

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

ODR No. 00764-0910KE

Child's Name: D.B.

Date of Birth: [redacted]

Dates of Hearing: 7/24/10, 9/14/10, 9/21/10

CLOSED HEARING

Parties to the Hearing:

Parents

Parent[s]

School District

Council Rock

The Chancellor Center

30 North Chancellor Street

Newtown, PA 18949

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney

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October 14, 2010

October 29, 2010

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student, now mid-teenaged, is a resident of Council Rock School District but is currently attending a private school for the 3rd consecutive year. Student has been IDEA eligible due to an autism spectrum disorder since the District completed an initial evaluation mid-way through 3rd grade. Student, however, has received special education services from the District for only two full school years, 4th and 6th grades, as well as during the last few months of the 3rd grade school year. Parents unilaterally placed Student in a different private school for 5th grade before re-enrolling Student in the District for 6th grade, and then choosing the current private school beginning with the 2008/2009 school year.

Parents' March 1, 2010 due process complaint sought compensatory education for the school year in which Student reenrolled in the District, as well as tuition reimbursement for their subsequent private school placement. Parents contended that the District failed to provide Student with an appropriate program and placement for the 2007/2008 school year, and failed to offer an appropriate program/placement for the subsequent two school years.

After 3 hearing sessions, Parents failed to establish that the District's program/placement was inappropriate, since Student made meaningful progress, both academically and on behavioral/social IEP goals during the 2007/2008 school year. Moreover, there is no reasonable basis for concluding that the IEP which would have been in place for the beginning of the 2008/2009 school year would not have been similarly effective, or that the District would have been incapable of providing appropriate services during the 2009/2010 school year, and in the future. Consequently, Parents' claims will be denied in all respects.

ISSUES

1. Did the School District provide Student with an appropriate educational program and placement during the 2007/2008 school year?
2. Did the School District offer Student an appropriate educational program and placement for the 2008/2009 school year?
3. Is there any basis for awarding Student and the Parents compensatory education or tuition reimbursement for any period in dispute in this case?

FINDINGS OF FACT

1. Student is a mid-teenaged child, born [redacted]. Student is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 11, 12)
2. Student has a current diagnosis of autism in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 11)
3. Student's disability is manifested primarily by anxiety, unwillingness to engage in non-preferred activities, rigid perfectionism and the desire to assume the role of "rule-maker," directing the conduct of others. Student's primary needs are in the areas of behavior and social skills. Student has considerable more difficulty with classroom routines, transitions and social interactions than with academic skills, with the exception of written expression. (N.T. pp. 67, 68, 650, 695, 702; S-2, pp. 2, 3, S-6, p. 5, S-7, p. 7)
4. Student began receiving special education services from the District after an initial evaluation in the middle of 3rd grade. Student completed 3rd grade in the elementary school Student had attended since kindergarten. (S-2, pp. 1, 2)
5. In 4th grade, Student was placed in an autistic support class in a different District elementary school. (N.T. pp. ; S-2, p. 2)
6. For 5th grade, Parents unilaterally enrolled Student in a private school. After initially requesting that the District pay the private school tuition, Parents ultimately decided not to pursue tuition reimbursement because Student did not do well. (N.T. pp. 35, 101, 104; S-2, p. 2, S-3, p. 50)
7. When Parents re-enrolled Student in the District for 6th grade, the District assigned Student to an emotional support program in a District elementary school Student had not previously attended. At the beginning of the school year, Student received grade-level instruction in all academic subject areas in the special education emotional support (ES) classroom, but participated in homeroom, science, lunch and special classes in a regular

education 6th grade class with non-disabled peers. Either an emotional support teacher or a teaching assistant was in the regular education classroom at all times to support Student and the other ES students in the same regular education classroom. The teaching assistant compiled daily data on Student's classroom behaviors. (N.T. pp. 314, 315, 319, 320, 351, 465; S-2, p. 3)

