

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: T.K.

Date of Birth: [redacted]

Dates of Hearing: 6/11/2015, 6/19/2015, 7/29/2015,
10/2/2015, 10/5/2015 and 10/21/2015

CLOSED HEARING

ODR File No. 15383-14-15 AS

Parties to the Hearing:

Representative:

Parents

Parent[s]

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Date Record Closed:

November 18, 2015

Date of Decision:

December 2, 2015

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a pre-teenaged student in the Methacton School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing convening over six sessions, at which the parties presented evidence in support of their respective positions.⁴ The Parents sought to establish that the District failed to provide Student with FAPE throughout the time period in question, seeking compensatory education and reimbursement for private school tuition. The District maintained that its special education program, as offered and implemented, was appropriate for Student, and that no remedy was due.

For the reasons set forth below, I find in favor of the Parents, but will not order all of the relief sought.

ISSUES

1. Whether the District timely identified Student as eligible for special

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

² 20 U.S.C. §§ 1400-1482.

³ 29 U.S.C. § 794.

⁴ References to the record will be made as follows: Notes of Testimony (N.T.), Parent Exhibits (P), School District Exhibits (S), and Hearing Officer Exhibits (HO). Citations to duplicative exhibits may be to one or the other or both, and are not necessarily exhaustive given the amount of repetition in many of the documents. It merits mention that the hearing in this matter was delayed in part due to a serious medical condition of one of the Parents (N.T. 318; HO-1), as well as the filing of an Amended Complaint that was permitted over objection of the District (HO-2). It should also be noted that several of the hearing sessions were not full days in order to accommodate availability of witnesses and the parties.

education;

2. Whether the District's educational programs, as implemented during the 2012-13 and 2013-14 school years, were appropriate for Student;
3. If the program was not appropriate during the 2012-13 and 2013-14 school years, whether Student is entitled to compensatory education;
4. Whether the District's educational program proposed for the 2014-15 school year was appropriate for Student;
5. If the program was not appropriate for the 2014-15 school year, whether the Parents and Student are entitled to tuition reimbursement.

FINDINGS OF FACT

1. Student is a pre-teenaged Student who resides in the District and is eligible for special education under the IDEA. (N.T. 58-59, 61; S-2 p. 31)
2. Student was evaluated for early intervention services in 2009 but none were recommended. (S-2 p. 38)
3. Student is very sensitive to appearing different than peers. (N.T. 783-84, 949-50, 1607; P-1 p. 215)
4. At the elementary school level, the District holds regular meetings of an instructional support team over the course of the school year to discuss student performance on benchmark assessments and any concerns with specific students. The District then implements tiered interventions for students based on whether they are meeting expectations. (N.T. 433-36, 496-99, 1129-31, 1571-72)

Entry Into District

5. Student started school in the District in first grade, the 2010-11 school year. In the fall of 2011, when Student was in second grade, the Parents and the second grade teacher became concerned about some behaviors that Student was exhibiting at school: throwing objects around the principal's office, going to the nurse with somatic complaints, and hiding in the restroom. Student also began smacking Student's lips and required ointment. The Parents spoke with the teacher, principal, and nurse about these incidents, which continued into the spring of 2012, and a meeting convened in approximately November 2011 to discuss the behaviors. (N.T. 65-68, 76, 89, 139-41, 302, 438, 447-48, 451, 459-60, 1245, 1246-47; P-7 pp. 6-7, P-19 pp. 7, p; S-1 p. 4)
6. The Parents and second grade teacher were concerned that Student's behaviors were related to fine motor weaknesses as Student was having difficulty with writing tasks. The teacher used several interventions with Student, such as discussing upcoming writing

assignments in advance so Student would be better organized and prepared. (N.T. 68-69, 77-79, 439, 444, 465-66, 487-88, 501-04, 1250-51)

