

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

Student's Name: Z.C.

Date of Birth: [redacted]

ODR No. 14980-13-14-AS

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Upper Moreland Twp. Sch. Dist.
2900 Terwood Road
Willow Grove, PA 19090-1431

Dates of Hearing:

Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Caryl Andrea Oberman, Esquire
Law Offices of Caryl A. Oberman, LLC
705 North Easton Road
Willow Grove, PA 19090

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July 9, 2014, September 12, 2014,
September 17, 2014, September 30, 2014

October 23, 2014

November 10, 2014

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

INTRODUCTION AND PROCEDURAL HISTORY

The Student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District). (NT 8.) The District has identified Student with Autism and Other Health Impairment [redacted]. (NT 8-9.) Parents assert that the District has failed to offer or provide to the Student a free appropriate public education (FAPE), as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and the Vocational Rehabilitation Act of 1973, 29 U. S. C. §794 et seq. (section 504). Parents seek reimbursement of tuition and transportation costs, having placed Student in a private school (School) unilaterally. They also seek reimbursement for privately provided summer services and appropriate relief for alleged discrimination due to predetermination of placement. (NT 57-70.)

The District asserts that it offered an appropriate program and placement; that the placement chosen by the Parents was inappropriate; and that tuition reimbursement should be barred on equitable grounds. It asserts that there are no grounds for reimbursement of summer services, and denies predetermination and discrimination.

The hearing was concluded in four sessions. The parties submitted written summations, and the record closed upon receipt of those summations. I will order the District to reimburse Parents for tuition and transportation costs for the 2014-2015 school year. I deny reimbursement for services purchased in the summer of 2014, and I conclude that there was no retaliation.

ISSUES

1. Did the District fail to offer a FAPE, in violation of the IDEA and section 504, for Student's 2014-2015 school year?
2. Was the private placement selected by Parents appropriate?

3. Should the hearing officer, exercising statutory and equitable authority, order the District to reimburse Parents for private school tuition and costs for the 2014-2015 school year?
4. Should the hearing officer order the District to reimburse Parents for private summer school tuition and costs for the summer of 2014?¹
5. Did the District discriminate against Parents by precluding their meaningful participation in the educational planning for Student, by predetermining Student's placement for the 2014-2015 school year, in violation of the IDEA and/or section 504?

FINDINGS OF FACT

1. Student began kindergarten in the District during the 2007-2008 school year. (NT 73, 77; P 18.)²
2. Student attended school in the District's elementary and intermediate schools until the end of the 2012-2013 school year, Student's fifth grade year. (NT 102-104.)
3. The District identified Student at the end of kindergarten as a child with the disability of Other Health Impairment [redacted]. Presently, Student is classified as a child with disabilities of autism and other health impairment [redacted]. (NT 76-78; P 1, 18.)
4. Student has a history of multiple diagnoses, including Asperger's disorder, Tourette's syndrome, attention deficit hyperactivity disorder (ADHD), obsessive-compulsive disorder, learning disorder and anxiety disorder. [Redacted.] (NT 76-104, 333; P 1, 5, 12, 15, 18.)

¹ The District moved to dismiss the Parents' claim for reimbursement of summer educational services, arguing that it is precluded by a settlement agreement that the District asserts was entered into on August 27, 2013. (NT 31-51; P 14.) However, I have no jurisdiction to construe the terms of any such agreement. J.K. v. Council Rock School District, 833 F.Supp.2d 436, 448-449, 450 (E.D. Pa. 2011). Consequently, I will decide only the issue as stated, with the understanding that the District is free to seek enforcement of any settlement agreement in court.

² The exhibits were marked jointly. However, for convenience and economy, the parties and hearing officer agreed to allow the exhibits to be marked as Parent exhibits, rather than joint exhibits.

5. Student has a history of significant behavioral difficulties in multiple preschool programs and in the District's elementary schools. These include crying, calling out, inattention and hyperactivity, social withdrawal, hyperfocus and perseveration on objects or on Student's thoughts, inflexibility with regard to classroom behaviors and activities, and extreme anxiety with meltdowns, inability to sleep and refusal to eat while in school. (NT 73-75, 77-97,102; P 1, 12, 13, 18; P 9 p. 2.)
6. In all settings, including school, Student is easily distracted and impulsive. Student becomes hyperactive. Student needs inordinate and frequent redirection to remain focused on any task. Student frequently misses key information or direction, and needs to be redirected frequently when a new lesson is introduced or directions are given. Student rushes through assignments impulsively. Student needs frequent prompts to complete work. (NT 92, 112, 165, 184-186, 257-259, 352-356; P 6, 12, 15, 18.)
7. Student has significant difficulties with organizational skills. (P 12, 18, 257, 277, 330-331-332.)
8. Student has significant sensory processing needs. (NT 835, 847-848, 852, 858-859; P 5, 15, 18.)
9. Student has difficulty with social relationships, and exhibits social skills that are markedly lower than those of Student's same age and same grade peers. Student needs assistance with social interactions, including remaining focused and engaged in group process, using eye contact, remaining on-topic in conversations, asking follow-up questions, engaging in active listening skills, reciprocal social interaction and perspective taking. (NT 95, 112-114, 151-153, 177-178, 257, 328-329; P 12, 15, 18.)
10. Student experiences anxiety to an unusual degree, especially concerning homework assignments. Student experiences difficulty with flexibly adapting to unexpected changes in routine. Such challenges increase Student's anxiety. Student's anxiety contributes to Student's difficulties with remaining attentive and focused and indicates that Student has self-regulation issues that impact Student's ability to reach Student' fullest academic potential. (NT 53, 89-91, 137, 158, 254-257; P 1, 5, 12, 18, 19.)
11. Student is unable to perceive Student's own emotional or physical conditions, and is unable to conceptualize or coherently report adverse emotional or physical states. (NT 118-119, 146-149, 151-153, 155-157, 171-3, 175, 273, 287-288, 329-330, 877, 894, 973-974; P 15.)