8. Student's initial IEP was developed in August 2007, just before the school year began, and included a goal for completing homework and other behavior goals and a behavior plan based primarily upon a behavior modification program model developed at Lehigh University Centennial School, a lab school where Student's case manager/ES teacher was trained and was previously employed. The behavior program depends heavily on data collection to assess progress and to determine the nature and extent of modifications that may be needed from time to time. (N.T. pp. 430, 435—437, 443—446, 455; S-6, p. 9, S-7, pp. 15—19¹)
9. The goal of the behavior program is to develop positive, pro-social behaviors to replace behaviors that interfere with classroom performance, primarily withdrawal and avoidance in Student's case. (N.T. pp. 331, 457, 458, 480 ; S-7, p. 17)
10. All students in the case manager's ES class begin the behavior program with an orientation period during which they remain in the ES classroom for most of the day. Student was expected to progress through a level or step system encompassing 5 general classroom behaviors and two areas more specific to Student's difficulties, homework completion and organization. Behavioral expectations increase at each level, moving from 80% compliance at levels 1 and 2, to 85% at level 3 and 90% at levels 4 and 5. Student was required to meet behavioral targets at one level for a total of 25 non-consecutive days before moving to the next level. (N.T. pp. 455, 456, 460, 464, 465)
11. Moving from academic instruction in the ES classroom to participating in the regular education 6th grade classroom for academic subject areas was based upon attaining higher levels in the behavior program. (N.T. pp. 210, 458; S-7, p. 1)
12. Student's progress in the behavior program was tracked via completion of daily "point sheets" with spaces for both teacher and Parents comments. The point sheets were sent home each day and returned to the teacher the following day. (N.T. pp. 111—113, 136, 156, 183, 215, 217, 218, 462; S-9)
13. Student's behavior plan also included effective strategies for addressing Student's difficulty with transitions, such as "priming," *i.e.*, advance notice of the daily schedule and warnings of changes in the daily routine, and descriptions of situations that Student might encounter during the school day. (N.T. pp. 325, 353, 448—450; S-7, p. 17, S-10 pp. 11, 12)

¹ The behavior plan found in S-7 at pp 15—19 was the final behavior plan for the 2007/2008 school year and was attached to the March 2008 IEP. The behavior plan originally attached to the August 2007 IEP was not preserved but exists only in the modified form. (N.T. pp. 445—448)

14. Student was also provided with “rule cards,” a written list of directions to assure that Student would know what to do when confronted with situations such as finding a seat in the classroom, preparing for/ beginning work in various classes, and preparing for group work or presentations. By the end of the school year, the ES teacher was able to begin replacing the rule cards with verbal prompts. (N.T. pp. 449, 450; S-7, p. 17, S-10, pp. 3—9)
15. The only academic goal in Student’s IEPs implemented during the 2007/2008 school year was in the area of written expression and was directed toward meeting the requirements of the District’s 6th grade writing rubric in the domains of content, organization and style. The writing goal was based upon Student’s avoidance of writing as a non-preferred activity rather than skill deficits. Student received language arts instruction in the ES classroom throughout the school year and made progress on the IEP writing goal. (N.T. pp. 501, 503—513, 554; S-4, S-6, p. 9; S-7, p. 10)
16. In November 2007, after notifying Parents, the District revised the August IEP because Student had progressed sufficiently to join the regular education social studies class. Student’s behavior goals were also revised by increasing the expected levels of achievement from 80% to 85%. Both changes were based upon Student’s moving from Level 2 to Level 3 in the behavior program (N.T. pp. 210, 321, 539; S-7, p. 1, S-8, p. 3)
17. Student’s initial 2007/2008 IEP also included a speech/language goal directed toward addressing Student’s needs in the area of pragmatic language skills, the “cornerstone” of social skills development. (N.T. pp. 249, 251, 252, 470; S-6, p. 9)
18. In December 2007 Student began receiving one 30 minute speech/language therapy session/week from the [local] Intermediate Unit speech therapist assigned to the school. The speech/language therapy, delivered individually in the speech/language support classroom, focused on initiating conversation, practicing conversational and other social skills through methods such as role-playing, playing games and discussion of appropriate social behaviors. (N.T. pp. 246, 248, 250, 258, 259, 277; S-2, p. 13, S-6, p. 10, S-12)
19. In addition to direct therapeutic services, the speech therapist worked with Student’s teachers and instructional aides to facilitate Student’s involvement in social and academic group settings in order to practice and continue to improve pragmatic language skills. The speech therapist also observed Student in those situations to collect data and assess progress. (N.T. pp. 252—256, 263, 264, 334)
20. Developing and practicing pragmatic language and other skills to improve social interactions was also part of daily instruction in the ES classroom, facilitated by use of the rule cards, role playing, specific conflict resolution techniques and providing opportunities for group work. (N.T. pp. 471—477; S-10, pp. 3—9)
21. Student’s August 2007 IEP also provided occupational therapy in the form of sensory integration strategies/interventions developed for Student by the occupational therapist