7. Student was referred to the instructional support team in November 2011, with a follow-up meeting in February 2012 that suggested some success with the supports provided. (N.T. 499-500, 1571-72; S-1 p. 4)
8. Sometime during the second grade year, when Student was in the principal's office, Student became upset; Student hid under a table, overturning chairs as a barricade when Student was under the table, and emptied a tissue box. (N.T. 65, 1100-01, 1247, 1250)
9. The second grade teacher spoke with the principal, other teachers, and school psychologist as well as Student's first grade teacher, and discussed strategies for the classroom to address the behaviors. She also implemented a behavior chart beginning in late fall, and Student's visits to the nurse decreased from a high of 15 in October 2011 to 3 or fewer per month for the remainder of the school year. Student's teacher believed that the strategies she employed were successful in addressing Student's behaviors and writing difficulties. (N.T. 440-45, 451, 455, 467-68, 475, 520; P-7 pp. 6-7; S-1 p. 4)
10. The Parents expressed concern with Student's handwriting to the District's occupational therapist in March 2012 via email, and asked if an evaluation was indicated, but did not get a response from the therapist. The elementary principal asked the occupational therapist to conduct a screening for Student. The teacher consulted with a District occupational therapist in the spring of 2012, who recommended the Handwriting Without Tears program that was then used at school and with the Parents at home. (N.T. 76-81, 457-58, 466, 470-71, 487-88, 1133; P-23 pp. 7-8; S-1 p. 5)
11. Student's grades at the end of the second grade year met or exceeded expectations in all classes with the exception of one music skill; and Student demonstrated inconsistency with producing neat work. (S-15 pp. 3-4)

Summer 2012 Evaluations

12. The Parents obtained private occupational, physical, and speech/language therapy evaluations in July 2012. They shared these evaluations with the District. Student began private occupational, physical, and speech/language therapy after these evaluations; physical therapy ended during third grade, but occupational and speech/language therapy continued through the end of fourth grade. (N.T. 90-91, 92, 94, 96, 144-45, 187, 235, 256. 1143, 1148; P-16; S-2 pp. 58-65, S-13 pp. 12-15)
13. The Parents also obtained a private neuropsychological evaluation during the summer and fall of 2012, and advised the principal at the beginning of September. They shared the report of this evaluation with the District in the fall of 2012. (N.T. 98-100, 124, 1142-43; P-18 p. 1)
14. The private evaluator issued a neuropsychological evaluation (NER). In the NER, the neuropsychologist summarized medical, personal, and educational information about Student including Student's anxiety that had been exhibited since Student was an infant.

She also conducted assessments of Student's cognitive ability, achievement, and behavioral/social/emotional functioning. (S-2 pp. 36-49)

15. Cognitively (Wechsler Intelligence Scale for Children, Fourth Edition, WISC-IV), Student achieved a Full Scale IQ of 102 and a General Ability Index Score of 100 (both in the average range) with Index scores from low average (Verbal Comprehension Index) to high average (Perceptual Reasoning and Working Memory Indices). On the Test of Memory and Learning, Student scored in the low to high average range on all subtests. On assessment of executive functioning, Student's scores in verbal fluency ranged from impaired to low average; and a motor coordination assessment was in the borderline range. On the Woodcock-Johnson Tests of Achievement, Third Edition (WJ-III-ACH), Student attained average to superior scores on all subtests. (S-2 pp. 39-41)
16. Rating Scales from the Parents and Student's teacher (Behavior Assessment System for Children – Second Edition (BASC-2)) reflected clinically significant concerns of both the parents and teachers with anxiety and somatization and on the Internalizing Problems composite; parental at-risk concerns were with hyperactivity, withdrawal, activities of daily living, and functional communication, and on the Behavioral Symptoms and Adaptive Skills composites. On the Behavior Rating Inventory of Executive Functioning (BRIEF), the Parent ratings reflected clinically significant concerns on the Global Executive Composite and on the Metacognition Index, noting significant concerns with initiation, working memory, and monitoring, and at risk concerns with inhibiting, shifting, and organization of materials. A rating scale related to Autism Spectrum Disorder did not reveal symptoms suggesting that diagnosis. (S-2 pp. 41-43)
17. The private neuropsychologist administered two subtests of the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4), with both scores in the average range. She found Student's expressive and receptive language skills to be variable based on her observations during the evaluation. Student's fine motor skills were also reported to be weak, consistent with the recent OT evaluation. (S-2 pp. 39-40, 44-45)
18. The NER provided several diagnoses for Student: Anxiety Disorder Not Otherwise Specified (NOS), Communication Disorder NOS, Developmental Coordination Disorder, and Disorder of Written Expression. She made a number of recommendations for Student's educational program, including consideration of special education eligibility; accommodations and modifications for expressive language and writing difficulties; and speech/language and occupational therapy. (S-2 pp. 46-48)