12. At present, Student is unable to generalize social skills to the classroom, when these skills are taught explicitly in separate small group sessions. (NT 274-276; 328-329, 873-874, 895, 958-960; P 13.)
13. Student demonstrates difficulty with handwriting and written expression. Student's written expression is below predicted expectations in light of Student's cognitive ability. (P 5, 6, 12, 18.)
14. Student's combination of disabilities and symptoms continues at present and interferes with Student's functioning across settings. Student's combination of disabilities interferes with Student's access to the curriculum to an unusual degree and requires a specialized instructional setting. (NT 221, 257-261, 265-268, 308-309, 313-319, 668-672, 835-836, 845-846, 883-884, 920-922, 938, 942-944, 968-974.)
15. Since third grade, Student has been receiving psychotherapy from a clinical psychologist in sessions every other week for about one hour. (NT 220-222.)
16. In the summer of 2013 and in part of 2014, Student received private occupational therapy, part of which dealt with typing skills and part of which dealt with identifying emotions. (NT 219-220.)
17. Academically, Student performed well above average and well above grade level in reading skills in the years before fifth grade. Student performs above average in mathematics, and average in written expression, spelling and written language. Student's scores in social studies and science have been variable. (P 6, 18.)
18. In fifth grade, Student's academic performance was variable. Student's performance in reading and written expression skills was assessed at a basic level, rather than at a proficient or advanced level, on a significant number of assessments. Student's performance was assessed at an Instructional level, rather than an Independent level, on other assessments, including assessments of reading comprehension. (P 8, 13, 18.)
19. Student needs to be educated in a small classroom environment that provides a slower pace, fewer social challenges and distractions, a high degree of structure and coordination of interventions, explicit teaching, and immediate intervention in the course of classroom instruction. (NT 265-281, 285-287, 735-736, 852-857, 873, 884, 890-891, 896, 960, 1067-1068; P 15, 18)
20. Parents removed Student from the District and placed Student in the private School for sixth grade during the 2013-2014 school year. (NT 109-111; P 15.)

21. The District paid part of the tuition at the School, the parties having negotiated a settlement agreement. There was a plan for the District to re-evaluate Student prior to the 2014-2015 school year and offer a placement for the 2014-2015 school year. (NT 322; P 14.)
22. The School is an independent private school for children with disabilities. It is licensed by the Commonwealth of Pennsylvania and is accredited by the Pennsylvania Association of Independent Schools. The School has about 75 students, and provides an academic curriculum for fifth through twelfth grades. Six students are enrolled for seventh grade, which is Student's grade for the 2014-2015 school year. (NT 806-807.)
23. The School provides Student with much smaller, more structured classes, a smaller, more quiet environment, individualized instruction, more explicit teaching, a slower pace of instruction, and immediate intervention to support Student's attention to task, emotional self-regulation, self-organization and social skill learning. (NT 107-109, 114-116, 161, 340-341, 810-818, 1020-1023; P 15, 18, 23, 24, 30.)
24. At the beginning of the 2013-2014 school year, while enrolled in the private school for sixth grade, Student exhibited inattention and inability to regulate behavior, as well as work avoidance and rushing through written assignments. These behaviors were similar in nature and degree to the behaviors that Student had demonstrated in the previous school year while attending the District's intermediate school. (NT 168-169, 835-836; P 15.)
25. As Student's sixth grade school year continued, Student began to display these difficulties less frequently. While Student exhibited continuing difficulties with attention, self-regulation and written expression, Student's anxiety was lower and Student required a lesser degree of intervention during class to maintain attention to task. (NT 118-119, 735-740; P 15, 17.)
26. At the private school, Student exhibited improved social relations. (NT 119-121, 858; P 15.)
27. Student's written expression improved while at the private school. (P 15.)
28. Student's executive skills improved while at the private school. (NT 858; P 15.)