- and implemented in both the ES and regular classrooms. (N.T. pp. 453, 454; S-6, p. 11, S-7, p. 12, S-10, p. 1)
22. During the first half of the 2007/2008 school year, the District conducted a reevaluation of Student. The results, reported in a reevaluation report (RR) dated January 30, 2008 confirmed that the needs arising from Student's disabilities remained primarily behavioral and social. (S-2)
 23. Student's IEP team met to revise the IEP in March 2008, after the RR was completed. The writing goal from the August 2007 IEP was not changed. The behavior goals also remained the same, with the expected levels of achievement reflecting the November 2007 revision. (S-6, p. 9, S-7, p. 10)
 24. Direct occupational therapy services were added to the March 2008 IEP to address Parents' concerns with handwriting. (N.T. pp. 387, 454; S-7, p. 12)
 25. The original speech/language goal for maintaining 5 reciprocal conversational exchanges with a communication partner on a non-preferred topic was changed to include preferred topics because Student demonstrated sufficient progress to begin incorporating Student's range of interests in conversation as well as the partner's interests. (N.T. pp. 261, 262; S-4, p. 7, S-7, p. 10)
 26. Given Student's success in maintaining reciprocal exchanges initiated by others, a new goal was added for initiating 2 reciprocal exchanges with peers each day in the classroom or cafeteria in order to begin working on the next level of social skills development. (N.T. pp. 262, 263; S-4, p. 7, S-7, p. 10)
 27. The method of delivering speech/language services also changed from individual to group therapy sessions to assure that the pragmatic language skills Student had developed would be maintained and continue to grow in a broader therapeutic setting. The group consisted of 3 other 6th grade [same gender students] who also needed practice in developing conversational skills. (N.T. pp. 267, 278, 281, 282)
 28. By the end of the school year, Student demonstrated mastery of the IEP speech/language goals. (N.T. pp. 293—297, 303, 321; S-4, pp. 7, 8)
 29. Although Student continued to have difficulty throughout the school year with social skills, including conversation, class participation and working in groups with peers, Student showed considerable improvement from the beginning to the end of the school year. Student became more comfortable with peer group interactions and more cooperative with the speech therapy sessions, appearing to recognize their value as peer relationships developed and participation in groups increased. Student's cooperation in the regular education classroom also increased and improved throughout the 2007/2008 school year. (N.T. pp. 265, 266, 269, 273—275, 303, 321, 324, 326, 327, 334, 361, 490; S-4, pp. 7, 8)