2012-13 School Year - Fall

19. Student's third grade teacher spoke with one of the Parents prior to the start of the school year, and they told the teacher that Student had anxiety and did not like writing. (N.T. 840, 843-45, 871)
20. There were approximately 22 students in the third grade. The students had English/language arts, specials, mathematics, science, and social studies classes. The

third grade teacher used a class-wide behavior plan where the entire class participated in a reward if they behaved appropriately. (N.T. 844, 897, 899)

21. Student began the third grade year exhibiting similar behaviors as in second grade: avoiding writing tasks, spending excessive periods of time in the restroom, and visiting the nurse (24 times between September and December 2012). Student also exhibited some new behaviors, including banging Student's head on the desk and hitting Student's head with a hand, which disrupted the class; and Student began picking at Student's hands. The Parents continued to be contacted about Student's behaviors. (N.T. 114-16, 132, 139, 854-55, 947-48, 1251-52, 15751; P-1 p. 19, P-7 pp. 7-8)
22. The third grade teacher started keeping track of Student's problematic behaviors immediately after the school year began. By October, the emotional support teacher was in communication with the third grade teacher and elementary principal regarding Student's problematic behaviors. She also provided support for Student during behavioral incidents, and various sensory techniques were tried with Student. (N.T. 137, 142, 855, 947-49, 932-35, 952-53; P-13; S-2 pp. 5-6, S-18 pp. 1-14)
23. The significant behavioral incidents tracked by the emotional support teacher and third grade teacher were described in a chart that may be briefly summarized as follows.

DATE	BEHAVIORAL INCIDENT
9/7/12	Frustrated with writing task, wrote with head under desk, went to restroom twice for extended periods during English/Language Arts
9/10/12	Frustrated with writing task, stomped feet, went to restroom for extended period
10/17/12	Cried in classroom, hid in closet, went to restroom for extended period, hit head
10/18/12	Frustrated in English/Language Arts, stomped feet, hit head with box and hand
10/22/12	Did not complete then ripped up math test, crumpled assignment, went to restroom then nurse claiming not feeling well, hit head
11/1/12	Frustrated with math test, went to and locked self in restroom, hit head and kicked wall, hit head with shoe, went to sensory room several times, crumpled test
11/2/12	Frustrated with writing task, hit head with computer table, cried
11/5/12	Hit head on desk and floor, cried, screamed, went to sensory room
11/26/12	Upset coming to school, cried, screamed, threw objects, hit head with objects
11/29/12	Screamed at aide at recess, pulled hat over face
11/30/12	Sat under table in classroom, hit head on table
12/3/12	Frustrated with writing task, scratching self, tore up papers, threw book, threw and broke chair, kicked at wall
1/4/13	Ripped book during testing, cried, called staff names
1/28/13	Picked at hands, not paying attention
2/6/13	Upset at recess, called aide names

On two of these occasions, the teacher removed the other students from the classroom so that Student could calm Student's self. Many of these incidents were also shared with the Parents. (N.T. 862-63; P-13; S-18 pp. 1-14; S-19 pp. 9, 16)

24. The Parents obtained physical and occupational therapy evaluations from The Children's Hospital of Philadelphia (CHOP) in October 2012. The occupational therapist reported generalized muscle weakness that impacted fine motor skills and sensory needs. Both the physical and occupational therapists recommended continued therapy. (P-3)
25. Student experienced difficulty with music class early in the school year due to the sensory stimulation. Student's therapist recommended that Student be excused from the class because of Student's sensory sensitivity. The District gave Student an exemption, and further addressed this difficulty by gradually increasing the time Student attended that class and providing a reward. (N.T. 310-12, 1061-62; P-1 p. 107; S-2 p. 70)
26. Student began seeing a private licensed social worker (LSW) for therapy in the fall of 2012 for anxiety. Student continued that therapy through the October 2015 hearing sessions, but the frequency decreased during the 2013-14 school year to once every two or three weeks. (N.T. 120, 1157, 1160-62, 1169-70, 1182, 1214-15, 1230)
27. Student was placed on medication in October 2012 by Student's treating psychiatrist. (N.T. 134-35, 241)
28. In early November 2012, the LSW made recommendations for addressing Student's problematic behavior at school, including escaping to the restroom. She recommended a sign to ask for help or a break, making choices, reviewing tests, and pre-writing for written assignments. Those suggestions were provided to the District. (P-5 p. 23)
29. Also in early November 2012, the District developed a plan of strategies to address Student's difficulties with writing tasks, and responses when Student became frustrated. Student was able to go to the occupational therapy room when frustrated or in need of a break, and writing tasks would be monitored. These suggestions were combined with those of the LSW. (P-5 pp. 25-28; S-19 pp. 7-8)
30. As of mid-November 2012, Student had not completed a single writing assignment, and was exhibiting difficulty choosing topics and executing all writing tasks. A variety of strategies to assist Student with writing and managing anxiety and emotions had proven to be only minimally effective. The teacher described Student as having "extreme distracting reactions" to frustration in all subjects that were impacting Student and the rest of the class (P-14 p. 1). Student's anxiety and frustration occurred in all subject areas. (N.T. 866-70; P-14)
31. The District created a de-escalation plan for Student in December 2012 to provide support while the ER and Individualized Education Program (IEP) process was taking place. Noted antecedents in this plan were transitions; writing; non-preferred tasks; time limits; and demands. The plan provided specific interventions based on the degree of behavior (potential for injury to Student or others). (N.T. 936-38; S-2 pp. 68-69)