29. Student made some academic progress while in the School. (NT 860-861, 949-950; P 15, 16.)
30. Student's needs are addressed by the School [redacted]. (NT 237, 240, 751-754, 810-812.)
31. The improvements in Student's attention, behavior, executive functioning and social skills were not due in significant part to changes in medication. (NT 204-208, 941-944; P 15.)
32. The improvements in Student's attention, behavior, executive functioning and social skills are attributable to the less challenging environment of the School, particularly smaller class size, smaller physical environment to navigate, smaller student body, more constant application of structure and positive behavioral reinforcement, and slower pace. (NT 355, 289-290, 862-863, 908-909; P 15, 18.)
33. The School's less challenging environment has enabled Student to experience reduced anxiety levels, which have resulted in greater ability to maintain attention to task and to control Student's emotions and behaviors. This improvement and Student's control over Student's emotions and behavior has allowed Student to experience greater success, more positive feedback and greater self-esteem. (NT 166; P 15, 16, 18.)
34. Parents were pleased with Student's progress at the School and wanted Student to remain for another year; however, Parents were willing to consider returning Student to the District if appropriate. (NT 125-128, 227, 295-296; 857, 927, 342-343, 987.)
35. The District did not offer or provide ESY services in the summer of 2014. (P 19.)
36. The District re-evaluated Student in March 2014 and found that Student continued to be a child with the disabilities of Autism and Other Health Impairment. (P 18.)
37. The March 2014 re-evaluation recommended educating Student in a small classroom environment for [redacted] programming, sensory breaks, advance notice of daily schedule, extended time for assignments, small group testing environment, prompts and rewards, a behavior support plan, a transition plan for Student's transfer from the School to the District's neighborhood Middle School, counseling sessions, copies of teacher notes, and daily end of day meetings with a designated educator to assist with material management and homework preparedness. The Re-evaluation Report also

highly recommended intervention focusing upon increasing Student's flexibility with small tasks such as routines and schedule changes. (P 18, 19.)

38. Parents received the private evaluator's second report on March 13, 2014. The District's re-evaluation report was completed on March 14, 2014. On or about March 18, 2014, Parents provided the District with a copy of a follow-up report by the private evaluator that they had retained. The District was able to address the private evaluator's findings in the subsequent IEP, provided to Parents on April 9, 2014, at the time of the IEP meeting. (NT 215-216, 232-233, 558, 859-860, 1036; P 15, 18.)
39. An IEP team including Parents developed an IEP on or about April 9, 2014, that offered supplementary aids and services; these included daily check-in and checkout, and class support from an autistic support teacher and an instructional assistant. The IEP offered group social skills lessons approximately one 45 minute period per week; counseling, 30 minutes per week; occupational therapy, approximately one hour per week; and classroom use of prompting, graphic organizers, keyboard for written assignments, and other assistive technology to be determined by an assistive technology assessment. (P 19.)
40. The April 2014 IEP offered about half the amount of time for social skills instruction that is provided in the School. (NT 181-182, 284-285, 821-822, 888, 1031-1033; P 18, 19.)
41. The IEP indicated that the autistic support teacher was expected to provide explicit teaching of strategies and techniques to enable Student to improve Student's attention to tasks and time on task. The IEP did not indicate the quantity of such services being offered, whether or not such services would be based upon research based methods, or how such services would be coordinated with the instructional assistant offered in the IEP. The IEP did not indicate whether or not the autistic support teacher would be the case manager for Student or would coordinate the services of numerous professionals called for in the IEP. These issues were not clearly delineated at the time of the IEP meeting. (NT 185, 310-311, 339-340, 345-347, 390, 414, 546-548, 893; P 19.)
42. District personnel were not familiar with the extent to which Student was unable to conceptualize and recognize Student's own or others' emotional states, including anxiety. (NT 1042-1056; P 19.)
43. The goals set forth on the offered IEP were constructed in such a way as to be measurable. Yet these goals were not informed by any baseline data; the offer was to collect baseline data within the first two weeks of Student's return to the District. In

- consequence, it was not possible to determine whether or not the goals as stated were a reasonable estimate of what Student could be expected to accomplish in one year. (NT 414, 551; P 19.)
44. The use of an instructional assistant to provide supplementary aids and services created the likelihood that the Student's typical peers would stigmatize Student, thus making Student's social skills development more difficult. (NT 885-887.)
 45. The April 2014 IEP also offered scheduled breaks and extended time for testing. (P 19.)
 46. The IEP offered goals for attention to task; self-identification of Student's feelings and emotions; social thinking; self-advocacy; anxiety and stress reduction strategies; social interaction; and organization of materials and work assignments. There was not a goal for written expression. (P 19.)
 47. It was not clearly delineated whether the various goals and specially designed instruction would be delivered in the regular education classroom or elsewhere in the Middle School building. (NT 414-420; P 19.)
 48. The IEP offered specially designed instruction including special scheduling to enable Student to complete homework during the school day; frequent check ins by an instructional assistant, specially trained and monitored, to assist Student with organizational needs and completion of assignments; training in anxiety management; direct and explicit instruction in organizational routine; modeling and role-playing instruction for social skills; preferential seating, cues, prompts, redirection, specially designed directions, increased wait time; instructional assistant present in regular education classrooms; and quiet lunch environment. Specially designed instruction also was to include various assistive technologies, including use of computers and graphic organizers for writing. (P 19.)
 49. The IEP team concluded that Student did not need extended school year services in order to provide a free appropriate public education, indicating that there was no data to support the need for intervention regarding regression or recoupment, or maintenance of skills. (P 19.)
 50. Parent experienced some regression in Student's behavior, emotional regulation and social skills every summer. (NT 168-170.)