30. During the 3rd quarter, Student joined a regular education math class. By the end of the school year, the only academic content area in which Student continued to receive instruction in the ES classroom was writing/language arts. Student participated in the regular education curriculum without modifications to the way the curriculum was delivered to typical students. (N.T. pp. 330, 363; S-4, p. 4)
31. Whether instruction was delivered in the ES or regular education classroom, Student met or exceeded grade level standards in all academic areas. Student maintained good grades on 6th grade level curriculum content throughout the school year. (N.T. pp. 346, 347, 497, 501, 522—24; S-4, pp.1—6, S-11)
32. Although the point sheets used to track Student's success in developing pro-social behaviors demonstrate that Student's progress was uneven and included setbacks, by March 2008, Student had moved to Level 4 in the behavior program and reached Level 5 during the last days of the school year. Students are generally expected to move from Level 1 to Level 5 over a period of 2 school years. (N.T. pp. 482, 532, 533, 611, 627; S-7, p. 7; S-8, S-9)
33. Student adjusted well to school from the beginning of the 2007/2008 school year. Parents were pleased with the 6th grade program and placement, as indicated by comments made to Student's teachers throughout the school year and written comments on the daily point sheets. (N.T. pp. 110, 176, 179, 180, 532—535, 538; S-4, p. 2, S-9)
34. Parents expressed concern over the transition to middle school and whether Student would make progress toward behavioral and social goals in 7th grade. (N.T. pp. 188, 388; S-7, p. 21)
35. Student's Mother met with District special education administrators and the proposed 7th grade teachers to plan for the transition to middle school in May 2008. Student's ES teacher also provided written information to the 7th grade teachers. The District 6th and 7th grade teachers meet each summer to share information and plan for the transition of elementary school students to middle school. (N.T. pp. 189, 389—345, 394, 395, 535, 536; S-5)
36. At the beginning of the 2008/2009 school year, Parents enrolled Student in another Private School, where Student completed 7th grade (2008/2009 school year) and 8th grade (2009/2010 school year), and is currently in 9th grade. (N.T. pp.139, 641, 642; S-3, p. 6)
37. Private School is a very small school with a teacher/student ratio of 1 to 2 or 3, typically. Instructional groups never exceed 5 students with 1 teacher. (N.T. pp. 142, 637, 638, 711)
38. Upon admission, the private school confirmed that Student's primary needs are social/emotional, that Student was academically on grade level in most areas, but struggled, and continues to struggle, with written expression, for which Student receives

significant academic supports. The private school does not use a specific writing program. (N.T. pp. 643, 654, 655, 663, 680)

39. Student does not have a behavior plan, does not receive occupational therapy or services from a speech/language therapist at the private school. (N.T. pp. 151, 155, 157, 698—700)
40. Report cards from the private school disclosed that Student received primarily As and Bs in 7th and 8th grades. (P-8)
41. When first enrolled in the private school, Student was anxious, isolated, withdrawn and did not engage in peer social interactions, but slowly began to connect with the school through [extracurricular activity] classes and participation on the [redacted] team. (N.T. pp. 646, 647—649, 666, 667, 690)
42. Student continues to have issues with classroom behaviors and with peer social interactions at the private school. The school provides opportunities to meet with a counselor individually as needed, and conducts group counseling and informal social skills training in the form of weekend or evening outings with peers and staff to address anxiety and provide opportunities for social interaction. Student did not willingly meet with the counselor to address anxiety and social concerns. (N.T. pp. 149, 158, 650, 651)

DISCUSSION AND CONCLUSIONS OF LAW

I. Statute of Limitations/Scope of Parents' Claims

Prior to the hearing in this matter, the District notified Parents' counsel that it would seek to limit the relief Parents could seek to the two years immediately preceding the date the complaint was submitted, March 1, 2008.² In the complaint, Parents sought compensatory education for the 2007/2008 and 2008/2009 school years, as well as tuition reimbursement for Parent's private school placement. (P-9, p. 3) A preliminary ruling on the District's request to limit the scope of Parents' claims was sent to counsel via e-mail message on April 11, 2010.³

² Because the District's letter was not previously made part of the record, it is hereby admitted as Hearing Officer Exhibit 1 (HO-1)

³ Because the preliminary ruling was not previously made part of the record, it is hereby admitted as Hearing Officer Exhibit 2 (HO-2)

Since the period outside of the two year limitations period for which Parents sought relief encompassed less than a full school year, Parents were permitted to present evidence concerning the entire 2007/2008 school year. Nevertheless, Parents were explicitly advised that

in order for compensatory education to be awarded or considered for any claim that arose before March 1, 2008, however, Parents will need to prove that an exception extends the timeline, as well as prove an IDEA violation. The complaint itself establishes that Parents were aware that a new IEP had not been offered prior to the beginning of the 2007/2008 school year, so there is no question that Parents had reason to know of the alleged violation prior to March 1, 2008.

HO-1, p. 2.

Parents presented no evidence that the District failed to provide them with required information or that the District misrepresented that it had resolved the problem that gave rise to the complaint. Consequently, there is no basis for extending the limitations period in this case due to either of the exceptions found in the IDEA statute and regulations. 20 U.S.C. Section 1415(f)(3)(c); 34 C.F.R. §300.511(f).