District Evaluation and Program Development

32. The District sought permission to evaluate Student in October 2012 following receipt of the private NER and based on Student's problematic behaviors, which were inconsistent;

the Parents gave their consent. The District school psychologist and Parents agreed that it was unnecessary to conduct further assessments, but she did obtain rating scales from the Parents and teachers. The District issued an Evaluation Report (ER) in December 2012 and an amended report in January 2013. (N.T. 1575-77, 1579-82, 1622-28, 1646-47, 1650; S-2 pp. 1, 50-51, 54-56, S-3 p. 1)

33. A meeting convened on November 30, 2012. The District school psychologist and various other participants discussed the ER with the Parents, including the possibility that Student had an emotional disturbance or was autistic. The Parents agreed to delay finalization of the ER so the school psychologist could speak with Student's private providers. The Parents consented to communication with the psychiatrist at that time, although they had given permission to speak with the LSW in October. (N.T. 149-50, 152-56, 158, 161-63, 1252-56, 1589-91, 1643-44; P-4 p. 1; S-2 pp. 56-57)
34. The ER contained information from the Parents, which focused on Student's anxiety and difficulty with writing tasks, and the relationship between the two. It summarized the NER and the private therapy evaluations, and provided input from Student's third grade teacher, the emotional support teacher, and guidance counselor, among others. The District school psychologist also conducted two observations that were summarized in the ER as were teacher recommendations based on strategies that had been successful and unsuccessful with Student's difficult behaviors; many teachers emphasized concerns with Student's anxiety and difficulty with writing tasks. Results of various academic assessments and Student's functional performance (including the various behavioral episodes set forth in the table above) were also reported. (S-2 pp. 1-17, 20-31, 52-53)
35. The District school psychologist also obtained rating scales using the Gilliam Asperger's Disorder Scale (GADS) from the Parents and one teacher. The results indicated a borderline concern (Parents) and a high probability of Asperger's Disorder (third grade teacher). (S-2 pp. 18-19)
36. The ER concluded that Student was eligible for special education on the basis of Other Health Impairment (OHI), but not a Specific Learning Disability in the area of written expression. Recommendations noted an upcoming speech/language evaluation and Functional Behavioral Assessment (FBA). (S-2 pp. 31-32)
37. An Addendum to the ER provided updated information from Student's teacher, who reported that Student was not exhibiting problematic behavior since the implementation of a sticker system in the homework book. The District school psychologist also summarized her conferences with Student's treating psychiatrist and Student's therapist. She included the report of the private speech/language evaluation that included an administration of the CELF-4, and pragmatic language and speech assessments, with a recommendation for speech/language therapy at school to address weaknesses in verbal expression and pragmatic language. The Addendum also reported the results of a second teacher's completion of the GADS, whose responses indicated a high probability of Asperger's Syndrome. The Addendum again found Student eligible for special education, but with the OHI specified as Anxiety Disorder, and with a second disability category of Speech/Language Impairment. (N.T. 1596; S-3)

