tuition reimbursement.

Parents were unable to discern how the District's offered program was calculated to address Student's attention deficit and related behavioral difficulties in school. I find that their decision to enroll Student in a private school was not inappropriate and that they complied with the IDEA's requirement to provide the District with an opportunity to cure the deficiencies in its program before they enrolled Student in the private school. 34 C.F.R. §300.148(d)(1)(ii).

On July 19, 2016, Parents provided 10 day notice according to law, and indicated their intention to remove Student from the District and enroll Student unilaterally in a private school at District expense. Parents waited more than 10 days after this before signing an application and placing a deposit with the School at their own expense, so the Student could be enrolled there for the coming school year. During this regulatory period, Parents had no reason to believe that the District would make a further attempt to address the Parents' concerns with its offer. Considering all of the evidence, I find nothing inequitable in Parents' behavior in making this decision. The IDEA posits a 10 day notice as presumptively fair, and Parents provided it<sup>12</sup>.

The District argued that Parents had predetermined to place Student in the School, and that the entire exercise of cooperating with the District's efforts to evaluate Student and make an offer of FAPE were simply going through the motions so that they could bring this due process request for tuition reimbursement. I explicitly find to the contrary. I find Parents' every action bespeaks a willingness to learn, an open-minded judgment about what is best for their child, and a fair-minded and thorough assessment of District offers that were, to a glaring extent, self-contradictory and inconsistent on their face. The equities weigh clearly in favor of Parents in this matter.

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<sup>12</sup> The District argues that Parents failed to give it yet another chance to alter the non-specific placement language in its offered IEP at the resolution meeting required by the IDEA as part of the procedures for receiving a due process hearing, 34 C.F.R. §300.510. It argues that the purpose of this required meeting is to give the school district a chance to resolve the matter, and that this purpose is undercut if parents are allowed to stand by their ten day notice and refuse to consider an IEP offered after expiration of the ten day notice period. I disagree, and reject this argument. The law explicitly provides for satisfaction of equitable concerns by providing a ten day notice prior to unilateral placement. Nothing in the general language of the regulation governing the resolution process contradicts this clear, specific provision. That circumstances may exist that militate against resolution does not contravene the resolution meeting requirement.

## SECTION 504 VIOLATION

I conclude that the District, which violated the IDEA by failing to offer a FAPE, also violated its obligations not to discriminate on account of handicap under section 504<sup>13</sup> and the ADA<sup>14</sup>. Based upon the record in the present case, the District failed to make an offer that was reasonably calculated to provide meaningful educational benefit. I conclude that this failure was also a failure to design Student's education in order to meet Student's individual needs as adequately as the needs of non-handicapped children in the District are met. 34 C.F.R. §104.33(b)(1).

## REIMBURSEMENT FOR EXPERT EVALUATIONS

I will order the District to reimburse Parents for the educational evaluation that Parent obtained privately, based upon my equitable authority to remedy a deprivation of FAPE by making Parents whole for providing information to the District that led it to reconsider and alter the placement offer that they made. A special education hearing officer has equitable remedial authority to order reimbursement. See generally, G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015)(requiring complete remedial orders). The circumstances of this matter equitably favor such an order.

In May, the District offered to place Student in general education, without mention of paraprofessional support in the IEP, with placement in autistic support for less than two hours per day. In June, after hearing from Parents' evaluator, it rewrote the IEP to provide for autistic support for the majority of Student's day. Although Parents, upon receipt of this new offer in mid-July,

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<sup>13</sup> There is no dispute that the District receives federal funding, that Student has a handicap within the meaning of section 504, and that the Student is "otherwise qualified" for section 504 purposes.

<sup>14</sup> I make this finding under the ADA only insofar as the Parents' claims and remedies that I consider are coextensive with or "derivative" of the Parents' IDEA claims. 20 U.S.C. §1415(l). See above, note 2.

reasonably found that the District's offer remained vague, contradictory and confusing in light of its failure to specify the amount of time in Autism support to begin the year, still the District essentially reversed its emphasis from offering placement primarily in general education to offering placement primarily in special education, a substantial shift in emphasis and service. I conclude that the private evaluator's opinion, which lent professional weight to Parents' previously formed lay opinions of the original District offer, substantially influenced the District to thus reverse its placement emphasis. In equity, this merits an order to pay for the private evaluator's June 20, 2016 report.

I decline, however, to order reimbursement for the evaluator's second report dated December 1, 2016 and her appearance at the hearing of this matter. These services were clearly performed in anticipation of litigation, and solely for the purposes of litigation. The IDEA does not provide for District payment of expert witness fees in due process. I do not conclude that there is any equitable basis for such an award in this matter, either pursuant to my authority under the IDEA, or any authority under section 504. Therefore I decline to enter the requested order regarding the evaluator's time spent in preparing the December 2016 report and testifying in these proceedings.

### **CONCLUSION**

I conclude that the District failed to offer to provide a FAPE to Student for the 2016-2017 school year, thus violating both the IDEA and section 504. It also deprived Parents of the opportunity to participate in educational planning by offering a placement that could change materially at the discretion of staff without an IEP team meeting. The Parents' unilateral placement is appropriate, and the equities favor tuition reimbursement. Therefore, I will order the District to

reimburse Parents for Student's tuition and costs for Student's attendance at the School for the 2016-2017 school year. In addition I will order reimbursement of the Parents' costs for the private psychoeducational evaluation dated June 20, 2016.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District shall reimburse Parents for the cost of tuition and all other costs charged by the School, for Student's enrollment at the School during the entire 2016-2017 school year, not including summer programming.
2. The District shall reimburse Parents for the cost of the private psychoeducational evaluation and report dated June 20, 2016 and marked as Exhibit P 34 in this matter.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

DATED: March 21, 2017