Moreover, Parents' claim that the period of recovery should be extended to the beginning of the 2007/2008 school year was based upon the District's alleged failure to timely offer a final IEP before the 2007/2008 school year began. The evidence produced at the hearing, however, established that Parents signed a Notice of Recommended Educational Placement (NOREP) on August 20, 2007, prior to the first day of school, approving the IEP presented at a meeting held on the same date and attended by both Parents. (S-6, pp. 1, 2, 15) In light of the signed NOREP, Mother's testimony at the hearing that she believed the IEP was intended to be in effect for only a few weeks, even if fully credited, cannot establish either a procedural or substantive IDEA violation, much less that the 2 year limitations period should be extended based upon the

misrepresentation exception . (N.T. p. 107) At most, Mother's testimony might explain why Parents approved an IEP that they later challenged as inappropriate.

Most tellingly, however, Parents acknowledged that the program and placement in effect for Student at the beginning of the 2007/2008 school year was effective until either January or March 2008. *See*, N.T. pp. 110, 113, 114, 125. Parents, therefore, did not establish a substantive IDEA violation for the portion of the 2007/2008 school year outside of the 2 year limitations period. Even assuming, for this purpose only, that the program/placement had become inappropriate beginning in January 2008, the District would have been entitled to a reasonable period to discover and correct the deficiencies. If Parent's testimony that problems began in March is credited, the denial of FAPE claim arose within the 2 year limitations period.

Finally, there was testimony from both Parent and the District concerning events that occurred well before the 2007/2008 school year. Since there was no claim in the due process complaint concerning those periods, however, such evidence was entirely irrelevant to the dispute, providing only background information.

II. Legal Standards

Prior to discussing the evidence and contentions of the parties concerning the issues in dispute beginning in March 2008, it is helpful to review the legal framework applicable to the matters in dispute.

A. Due Process Hearings/Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by

other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009).

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

Since the Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in “equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. Both parties, however, have the obligation to produce evidence in support of their respective positions.

B. Relevant IDEA Requirements

The legal obligation of a school district to provide for the educational needs of children with disabilities residing within its borders was recently summarized by the Court of Appeals for the 3rd Circuit as follows:

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “free appropriate public education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP “must be ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Shore Reg’l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)).

Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 240.

The term “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 (3RD Cir. 1999). Consequently, in order to properly provide 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, 102 S.Ct. 3034 (1982); *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his 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 (3rd Cir. 1996; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by *Rowley* case and other relevant cases, however, a school district is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*); *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

C. Tuition Reimbursement

1. Three Step Test

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court established the principle that parents do not forfeit an eligible student’s right to FAPE, to due process protections or to any other remedies provided by the federal statute and regulations by unilaterally changing the child’s placement, although they certainly place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE

or parents are otherwise not entitled to reimbursement of the private school tuition from the District.

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof.

The Court of Appeals has recently provided guidance with respect to assessing the appropriateness of a unilateral private placement, noting that

A parent's decision to unilaterally place a child in a private placement is proper if the placement “is appropriate, *i.e.*, it provides significant learning and confers meaningful benefit...” *DeFlaminis*, 480 F.3d at 276 (internal quotation marks and citation omitted). That said, the “parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA.” *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir.1999). In fact, the Supreme Court has ruled that a private school placement may be proper and confer meaningful benefit despite the private school's failure to provide an IEP or meet state educational standards. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 14-15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993)

Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 242.

III. Nature of the Claims/ Components of District’s Program

A. Behavior Issues

There is no dispute in this case that Student’s educational needs center on classroom behaviors such as resisting transitions, changes in routine and non-preferred activities, as well as

difficulties with social interactions, including a marked unwillingness to engage with peers. (FF 3, 29, 38, 42)

The District developed an elaborate, detailed, individualized behavior plan based upon a well-established behavior modification program to address Student's needs during the 2007/2008 school year, and provided immediate and increasing opportunities for Student to participate in the regular education classroom with non-disabled peers as behaviors improved. (FF 7—11) The behavior program included a system for daily monitoring of the positive behaviors that the program was designed to encourage and for sharing both progress and setbacks with Parents on a daily basis. (FF 12)