51. The IEP offered a transition plan, including meetings in the summer for adult educators to listen to Student's fears and concerns; touring the school building in the summer and discussing the schedule for the upcoming school year; visiting the school in summer and playing games with selected peers; discussing organizational strategies with the occupational therapist; meeting teachers during in-service days and touring the building with a greater number of people present; reviewing a list of people who can intervene in the event of increasing stress; assignment of a peer buddy to help Student find Student's way through the day in the beginning of school; and assigning an instructional assistant to be available for support. (P 19.)
52. The IEP did not provide for an interim behavior support plan for the initial weeks of school, when it proposed that baselines would be established and a Functional Behavior Assessment completed in preparation for provision of a Positive Behavioral Support Plan. (NT 621-622; P 19.)
53. The District's Middle School is structured so as to provide more support to sixth graders than to seventh and eighth graders, so as to support sixth graders' transition to the Middle School environment. Student, having spent sixth grade at the School, would be transitioning into a less supported environment. (NT 187-188.)
54. The District's offered IEP did not provide for autistic support or for learning support in a small group setting for any part of the school day. (P 19.)
55. [Redacted.]
56. Parents expressed dissatisfaction with the offered IEP during the April 9 IEP meeting. (NT 189.)
57. The District presented Parents with a Notice of Recommended Placement (NOREP) on April 21, 2014. The District's offered placement was itinerant autistic support and [redacted] services in Student's neighborhood school, which for grade seven would be a District middle school. The IEP discussed at the April 9, 2014 IEP meeting was attached as part of the District's offer. (NT 343, 346-348; P 18, 19, 20.)
58. Parents returned the NOREP, signed on April 23, 2014, disapproving the recommendation and requesting a due process hearing. (P 20.)
59. On April 29, 2014, Parents signed a contract to re-enroll Student at the School for the 2014-2015 school year. (NT 231.)

60. Parents filed a request for due process dated May 2, 2014. (P 21.)

61. Parents enrolled Student in the School for the 2014-2015 school year. (NT 189.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is comprised 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.³ 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 evidence⁴ 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.

³ 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).

⁴ A “preponderance” of evidence is a weight of evidence that is greater than the 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.

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

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 placement⁵. 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 appropriate? 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 (3rd Cir. 2007).

⁵ 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.

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 children with disabilities. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Program (“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 (3rd 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 a 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 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” 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 it was made, and the reasonableness of the school district’s offered 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).

PROVISION OF A FAPE TO STUDENT AS DEFINED BY THE IDEA

The first step in deciding whether or not the District must either provide compensatory education or pay tuition reimbursement is to determine whether or not the District offered a FAPE to Student before the Parents unilaterally enrolled Student in the private school. I review the last offered IEP to determine whether or not that document was reasonably calculated to provide Student with meaningful educational benefits at the time at which the IEP was offered. D.S. v. Bayonne Bd. Of Educ., 602 F.3d 553, 565-565 (3d Cir. 2010). Thus, the determination must be made on the basis of facts known or available to the parties at the time that the IEP was offered. See R.E. v. New York City Dept. of Educ., 694 F.3d 167, 185-187 (2d

Cir. 2012). This is especially important in the present matter, where Parents were required to make a decision about the wellbeing of their child based upon the offered IEP and NOREP; these were the only written promises to them, and they could not be assured that any unwritten promises substantially deviating from those made in the IEP would be either honored or enforceable. Ibid. Guided by the above authority, I will not in effect amend what is written in the IEP and NOREP retrospectively by relying upon additional promises or explanatory evidence provided at the hearing. I will determine on the record what Parents reasonably knew or should have known was being offered by the District.

I conclude that the District failed to offer Student an appropriate IEP and NOREP for the 2014-2015 school year. The interventions that were offered in writing in the IEP were not reasonably calculated to provide Student with an opportunity for meaningful educational benefit. The evidence is preponderant that the District failed to clarify several essential aspects of its offer at the IEP meeting. Thus, the Parents were within their rights to place Student unilaterally and request that the District reimburse them for the tuition and transportation costs incurred by reason of that private placement.

The evidence is preponderant that the Student has an unusual combination of disabilities. In addition to Autism and ADHD, hyperactive type, Student struggles with prominent symptoms of Obsessive-Compulsive Disorder and extreme anxiety. Three witnesses testified credibly that Student's attention disorder and hyperactivity were among the most severe such disturbances that they had ever seen in a child of Student's age.

