

*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**

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**Child's Name:**

E. H.

**Date of Birth:**

[redacted]

**CLOSED HEARING**

ODR Case #18497-1617AS

**Dates of Hearing:**<sup>1</sup>

February 27, 2017 - March 15, 2017 - March 28, 2017 - April 28, 2017

**Parents:**

Parent[s]

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*Counsel for Parents*

**School District:**

Pittsburgh School District – 341 South Bellefield Avenue – Pittsburgh, PA – 15213

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*Counsel for the School District*

**Date of Decision:**

June 20, 2017

**Hearing Officer:**

Michael J. McElligott, Esquire

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<sup>1</sup> The parties presented evidence over the February, March, and April sessions. An early April session, which would have been the final session in the hearing, was cancelled due to hearing officer illness. Counsel for the parties requested time to submit written closing statements after the final session in late April.

## **INTRODUCTION**

Student (“student”)<sup>2</sup> is a late teen-aged student who formerly resided in the Pittsburgh School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>3</sup> for specially designed instruction/related services as a student with autism, as well as needing support in mathematics.

Parents claim that the student was denied a free appropriate public education (“FAPE”) during the student’s enrollment in the District for a period from December 2014 – June 2015. Thereafter, the student was enrolled in a private out-of-state placement for the summer of 2015 and, briefly, in a private out-of-state placement at the outset of the 2015-2016 school year and then, in October 2015, in a second out-of-state private placement for the remainder for the 2015-2016 school year, and the fall of 2016. In December 2016 the student took a diploma from the second private placement. Parents seek tuition reimbursement for these private out-of-state placements, including the summer programming. Parents also seek reimbursement for various out-of-pocket expenses related to the private placements.

The District counters that at all times its programming was designed to provide FAPE and, when implemented, did provide FAPE to the student for the period of the student’s enrollment in the District. As such, the District argues that the parents are not entitled to remedy, whether compensatory education or tuition reimbursement.

For the reasons set forth below, I find in favor of the District.

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<sup>2</sup> The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

<sup>3</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 (“Chapter 14”).

## **ISSUES**

Did the District provide the student FAPE  
in the period December 2014 - June 2015?

If the answer to this question is answered in the negative,  
is the student entitled to compensatory education?

Are parents entitled to tuition reimbursement  
for the unilateral private placements undertaken  
in summer 2015?

Are parents entitled to tuition reimbursement  
for the unilateral private placement undertaken  
for the 2015-2016 school year,  
and the fall of 2016?

Are parents entitled to reimbursement  
for out-of-pocket expenses  
related to these private placements?

## **FINDINGS OF FACT**

### Schooling Prior to 11<sup>th</sup> Grade

1. The student attended both private schools and District schools in the school years prior to the school years at issue in this matter. As early as June 2006, the student was evaluated by the District, under the equitable participation doctrine, while attending a private school. (Parents' Exhibit ["P"]-1, P-2, P-3, P-4; Joint Exhibit ["J"]-6).<sup>4</sup>
2. As part of the June 2006 equitable participation evaluation, the student's full-scale IQ was 91. The student demonstrated strengths in reading and written expression, and weakness in numeric operations. On an autism assessment, both the student's teacher and mother rated the student in the severely-autistic range, which aligned with a prior diagnosis of autism spectrum disorder from outside evaluations. The District evaluator found that the student met the criteria for identification of the student as a student with autism. (J-6).

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<sup>4</sup> A neuropsychological report issued in the spring of 2015 (see Finding of Fact 35, and following, below) contained a section entitled "Brief Relevant History" which contains a multitude of information related to the student's early life and significant educational, behavioral, and therapeutic needs. Some of this information included information from the student's time at the District. Other aspects of this information, however, was not shared with the District, at least as evidenced on this record, including the private neuropsychological report itself. (P-10, P-25f, P-25g, P-25h, P-25i, P-25k, P-25m, P-25n, P-25v; School District Exhibit ["S"]-1, S-16 at pages 31, 34, 44-45; Notes of Testimony ["NT"] at 245, 677).).