Student's Mother testified that after an encouraging start to the school year, Student stopped making progress and began "a downward spiral" of problem behaviors between January and March 2008. (N.T. pp. 113, 114, 125) Parent's subjective and vague assertions that Student began experiencing increasing behavioral difficulties and began trying to avoid school in the winter/spring of the 2008 were contradicted by the consistent and credible testimony to the contrary by Student's teachers and speech/language therapist. The objective evidence supports extending to the entire school year Parent's acknowledgement that during the first half of the school year, the daily point sheets demonstrated an "ebb and flow" of behavior—forward progress interrupted by frequent setbacks. (N.T. p. 125) That pattern continued throughout Student's 6th grade year, but by the end of the year, Student had demonstrated overall progress. (FF 29, 32) During the 3rd quarter of the 2007/2008 school year, when Parent testified that Student was regressing, Student actually reached the third level of the behavior program and was able to begin receiving math instruction in the regular 6th grade classroom. (FF 30) By the end

of the school year, Student's behavior progress had reached, or nearly reached, the levels expected of students who had spent two full years in the emotional support class. (FF 32)

Student has significant needs arising from Student's autism disability. The District is required to provide services that result in meaningful progress toward IEP goals, not complete remediation of the effects of a complex disability within the space of a single school year. It is difficult to understand how much more progress in developing positive behaviors Parents expected the District's program to provide for Student. Moreover, there was no testimony by Parents or documents suggesting that Parents raised any concerns about regression in Student's behaviors or about deteriorating mental health at the IEP meeting in March 2008, when, according to Parent's testimony, behaviors had either begun to regress or Student had been in decline for nearly two months. Consequently, despite Parent's testimony at the due process hearing, the record supports the District's position that Parents remained satisfied with Student's behavior program throughout the school year. (FF 33)

In any event, by all objective and reasonable measures, the District provided Student with an appropriate behavior plan and services that allowed Student to make meaningful progress throughout the 2007/2008 school year. In addition, the IEP proposed by the District in March 2008, which was largely a continuation of the August 2007 IEP, with modifications reflecting Student's progress, would have continued to provide Student with an appropriate behavior program and supportive services for more than the entire first half of the 2008/2009 school year.

B. Social Skills

The District provided ample evidence of appropriate social skills training through speech/language therapy directed toward development of pragmatic language skills and the additional strategies for improving social skills provided daily in the ES classroom. (FF 18—20,

25—28) Parent’s argument that the District failed to provide adequate speech/language services rests solely upon the unexplained delay in not starting services until December 2007, rather than at the beginning of the school year. (FF18) Although that was an unfortunate lapse, Parents did not, and could not, establish that the delay in beginning services resulted in a substantive loss of educational benefit, since Student met the speech/language IEP goals in the August 2007 and March 2008 IEPs by the end of the 2007/2008 school year. (FF 28) Under the IDEA statute and regulations, procedural violations alone cannot establish a denial of FAPE. 34 U.S.C. §300.513(a).

C. Academic Progress

Except for written expression, a very much non-preferred activity, Student was easily able to meet 6th grade level academic standards without specially designed instruction, and still maintains grade-level academic progress. (FF 30, 31, 38) The District included a writing goal in Student’s IEP because it is the single academic area very much adversely affected by Student’s disability. (FF 15) Student’s difficulties with writing have persisted. Even in third year of enrollment in the private school, Student continues to need substantial assistance with writing. (FF 38)

Parents argued that the District’s failure to provide a specific, researched-based writing program establishes that Student did not receive appropriate instruction in writing. Student’s problems with written expression, however, arise from resistance to a non-preferred activity not from a learning disability in written expression or any other type of deficit related to the cognitive ability to develop effective writing skills. Since Student’s issues with written expression are rooted in behavior difficulties, academic instruction of the same type provided to students without learning disabilities, accompanied by appropriate behavior interventions, are

better designed to meet Student's needs in this area than a writing program designed to address skill deficits related to academic disabilities.