One of these witnesses is a doctor of education, a Pennsylvania licensed clinical psychologist and a Pennsylvania certified school psychologist; this expert specializes in providing psychotherapy and educational consultations for children with autism, and his career

included over twenty years with a Pennsylvania intermediate unit as a consultant for their autism support programs. This witness has seen thousands of children on the autism spectrum. The witness is Student's private therapist, and has seen Student once every two weeks since 2011, with a short hiatus of a few months during that time span. Based on this witness's expertise and familiarity with Student's disabilities over a long period of time, I accord substantial weight to his estimate of the severity of Student's disabilities.

Another witness who found Student's disabling conditions unusually severe was Student's teacher at the School. The witness has about thirty years of experience as a teacher⁶ and school counselor. The witness has served as an admissions director and counselor for a private school specializing in services for students with learning and developmental disorders. Due to her experience, I accord significant weight to her estimate of the severity of Student's disabilities and their impact in the educational setting.

The third witness is a doctorate-level neuropsychologist licensed in Pennsylvania to practice clinical psychology. The witness specializes in clinical evaluations, and has evaluated both children and adults for over thirty years. This witness observed Student twice – in a District placement and in the School – and provided a neuropsychological evaluation of Student. (NT 840-843.) I give weight to her observations of Student's functioning in the classroom, because they are the report of a clinician, trained and experienced in making observations of the behavior of children.⁷ I give her estimate of the severity of Student's disabilities weight, because she

⁶ The District makes much of this teacher's lack of special education certification, arguing that this disqualifies her opinion on the severity of Student's disabilities and their impact in the classroom. I do not accept this argument, because this teacher has an unusual degree of familiarity with students with disabilities, due to her experience working in schools specializing in serving this population, and due to her experiences with teaching children with disabilities in her regular education teaching assignments.

⁷ The District's Director of Special Education testified that Student's fifth grade teacher, whose class the neuropsychologist observed for no more than two hours, protested that the report was inaccurate, and that, even if

testified credibly that she has seen a large number of children with autism in her evaluation practice.

I conclude, based upon the record as a whole, and the testimony of these three expert witnesses, that Student's disabilities severely impede Student's access to the school curriculum, create severe anxiety in periods of stress, and cause Student to be socially and functionally immature.

The record is preponderant that Student requires very frequent prompting to maintain attention to task, specially designed instruction to assure Student's understanding of assignments, extra time for assignments and tests, frequent sensory breaks, and behavior management plans to assure safety and address Student's potential to "melt down" in the classroom. Student's rigidity and obsessive-compulsive symptoms require special accommodations to provide advance warning of deviations from any scheduled activity.

The evidence shows that Student presently is unable to advocate for self, due primarily to Student's extreme lack of insight. Student does not conceptualize or adequately communicate Student's internal physical and emotional states. Student cannot recognize when Student is anxious or ill. Student can go for hours without eating and not realize or report that Student is hungry. It is necessary that Student's adult caretakers, whether Parents or educators, detect Student's discomfort and prompt Student to seek appropriate assistance.

Student, of middle school age, does not have normally developed social skills. In social situations, Student is most often not aware that other people have feelings or different

accurate, did not describe the typical extent of the extent of the teacher's interventions with Student. The teacher did not testify. This assertion was not corroborated by other evidence. Therefore, it is uncorroborated hearsay which I conclude is not reliable under the circumstances, and does not constitute substantive evidence of the truth of the matter stated. 20 U.S.C. §1415(f)(3)(E)(i). Therefore, I give it no weight as against the neuropsychologist's testimony which it purports to contradict.

perspectives. Student's social behavior is often not reciprocal. It is often odd or abnormal, sometimes due to Student's obsessive and compulsive behaviors, and sometimes due to immaturity and the inability to perceive others' perspectives.

[Redacted.]

In finding the District's offer inappropriate for Student, I consider Student's previous experience with the same placement provided to Student in fifth grade. Student was placed in regular education with itinerant autistic support services in fifth grade, with supplemental aids and services⁸. The evidence is preponderant that Student experienced serious difficulties in fifth grade, including increased problems with attention and self-organization, difficulty completing homework and assignments, and extreme levels of anxiety. Student's academic achievement was inconsistent. This history supports my conclusion that the offered placement is not an appropriate one for Student.

I also consider Student's sixth grade experience in the private school. Student's anxiety levels reduced markedly during sixth grade. Student seemed to be more organized and better able to complete assignments. Student experienced improved social relationships. The record is preponderant that Student made significant academic progress in the School's curriculum.

The evidence is preponderant that the Student needs a small group setting for academic instruction. Student is so extremely distractible that a teacher must devote almost constant attention to cuing and prompting Student to return attention to the task at hand. Moreover, in order to avoid prompt dependence, it is necessary to teach Student strategies to maintain focus and attention during instruction. The expert witnesses credibly and convincingly testified that all

⁸ The fifth grade IEP did not provide one-to-one services by an educational assistant; however, in fifth grade, Student had one teacher for most subjects, thus reducing the risk of variable of interventions for Student's attention, hyperactivity, obsessive and compulsive behaviors.

of these needs – given their severity in Student’s case - cannot reasonably be expected to be met by an educational assistant, no matter how well trained, in the context of a regular education classroom. Instead, the Student needs a slower pace of instruction that permits the teacher to provide unusually frequent redirection and constant teaching of social and emotional regulation skills, while also providing academic instruction.