3. In March 2010, in the spring of 6<sup>th</sup> grade, the student came to the District from private schooling and was re-evaluated by the District. The District found that the student continued to be identified as a student with autism. (J-7).
4. The student received special education services through individualized education programs (“IEPs”) developed in March 2010 (spring of 6<sup>th</sup> grade and most of 7<sup>th</sup> grade) and March 2011 (spring of 7<sup>th</sup> grade and most of 8<sup>th</sup> grade). (P-2, P-3).
5. While at the District, the student was resistant to being viewed as a student having a disability or requiring special education. The services for, and placement of, the student were designed around this resistance. (NT at 155-158, 161-162).
6. In March 2012 (spring of 8<sup>th</sup> grade), the student’s IEP underwent its annual revision. (P-5).
7. The student did not return to the District for the 2012-2013 school year (9<sup>th</sup> grade). In the 2012-2013 and 2013-2014 (10<sup>th</sup> grade) school years, the student attended a private school. (S-5, S-11 at page 3).
8. In April 2014, the family was informed that the private school where the student had been attending would close its doors, and the family began preparations for decision-making for 11<sup>th</sup> grade. (S-17 at pages 1-20).
9. In June 2014, the student underwent a District equitable participation re-evaluation for potential enrollment in another private school. The student’s full-scale IQ was 100. The student demonstrated weakness in numeric operations and math problem-solving. The evaluator found, through input and assessment, that the student continued to be a student identified as a student with autism. For the first time in the District’s evaluative history, a diagnosis of anxiety disorder was reported. (J-8).
10. In July 2014, the student underwent a District evaluation for potential return to the District. The July 2014 re-evaluation report included some updated information but was largely based on the equitable participation re-evaluation report completed a month earlier. (J-1).

### 11<sup>th</sup> Grade

11. The student did not attend the District at the outset of the 2014-2015 school year (11<sup>th</sup> grade), instead enrolling at a different private school. (NT at 170-171).
12. In November 2014, the student’s family contacted the District regarding re-enrollment, and in early December 2014, after the Thanksgiving break, the student began to attend a District high school. (S-4, S-5, S-17 at pages 20-31; NT at 172).
13. Upon re-enrollment in the District, in December 2014, while the student’s IEP was being drafted, the student received services through the student assistance program and the District provided observations and strategies. (P-12, P-13, P-25a, P-25b, P-25c, P-25d; S-8, S-16 at pages 1-12).

14. In December 2014, the student experienced behavioral and academic difficulties adjusting to the District high school. (P-11, P-14 at pages 1-4, P-25e; S-9 at pages 3-4).
15. In January 2015, following a drafting process over December, the District issued an IEP based on the July 2014 District evaluation report ("ER"). (J-2, J-3, J-8).

*January 2015 IEP*

16. The January 2015 IEP indicated that the student had performed in the average range on most achievement assessments in the July 2014 ER, except for numerical operations and math problem-solving where the student performed in the below average range on each assessment. (J-1; J-2 at pages 7-8).
17. The January 2015 IEP indicated that the student's grades in academic classes at the private school which the student attended in the fall of 2014 were: As in creative writing, algebra, biology, social studies, and a B in English. (J-2 at page 8).
18. After approximately four weeks of instruction at the District (December and early January), the student's grades in academic classes were: As in web design and African-American history, B in English, C in algebra, and D in biology. The mathematics and biology teacher indicated that missing work impacted the student's grades. (J-2 at page 8).
19. The January 2015 IEP indicated that the student is resistant to the identification as a student with autism and is resistant to the ideas of special education and having an IEP. (J-2 at pages 9).
20. The January 2015 IEP noted that, based on the July 2014 ER, the student experiences difficulty in social interaction and social communication. The student also experiences significant anxiety in the educational setting. (J-1; J-2 at page 9).
21. The January 2015 IEP included parental input related to strategies and accommodations that the parents felt would be effective for the student. (J-2 at page 11).
22. The January 2015 IEP identified needs in anxiety reduction/management, organization/focus, and mathematics. (J-2 at page 11).
23. The January 2015 IEP included post-secondary transition planning in the areas of post-secondary education, employment, and independent living. (J-2 at pages 10, 12-13).
24. The January 2015 IEP included two goals, one for coping strategies/interventions for anxiety and one for mathematics. (J-2 at pages 18-19).
25. The January 2015 IEP included numerous accommodations in the form of specially designed instruction and modifications for use across academic settings, including extended time, frequent breaks, frequent checks for understanding,