In addition, it must be noted that the private school Parents chose and consider appropriate for Student does not use a particular, research-based writing program. (FF 38) Parents cannot attack the District's program as inappropriate for lack of a specific methodology, yet maintain that the private school is appropriate in all respects when both settings provide similar instruction and Student continues to exhibit the same difficulties in the private setting that existed in the public school.

IV. Overall Appropriateness of the District's Program/Placement

Parents did not adduce sufficient evidence at the due process hearing to establish that the District failed to provide an appropriate program and placement that met all of Student's needs when Student was enrolled in the District for 6th grade. In addition, the District offered an appropriate IEP in March 2008 that would have remained in effect for the beginning of the 2008/2009 school year, subject, of course, to revision based upon any new or additional needs that arose from entering middle school.

Parents argue that their right to tuition reimbursement for the 2009/2010 school year can be established by the District's failure to respond to Parents' request for an IEP team meeting in January 2009, after Student was already enrolled in private school. (S-3, p. 4) Although the District did not convene an IEP meeting to develop a new IEP at that time, the record supports the conclusion that the March 2008 IEP, still in effect in January 2009, would still have been appropriate and could have been implemented had Parents decided to reenroll Student in the District at that time. . The evidence from the private school established that Student continues to have the same needs as when Student left the District in the fall of 2008. (FF 38, 41, 42)

Consequently, the IEP that was appropriate at the end of the 2007/2008 school year could have been implemented until it expired in March 2009. There is no evidence suggesting that Parent requested an IEP meeting after March 2009.

In short, Parents' attacks on the District's program/placement either lacked objective support or were based upon procedural lapses without substantive effect. Because Parents did not establish that the District failed to provide or offer an appropriate special education program and placement for the 2007/2008, 2008/2009 and 2009/2010 school years, they have not established that the District is obligated provide compensatory education for Student for the portion of 2007/2008 school year within the 2 year IDEA limitations period, and have not established the first requirement for obtaining tuition reimbursement.

V. Appropriateness of the Private School Placement

It is unnecessary to engage in a lengthy discussion of the appropriateness of the private school selected by Parents in light of the conclusion that the District offered an appropriate program and placement to Student throughout the period in dispute. This case, however, merits some discussion of Parents' choice of a private school in light of their arguments concerning the District's program/placement. Although a private school need not duplicate the services available in a public school, as long as it meets Student's unique needs and the public school failed to do so, Parents cannot reasonably base their claim that the public school failed to offer FAPE upon the contention that specific services designed were inappropriate and inadequate, when the private school services are comparable to what the District provided. Here, *e.g.*, Parents complained that the District failed to use a research-based writing program, yet the private school likewise has no such program in place for Student, and there is no evidence that Student's needs are met any differently than in public school (FF 38) Parents also argued that

the District's behavior plan for Student was inadequate, yet despite Student's continuing behavior needs arising from Student's disability, the private school has not developed a behavior plan at all to systematically address those needs. Under such circumstances, denial of tuition reimbursement would be justified even if there were inadequacies in the District's program/placement. As noted by the court in *Gagliardo v. Arlington Central School District*, 489 F.3d 105, 115 (2nd Cir. 2007), tuition reimbursement may be denied based upon the adequacy of the private school where,

[T]he chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not. A unilateral private placement is only appropriate if it provides "education instruction *specifically* designed to meet the *unique* needs of a handicapped child." *Frank G.*, 459 F.3d at 365 (quoting *Rowley*, 458 U.S. at 188-89, 102 S.Ct. 3034) (emphasis added).

Here, Parents established no specific benefits offered by the private school to meet Student's behavioral/social needs. The evidence concerning the private school established only that in an extraordinarily small setting, Student continued to make adequate academic progress, comparable to the academic progress Student made in the public school, despite the lack of specific services designed to address the needs arising from Student's disability. Under such circumstances, there is no basis for requiring the District to fund the private school even if there were inadequacies in the District's program/placement that could be corrected.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Parents' claims are **DENIED** in all respects. The School District is not required to provide Student with compensatory education for any part of the 2007/2008 school year, or to reimburse Parents for private school tuition for the 2008/2009 or 2009/2010 school years.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

October 29, 2010