The weight of the evidence shows that Student is unable make meaningful progress in these essential areas of learning through explicit teaching in a separate setting and generalization to the regular education classroom. It is not reasonable to expect Student to generalize self-regulation skills learned cognitively in the separate setting, unless the classroom setting is able to differentially address emotional regulation needs as they arise during the course of instruction. While this can be accomplished in a very small classroom setting with a slower pace, it is not reasonable to expect this degree of differentiated teaching in a regular education setting.

Similarly, the evidence was preponderant that Student also needs to learn social skills both explicitly in small classes and by differentiated instruction during the course of academic classes, when situations arise. Again, it is not reasonable to expect educators in the regular education setting to provide the degree of differentiation needed to teach Student these skills in praxis, even with an educational assistant providing prompting, review and repetition services. Moreover, the quantity of the District’s offered explicit teaching of social skills would be about one half of the amount of services presently provided to Student at the School, and I find that Student’s need in this area requires more time spent for teaching social skills and at more frequent intervals.

Student’s executive functioning needs also would be challenged unreasonably in a larger setting. The record shows that Student’s compulsive needs lead to significant increases of

anxiety. Student's anxiety when stressed is so extreme as to be unhealthy physically; this anxiety itself exacerbates Student's difficulties with staying on task and compulsive rigidity in the face of changing demands.

Given the profound needs thus proved by Parents in this hearing, the District's IEP did not evidence any serious effort to consider the full continuum of least restrictive services that the District is required to make available to every child with a disability. 34 C.F.R. §300.115. The IEP evidences consideration of only the offered placement – itinerant level autistic support services. There was no evidence that the District gave serious consideration to a supplemental or full time level of support or to placement in a separate classroom or separate school. 34 C.F.R. §300.115(b)(1). While such placements would be fraught with difficulty due to Student's [profile], I conclude that the District's failure to even explore such options is inappropriate, and constitutes another factor that contributes to the inappropriateness of its offer.

The Student's combined disabilities, especially Student's impulsive tendency to rush through assignments and Student's rigidity and obsessive tendencies, have impaired Student's ability to create written products commensurate with Student's ability. Nonetheless, the District has failed to offer a goal in the IEP to address Student's needs in written expression. I conclude that this is an inappropriate omission from the IEP in view of Student's well known and prominent under-performance in this area⁹.

The District offered a transition plan for Student's return to the District in its Middle School. The plan depended to a significant degree upon Student having the ability to recognize and articulate feelings of anxiety and worries about transition. To this extent, the plan was

⁹ The District's evaluation did not determine a specific learning disability in written expression; however, written expression was affected by Student's disabilities, regardless of how classified.

inappropriate, due to Student's disabilities in the areas of insight and articulation of feelings. In other respects, the plan was appropriate, but this flaw in the plan is another factor that renders the IEP inappropriate.

The District's offered plan was inappropriate also because it was not appropriately coordinated as offered. It is obvious that, without effective coordination, the plethora of service providers called for in the plan would not be able to provide effective interventions and teaching in the areas of attention to task, behavioral and emotional self-regulation, social skills and self-organization. Yet nowhere did the District indicate what person in this group of service providers would coordinate the team. In particular, the plan did not make clear what would be the role of the autistic support teacher. Although there was mention of explicit teaching, there was no information in the IEP about whether or not this teacher would coordinate the services, how much time the teacher would provide for in-class teaching of skills, or how this teacher would coordinate with the educational assistant. Without this information, the IEP offered a plan that was not reasonably calculated to provide a FAPE.

As the Student was returning to the District from a private placement, the District was challenged to provide a meaningful behavior support plan. The District offered to provide an FBA within the first few weeks of school, but there was no provision for an interim behavior support plan. Although the District's Director of Special Education testified that the previously existing District plan would serve as an interim plan, this was not stated in the IEP. As the first weeks of school are calculated to be a critical time for this transitioning Student, the failure to offer a plan for that time period was another element rendering the IEP inappropriate.

In sum, I conclude that the above described deficiencies of the placement and IEP, taken together, render the District's offered placement inappropriate. This satisfies the first test

of the Burlington-Carter analysis. I therefore must turn to the second stage, the appropriateness of the Parents' private placement.

THE PRIVATE SCHOOL PLACEMENT WAS APPROPRIATE

I conclude that the private placement chosen by the Parents for Student was appropriate. A unilateral placement does not have to comply with all of the requirements that the IDEA imposes upon local education agencies, and a private placement's failure to meet state education standards is not a bar to tuition reimbursement. 34 C.F.R. §300.148(c); Mary Courtney T. v. Sch. Dist., 575 F.3d 235, 242 (3d Cir. 2009); Lauren W. v. DeFlamminis, 480 F.3d 259, 276-277 (3d Cir. 2007). The private placement only needs to provide significant learning and confer meaningful benefit, in the least restrictive appropriate setting. 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.