increased wait time for oral answers, chunking of information/tasks, prompting/cuing when providing directions, repetition of new material, positive reinforcement, modified workload, assistance with organization of class materials, peer partnering, provision of outlines/study guides, and modifications in mathematics class. (J-2 at page 21).

26. The January 2015 IEP included strategies to allow the student to manage anxiety, including frequent breaks when anxious, access to “cool down” locations, access to music (soothing to the student when anxious), and monthly school counseling sessions. (J-2 at pages 18, 20).
27. The January 2015 IEP included accommodations specifically geared to mathematics, including use of a calculator and use of a formula sheet. (J-2 at pages 20-21).
28. The January 2015 IEP included specially designed instruction and modifications to address focus and organization, including extended deadlines for assignments, chunking of tasks, assistance with organizing classroom materials, and the provision of outlines/study guides. (J-2 at page 21).
29. The January 2015 IEP indicated that the student would receive 100% of instruction in the regular education environment. (J-2 at page 26).
30. The student continued to be deeply resistant to being identified as having a disability, to recognizing the need for special education, and to receiving specially designed instruction/modifications to address the autism-spectrum disorder. (P-25c, P-25f, P-25g, P-25n, P-25ii; S-16 at pages 30, 37; NT at 176, 180, 416-417, 455-457).
31. In January 2015, the student’s parents approved the recommended program and placement. (J-3).

*11<sup>th</sup> Grade – February/March/April 2015*

32. In February-April 2015, participating in the counseling sessions and through various check-ins with the student, the student would share feelings of anxiety, anger, and negative feelings about others. The student also struggled, at times, academically. At the same time, the District continued to refine accommodations and work with the family on the needs the student was exhibiting in the educational environment. (P-14 at pages 5-6, P-25o, P-25q, P-25r, P-25s, P-25t, P-25u, P-25w, P-25x, P-25y, P-25aa, P-25bb, P-25dd, P-25ff; S-16 at pages 13-120).
33. In February 2015, the student was involved in two behavioral incidents with other students. (S-9 at pages 1-2).
34. In April 2015, due to parents’ concerns, the parents requested a re-evaluation of the student. At the same time, District personnel shared views that the student might require a program with a therapeutic component in addition to an academic component. The District sought permission to re-evaluate the student, but parents did not provide permission to re-evaluate, preferring instead to pursue a private

evaluation. (J-4, J-5; P-25f, P-25g, P-25h, P-25i, P-25k, P-25m, P-25n, P-25v; S-1, S-16 at pages 31, 34, 44-45).

*April/May 2015 Neuropsychological Evaluation*

35. In late April/ early May 2015, the family engaged a private neuropsychologist for a private neuropsychological evaluation (“April/May 2015 neuropsychological report”). (P-10, P-14 at page 8).<sup>5</sup>
36. The April/May 2015 neuropsychological report consisted of three parts: (1) a psycho-educational evaluation, (2) a neuropsychological battery, and (3) an objective behavioral assessment. (P-10 generally and at page 2).
37. The April/May 2015 neuropsychological report found that the student’s IQ was 84, in the low average range. (P-10 at pages 2-3).
38. The April/May 2015 neuropsychological report found that, on academic/achievement testing, the student presented weakness in writing and a specific learning disability in mathematics. (P-10 at pages 3-6, 18).
39. The April/May 2015 neuropsychological report indicated, in its neuropsychological component, that the student exhibited difficulties with fine motor skills, some strengths and some weakness with attention/focus, some strengths and some weaknesses in processing speed, some strengths and some weaknesses in visuo-perceptual and constructional abilities, some strengths and some weaknesses in language (but an explicit finding that the student does not have a receptive language impairment but may have difficulty with semantics/word retrieval), some strengths and some weaknesses (notably in visual memory) in memory, some strengths and some weaknesses in executive functioning (with notable skew between the parents’ ratings and student’s self-rating on executive functioning in a behavioral context), some strengths and some weaknesses in learning strategies (with particular weakness in study strategies and time management), and some strengths and some weaknesses in complex problem-solving. (P-10 at pages 6-16).
40. The April/May 2015 neuropsychological report included objective behavioral assessment, finding that the student’s diagnoses/identifications as a student with anxiety, internalizing problems, and autism were reflected in the assessments, as well as confirming the student’s autism-spectrum identification through an autism/Asperger’s assessment. (P-10 at pages 16-18).<sup>6</sup>