A preponderance of the evidence in this record proves that the School is providing significant learning and is meeting all of the Student's educational needs. Parents produced extensive documents describing the School and its mission, structure and programming. They also provided documentation regarding Student's progress in sixth grade at the School. In addition, they produced both the School's Head of School and the Student's sixth grade homeroom teacher and case-manager, who testified at length as to their subjective assessments of Student's progress. Progress reports were anecdotal, but were organized according to a plan that prioritized Student's most urgent needs, and a report card that provided teacher reports according to detailed check-lists of learner skills and subject-specific achievement. I conclude that the

record preponderantly supports the conclusion that the School provided Student with significant learning and meaningful benefit.

The Parents and their witnesses from the School testified credibly and persuasively that the small environment of the School attenuated Student's most urgent challenges, including attention to task, hyperactivity, anxiety and emotional regulation, rigidity and organizational skills. Consequently, Student was able to access the curriculum taught there.

The District argues that the School is inappropriate because it offers a slower pace, and less challenging physical and social environment. It argues that the Student needs to be challenged by the pace and organizational and social demands provided in a regular education setting. This argument requires me to weigh the competing expert opinions produced by the parties, and I conclude that the weight of the evidence is preponderant in favor of the Parents on this point.

Parents' expert witnesses were highly experienced in the teaching and treatment of children with autism. They all opined that Student needs the slower pace and small group setting to address Student's emotional, behavioral and social difficulties that increasingly interfere with Student's education as Student progresses from grade to grade. In their opinions, Student can be re-introduced into the regular education setting gradually, as these skills are internalized at a level sufficient to permit Student to function in the more challenging environment.

I find these opinions to be well-reasoned, credible, and consistent with the evidence of Student's functioning. Moreover, I conclude, on the strength of these well-founded opinions, that Student needs the advantages of a small classroom in a separate school at present; consequently, the School offers the least restrictive appropriate setting for Student.

The District offered little to rebut this evidence. Their psychologist's testimony primarily was based upon the uncontested fact that the School has a slower pace than the District's regular education settings. However, the psychologist's argument as to the appropriateness of the separate school placement for Student was essentially a philosophical one, asserting that, in general, it is important to challenge students so that they can grow. The psychologist did not directly confront the Parents' experts' view that such challenge, for this Student, at this time, is counter-productive. Therefore, her testimony was less persuasive to me than the Parents' experts' opinions, which centered upon Student's present educational functioning.

The District also showed that the School does not employ the IEP-based, goal-driven approach mandated by the IDEA. The School does not identify in writing all of Student's needs, and does not take data systematically. However, as noted above, a private placement does not have to meet the requirements of the IDEA to be appropriate on the second test of the Burlington-Carter analysis. Therefore, I accord reduced weight to these arguments concerning the School's appropriateness.

In sum, the Parental placement meets the second test for tuition reimbursement. The School provides an appropriate setting for Student at this time.

THE EQUITIES FAVOR TUITION REIMBURSEMENT

The District argues prominently that the equities favor the District because the Parents "predetermined" a private placement before the District offered its April 2014 IEP. I find that the equities favor reimbursement of tuition and transportation costs.

The evidence is preponderant that the Parents did not "predetermine" a private placement before they met with middle school officials at the IEP meeting. On the contrary, the record

shows that they acted prudently in order to provide for the wellbeing of their child. Nothing in this suggests that Parents had predetermined a private placement.

The District argues that the Parents predetermined a private placement and therefore did not give the District a fair opportunity to address their concerns in the IEP meeting. They point to testimony that the Parents expressed to both of their privately retained clinicians (who later testified) that they desired to keep Student in the private setting for the present school year.

I accept this evidence of Parental wishes. However, the wishes of the parties do not in my opinion prove that they did not approach the IEP with a willingness to consider each other's points of view fairly. The record leaves no doubt that the District similarly wished to provide the offered placement in its own school, without the expense of another year at the School¹⁰. If I were to impute an unfair intent to one party from evidence of its desires, I would have to make the same imputation to the other party. I decline to make such imputation, however, without some additional evidence of actions or statements going beyond mere desire, and proceeding to unreasonable disregard of the other party's proposed placement.

The District argues that Parents evidenced such unfair intent by withholding information from the District's psychologist during the Parental input phase of the re-evaluation process. I do not find this argument convincing.

The Parents failed to disclose Student's ongoing therapy with the Parents' first expert witness; however, the District was on notice of this therapist's involvement, and did not ask

¹⁰ The evidence included a line in the District occupational therapist's portion of the re-evaluation report that arguably presupposed that Student would return to the District. However, the record shows that this statement was based upon an assumption by the therapist that the Student would return to the District, based upon the therapist's understanding that a settlement agreement had provided for such return, and the belief that such was Parents' intent. This evidence does not rise to the level of a District's predetermined intent to return the Student regardless of Student's needs.

about it. Moreover, there is no evidence that knowledge that this therapy continued would have led the psychologist to make a different placement recommendation.

The District showed that the Parents failed to disclose private occupational therapy provided to Student for typing skills in the summer of 2013. Again, there is no evidence to suggest that this was a material omission.

The District showed that the Parents provided a second private evaluation by Parents' retained neuropsychologist several days after the re-evaluation was issued. However, the record showed that the Parents provided this report within five days of receiving it; that they spoke to the psychologist about it and about whether the evaluation would be amended in light of it; and that the District had a full opportunity to review and consider it before offering the placement in the April IEP. Therefore I conclude that there was no evidence of parental bad faith in these incidents, and that the District was not in any way misled as to Student's needs or induced unfairly to make an inappropriate offer because of these incidents. They do not prove that Parents' desires had crystallized into an unfair predetermination.

The Parents testified without contradiction that they received the District's proposed IEP at the meeting on April 9, 2014. They credibly testified that they did their best to understand it and express their concerns during the meeting. Both parties were represented by counsel at the meeting. Under these circumstances, the District will not be heard to raise an equitable claim that the Parents failed to articulate all of their concerns. Moreover, there is a history of lengthy communications between the parties prior to the IEP meeting, as a result of which the District is chargeable with notice of many if not all of Parents' concerns with the regular education placement of Student. There is no evidence in the record that suggests that the District was unaware that the Parents would keep Student in the private placement and seek reimbursement.

The circumstances of the IEP meeting leave no doubt that the District's offer was made with notice of the Parents' intentions.

In sum, the Parents have proven by a preponderance of the evidence that the District failed to offer Student a FAPE, that they chose an appropriate private placement, and that it is equitable for the hearing officer to order reimbursement of tuition and the costs of transportation.¹¹ Therefore, I will order such reimbursement.

SECTION 504

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 504¹². 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).

¹¹ Parents at the hearing requested reimbursement for transportation costs, including a yearly fee for shuttle bus service, mileage, tolls and "indirect" costs consisting of the time of Parents or their au pair in driving Student to the shuttle bus and to school on a few days per year. My order will be limited to reimbursement for tuition, the shuttle bus fee for the 2014-2015 school year, and mileage and tolls incurred during that year. In the exercise of my equitable remedial authority, I consider this amount of reimbursement by the public agency to be fair; I do not consider reimbursement for time to be appropriate in the present matter.

¹² It is not denied – nor on this record could it be denied credibly - that the District is federally funded, that Student has a handicap within the meaning of section 504, and that the Student is "otherwise qualified" for section 504 purposes.

ESY

Parents testified that student does not retain what Student has learned as a general matter. Parent also stated that the Student had a difficult transition to school after every summer. Thus, Parents argue that the District erred in determining that there was no evidence supporting ESY for Student for the 2014-2015 school year. I find this evidence unconvincing. It is subjective and general in nature. It does not provide data to the District that would reasonably support a need for ESY services. It does not specify the kinds of learning for which the Student displayed regression, and there is no evidence that the Parents addressed any specific educational need in the summer of 2014 for which a claim for reimbursement could be supported by the evidence. Therefore I decline to order reimbursement of expenses incurred in the summer of 2014.

RETALIATION

Parents argue that the District predetermined placement in its Middle School regular education classes, and that this constitutes retaliation under section 504. I conclude that there was no predetermination, as discussed above. Therefore, I reject the claim of retaliation under section 504.

CONCLUSION

I conclude that the District failed to offer a FAPE within the meaning of the IDEA and section 504; that the Parents' private placement was appropriate; and that the equities do not favor reduction of reimbursement due to failure of the Parents to put the District on notice of their concerns and intentions fairly. I order the District to provide both tuition reimbursement and transportation costs paid by them for Student's attendance at the School in the 2014-2015

school year. I deny Parents' request for reimbursement of any expenses incurred for programming in the summer of 2014, and I conclude that the District did not retaliate against Student or Parents within the meaning of section 504, based upon this record.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, I hereby **ORDER** as follows:

1. The District is **ORDERED** to reimburse Parents for the full cost of tuition for Student's education at the School for the 2014-2015 school year.
2. The District is **ORDERED** to reimburse Parents for the full cost of Student's transportation to the School for school days during the 2014-2015 school year. Such costs shall be limited to the cost of contracted school bus or shuttle bus services and private travel costs. School bus or shuttle bus expenditures shall be established by receipts or canceled checks showing payment. Travel costs shall include mileage and tolls; mileage shall be reimbursed upon appropriate proof submitted, at the prevailing rate established by the District, or if there is no District rate, an appropriate rate based upon a state governmental agency's established rate.
3. Parents' request for an order of reimbursement for educational expenses incurred during the summer of 2014 is hereby **DENIED**.
4. The District did not discriminate against Parents by precluding their meaningful participation in the educational planning for Student, by predetermining Student's placement for the 2014-2015 school year, in violation of the IDEA and/or section 504.

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.

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

November 10, 2014