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<sup>5</sup> The private neuropsychological report lists April 30, 2015 and May 7, 2015 as the dates of evaluation. The report itself, however is undated and the mother’s testimony was not clear as to when it was provided to the family. Therefore, the private neuropsychological report will be referred to as the April/May 2015 neuropsychological report. (P-10).

<sup>6</sup> In this section of the April/May 2015 neuropsychological report, the evaluator administered a personality assessment and attention-disorders scales. The evaluator treated these results cautiously in light of the fact that those assessments touched on potential psychiatric assessment, which was beyond the scope of his expertise and the evaluation, as well as the fact that previous psychiatric treatment had ruled out attention issues. Given the caution of the evaluator’s stance on these issues in the April/May 2015 neuropsychological report, those results are not incorporated into these findings of fact.

41. The April/May 2015 neuropsychological report acknowledged that “(the student) is essentially in denial of (the) spectrum disorder....” and that “(the student) refuses to be recognized for special education accommodations/adaptations.” (P-10 at page 1).
42. The April/May 2015 neuropsychological report recognized that the student’s strengths centered on verbal processes/understanding and the student’s weaknesses centered on non-verbal processes/understandings. (P-10, generally).
43. The April/May 2015 neuropsychological report recommended the following: breaking down multi-step directions and tasks, verbal instruction and demonstrative/hands-on learning, heightened need for organization and structure, accommodation for predictive/anticipatory tasks, management of stress/anxiety in academic settings, extended time, and strategies for social problem-solving. (P-10 at pages 19-20).
44. The evidence is preponderant that the April/May 2015 neuropsychological report was not shared with the District. (P-25f, P-25g, P-25h, P-25i, P-25k, P-25m, P-25n, P-25v; S-1, S-16 at pages 31, 34, 44-45; NT at 245, 677).

#### *May 29, 2015 Incident*

45. In the late morning on Friday, May 29, 2015, the student [engaged in behavior that seemed to be potentially self-harming]. (P-15 at pages 4-6).
46. The issue was particularly acute for observers because [of a similar circumstance of another student earlier that year]. (NT at 124-125).
47. After a fellow student intervened, [redacted] statements were made by the student and others that indicated everyone involved, including the student, viewed the incident as a suicidal ideation/action. (P-15 at pages 4-6).
48. The student was seen that afternoon in the emergency department of a local psychiatric hospital and was released with instructions to continue with treatments already in place. (P-15 at pages 1-3, P-25z; S-16 at page 111).
49. The student returned to school on Monday, June 1, 2015 and attended each school day through Thursday, June 4, 2015. The student was medically excused for the last day of school on Friday, June 5, 2015 due to anxiety. (P-25cc, P-25ff; S-4 at pages 4-5; S-16 at page 112).

#### *Progress/Achievement in 2014-2015 School Year*

50. The student made progress on the anxiety-management goal, although the progress monitoring noted that the student struggled in the final quarter of the year,

escalating in classroom settings rather than utilizing coping strategies. (P-9; S-2 at page 1).

51. The student made progress on the mathematics goal, although the 77% achievement level was below goal-mastery of 85%. (S-2 at page 2).
52. The student completed the first semester with the following grades in academic classes: As in creative writing, algebra, and web design; B in English and African-American history; and C in biology. The student completed the second semester with the following grades in academic classes: Bs in English, African-American history, and health; Cs in algebra, biology, and computer applications. (S-11 at page 3).
53. The student scored below basic in Algebra and proficient in Literature on statewide standards-based Keystone Exams. (S-6).

#### *Summer 2015 Programming*

54. The student attended an out-of-state program for the summer of 2015. (P-28; NT at 821-896).
55. The summer 2015 program was entirely therapeutic and not educational. (NT at 821-896).
56. Parents spent private funds for tuition, travel, meals, and other out-of-pocket expenses over the period June – August 2015 while the student was enrolled in the out-of-state program. (P-28; NT at 1001-1088).

#### *Notice of Withdrawal/ Claim for Tuition Reimbursement*

57. A document dated August 7, 2015 was introduced into evidence. It is a letter signed by the student's mother, and addressed to an assistant principal at the high school who was identified as the District representative (the 'LEA representative') at the January 2015 IEP meeting. (J-2; P-16).
58. The August 7<sup>th</sup> letter indicates that the student's mother is informing the assistant principal that she rejects the District's programming and intends to withdraw the student from the District. The letter indicates that the student's mother is enrolling the student in a private placement for the 2015-2016 school year and that she intends to seek tuition reimbursement from the District for that placement. (P-16).
59. The student's mother testified that she mailed the letter to the assistant principal's attention at the high school. (NT at 214-219).
60. The assistant principal testified that he was not under contract during that summer and did not return to work for the 2015-2016 school year until August 17, 2015. He testified that any mail addressed to him and delivered over the summer was

placed in his high school mailbox and would have been retrieved and read by him upon his return. He testified that he did not receive, and until the hearing had never seen, the letter. (NT at 578-582, 588-591).

61. The school district special education administrator at the high school level indicated that she would have been informed by the assistant principal, with whom she had a close working relationship on special education matters, about a letter such as the one dated August 7<sup>th</sup>; the assistant principal testified, too, that matters he comes across involving special education are referred to the special education administrator or the school counselor. (P-16; NT at 290-292, 590).
62. The school counselor, who worked with the student in the weekly counseling sessions and had extensive ongoing communication with the students' parents, and the student's mother particularly, testified that she had not been informed by the student's mother that the student had been placed in a private placement. She had not seen the letter dated August 7<sup>th</sup> in the exhibits until the hearing. (P-16; S-18; NT, generally and at pages 679-684).
63. The school counselor and special education administrator corresponded with the student's mother in early and mid-August. While the student's mother discussed potential private placements, the student's mother did not indicate that the student was being withdrawn or was being placed in a private placement. (P-25hh, P-25ii, P-25jj, P-25kk; S-18 at pages 1-11; NT at page 682).
64. In early September 2015, after the school year had begun, the student's homeroom teacher inquired of the school counselor why the student had not been attending school. The school counselor thought the student was still enrolled in the District until September 4, 2015 when, in a chance meeting at the school, the student's mother was dropping off paperwork to withdraw the student officially from the District. (P-25mm; S-18 at pages 13-14; NT at 682-684).
65. The evidence— in the form of the nexus of the testimony of the assistant principal, the special education administrator, and the school counselor, in their communications with each other and with the student's mother and their actions and, importantly, lack of certain communications/actions— is preponderant that the letter dated August 7<sup>th</sup> was not mailed by the student's mother, or that the student's mother was mistaken in thinking she had mailed it. (P-16, P-25hh, P-25ii, P-25jj, P-25kk, P-25mm; S-18 at pages 1-14; NT at 290-292, 578-582, 588-591, 679-684).

## 12<sup>th</sup> Grade

66. At the outset of the 2015-2016 school year, the parents placed the student in an out-of-state placement. By late September, the parents had withdrawn the student from this placement. (S-20; NT at 1001-1088).
67. Parents spent private funds for tuition, travel, meals, and other out-of-pocket expenses over the period August – September 2015 while the student was enrolled in the out-of-state program, although a portion of the tuition was refunded by the private placement. (P-27, S-20; NT at 1001-1088).

68. In October 2015, the student was enrolled in a second out-of-state private placement. (P-23, P-26; NT at 1001-1088).
69. The intake assessment document in the second private placement, including goals and assessments, was entirely therapeutic and geared to mental health or affect concerns. There is no program-related educational goal or assessment contained in the document. (P-23).
70. At the beginning of the enrollment in the second private placement, the student underwent a 45-day therapeutic, non-educational experience. (NT at 716-815).
71. The student's treatment plan is largely therapeutic and includes no information related to academic instruction or accommodations. The therapeutic interventions, however, do address social interaction, social communication, and anxiety management. (P-22).
72. The private placement provides very little, if any, specific academic/classroom accommodations or modifications related to the student's needs in educational environments. (P-22, P-25; NT at 908-998).
73. Over the course of the 2015-2016 school year, the student earned academic credit in English, economics, and government. The student did not receive transcribed credit for mathematics, but testimony by a witness from the private placement indicated that the student received instruction in mathematics. Testimony from the same witness indicated that the private placement implemented some of the specially designed instruction/modifications from the January 2015 IEP as part of its academic instruction of the student. (P-26; NT at 908-998).
74. The student took a diploma from the private placement in December 2016 and, at the time of the hearing, the student was attending an out-of-state community college located near the private placement. (NT at 722, 1049).
75. Parents spent private funds for tuition, travel, meals, and other out-of-pocket expenses over the period October – December 2015, for which parent presented evidence, while the student was enrolled in the out-of-state program in the fall of 2015. (P-29; NT at 1001-1088).

### **Credibility Findings**

- A. All witnesses testified credibly.
- B. Little weight was accorded to the testimony of the witness from the summer 2015 program due to his exclusively clinical, non-educational background and the wholly therapeutic nature of the witness's experience with the student. (NT at 821-896).
- C. A medium degree of weight was accorded to the testimony of the District school psychologist, the District social worker, the student's mother, the two District regular education teachers, the District special education teacher, the District assistant

principal, the program administrator for the private placement in the 2015-2016 school year and the fall of 2016, the teacher from that private placement, and student's father. (NT at 46-98, 99-140, 142-245, 315-344, 346-409, 414-552, 555-594, 716-815, 908-998, 1001-1088).

D. Heavy weight was accorded to the testimony of the special education administrator and the school counselor. (NT at 257-313, 603-708).

## **DISCUSSION AND CONCLUSIONS OF LAW**

To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning (Endrew F. ex rel. Joseph F. v. Douglas County School District, U.S. , S. Ct. , 197 L. Ed. 2d 335, (2017); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

### Compensatory Education: December 2014 – June 2015

In the months when the student was at the District, the student's program was reasonably calculated to yield meaningful education benefit and, as implemented, provided the student with significant learning. The record as a whole shows that the student has consistent needs in the educational setting, namely difficulty negotiating social interactions, managing anxiety, and needing academic support in mathematics. The District explicitly addressed the latter two of these three needs. The January 2015 IEP contained a goal to address each of these needs and the specially designed instruction/program modifications were specific and comprehensive. While progress on both goals was not necessarily smooth and linear, by the end of the 11<sup>th</sup> grade school year,

the student had made progress on both goals. Most importantly, the student's anxiety was managed to allow for marked academic achievement in all academic subjects. This academic achievement included mathematics where the student made progress on the goal albeit without mastery. Still, on balance, the student's educational programming—in both regular education and in terms of special education goals—provided the student with significant learning.

The student's need for support in social communication and social interaction, however, was not addressed in the student's IEP. This is a flaw in that programming but here there is a significant intervening factor, an intervening factor that does not allow the flaw in the programming to rise to the level of a denial of FAPE. Specifically, it is clear that the student rejected any programming or services which would remove the student from the regular education environment. Indeed, the student was deeply resistant to the idea that any disability-identification, and especially an identification as a student with autism, was accurate. The neuropsychological evaluator even opined, in the April/May neuropsychological evaluation report, that this resistance/denial needed to be addressed in a therapeutic way.

Because specially designed instruction for social communication, social skills, and social interaction would necessarily be delivered outside of regular education (and, most likely, in a separate speech and language instructional period), the IEP team faced a conundrum: Should the student's resistance to delivering special education services outside of the regular education environment be forced at the expense of the student's anxiety, or should the team bypass social communication/interaction services to accommodate the student's significant anxiety management needs? The IEP team chose the latter course. In doing so, an identified need of the student was not addressed. But, on this record, there was a defensible logic behind the team's decision. The record in its entirety also supports a conclusion that the IEP team—and, for that matter, all educators and

therapeutic providers, including even the private placement witnesses—clearly prioritized the anxiety management needs over social communication/interaction needs. Therefore, the lack of any programming in the student’s January 2015 IEP related to social communication/interaction did not amount to a denial of FAPE.

It must also be noted here that the District professionals and the family communicated regularly, collaborated extensively, and worked diligently over January – June 2015 to ensure that the student’s needs were met in the educational environment. Both parties are here recognized and lauded for making sure that the focus was always where it should be—on the student’s needs and progress.

Accordingly, the District provided a FAPE to the student over the period December 2014 – June 2015, and there will be no award of compensatory education.

#### Tuition Reimbursement

Long-standing case law and the IDEIA itself provide for the potential for private school tuition reimbursement, including related out-of-pocket expenses absorbed by parents, if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); *see also*, 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive examination of any parents’ reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3)).

In the three-step Burlington-Carter analysis, the first step is an examination of the school district’s proposed program, or controlling program, at the time the family made the decision to seek a private placement and whether it was reasonably calculated to yield meaningful education benefit. If the school district programming is not appropriate at step one, the second step is an examination of the appropriateness of the private placement.

Finally, if the private placement is appropriate at step two, the third step is to examine the equities between the parties to see if those equities impact the claim for reimbursement. The steps are distinct and sequential.

Here, all claims for tuition reimbursement at the private, out-of-state placements (the summer of 2015, the 2015-2016 school year—initially at one placement in September 2015 and then the remainder of the school year at a second placement—and the fall of 2016 at the just-noted second placement) can be considered under the same analysis. Particularly, as set forth above, the student’s District-based programming, as designed and implemented through the January 2015 and operative as of June 2015, was appropriate. In effect, the student was unilaterally enrolled in the summer 2015 private placement and then, later, withdrawn from the District and enrolled in the 2015-2016 and fall 2016 private placement while an appropriate District-based program was in place.

And the parties’ disputed view of the purported early August 2015 notice of parents’ intent to withdraw the student and seek tuition reimbursement for the subsequent private placements is important, especially as to the claims for reimbursement for the 2015-2016 school year and the fall of 2016. That notice provision (34 C.F.R. §300.148(d)(1)) to a school district by parents provides a safeguard so that a District may respond to a parental concerns and see what, if anything, the IEP team needs to do to address the student’s special education program. In this case, the District was not able to respond in this way; indeed, while District personnel working closely with the family knew that the family was investigating private placements, they had no indication that parents were doing so as the result of a disagreement with, or rejection of, District programming. What, specifically, the District might have done had notice been provided is speculative musing. But based on the record in its entirety, it is not speculative to assert, generally, that the District would have communicated with parents and collaborated with them about their concerns.

When the school district's last-offered or last-operational program is appropriate, as is the case here, the school district has met its obligations to the student, and the second and third steps of the Burlington-Carter analysis (respectively, whether the private placement is appropriate and whether the equities between the parties impact the tuition reimbursement remedy) are not undertaken. Accordingly, the District's January 2015 IEP was appropriate, so there is no tuition reimbursement remedy owed to the parents. Because the parents' claims for related out-of-pocket expenses are rooted in accessing these private placements, those expenses too are not eligible for reimbursement.

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### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the School District is not responsible for any compensatory education remedy during the student's enrollment in the School District over the period December 2014 – June 2015. Likewise, the School District is not responsible for any reimbursement remedy for the following periods: summer 2015, the 2015-2016 school year, and the fall of 2016.

Any claim not specifically addressed in this decision and order is denied.

*Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

June 20, 2017