38. The District school psychologist did not agree with the private neuropsychologist that Student had a disability in the area of written expression because Student was able to produce written work when provided with accommodations such as use of a computer. She attributed Student's difficulties with writing to anxiety and a lack of organizational and other executive functioning skills. (N.T. 1587-88)
39. An IEP meeting convened in January 2013. The IEP developed summarized the ER and identified Student's strengths (including academic skills in reading, mathematics, science, and spelling) and needs (difficulty completing writing tasks including handwriting, problematic behaviors, strategies for coping and managing and expressing emotions, difficulty accepting help, following directives, accepting corrections, fine and gross motor skills, sensory processing and self-regulation, and expressive, motor, and pragmatic language skills). Present levels of academic achievement and functional performance were included. (N.T. 172-73, 875-76; S-4)
40. Annual goals in the January 2013 IEP addressed: labeling the need for and accessing self-regulation/sensory input; behaving appropriately and managing frustration; demonstrating fine motor skills; and speech/language (motor, expressive, and functional language skills). Program modifications and items of specially designed instruction (SDI) included occupational therapy, sensory needs, speech/language supports, repeated directions with checks for understanding, chunking of tasks and assignments, extended time, preferential seating, reduced workload, breaks, positive reinforcement, and testing accommodations. Occupational therapy, social skills group, and speech/language therapy were provided as related services. The de-escalation plan and a sensory diet were part of this IEP, but there was no Positive Behavior Support Plan (PBSP). Student would participate in regular education with the exception of related services with itinerant emotional and speech/language support. The Parents approved the NOREP (N.T. 177; S-4)

2012-13 School Year - Spring

41. The emotional support teacher created a behavior system for Student, wherein the third grade teacher placed a sticker in Student's homework book and checked off how Student managed Student's frustration that day. Student also monitored Student's ability to follow directions and accept consequences and earned points for doing so. This system was not a PBSP. (N.T. 878, 899-900, 949-50, 992-95, 1036-38, 1046-47; S-18 pp. 20, 23-28; S-19 pp. 30-33)
42. The third grade teacher implemented the de-escalation plan after the IEP meeting. Sensory items were available, but Student sometimes refused to use them. (N.T. 879-80, 909-10)
43. The emotional support teacher provided social skills instruction once each week, and was in Student's classroom during writing instruction each day. She also consulted with the third grade teacher on modifying assignments or to schedule additional time for push-in support. (N.T. 871-72, 945-46, 956-57)

44. Student's IEP was revised in March 2013 following a parent conference, and the team added accommodations for state and local assessments and a weekly social skills group. The Parents approved the NOREP. (S-5)
45. A report of an FBA was completed in April 2013 by an outside source. The identified behaviors were facial self-stimulation (throughout the school day) and difficulty discerning social skills (especially at recess and lunch). The hypothesis of the function of those behaviors was automatic reinforcement with a secondary function of escape from work and social interactions. The Behavior Analyst recommended social skills training but no behavior intervention plan or PBSP. (S-6)
46. Student continued to exhibit problematic behaviors in the spring of 2013, specifically visiting the nurse (17 visits between January and June 2013), hiding in the restroom, and avoiding writing tasks, but Student no longer banged or hit Student's head. There continued to be instances of negative interactions with peers and staff. After the IEP was implemented, Student was able to use the computer and had assistance from the emotional support teacher for prewriting activities, but difficulties with writing continued, with some decrease by the end of that school year. (N.T. 178-79, 865, 867-68, 870, 883, 885-87, 911, 941-42, 957, 1011; P-5 pp. 124-25; P-7 p. 8, P-18 pp. 153, 154, 157)
47. Student's grades at the end of the third grade year reflected that Student met or exceeded expectations in all classes with the exception of writing appropriate responses to reading comprehension questions, solving and explaining mathematics problems, and music, where skills were developing. Student over the course of the school year demonstrated inconsistency with all of the characteristics of a successful learner and citizen, particularly listening attentively, using time wisely, revising work, producing neat and organized work, and treating others with courtesy and respect. (S-15 pp. 5-6)
48. Progress reports on Student's January 2013 IEP goals reflected that Student was learning to use calming strategies to self-regulate with prompting, and was doing so independently in November 2013; was following teacher directions and accepting consequences; was using sensory input and strategies; was exhibiting improved fine motor skills but was rushing through tasks; was using strategies to improve speech intelligibility and fluency; and met expressive language goals and objectives. Student made some gains in recognizing nonverbal communication and pragmatic language skills. (S-16)

2013-14 School Year – Fall

49. Student began fourth grade in the 2013-14 school year. Prior to the first day of school, Student's teacher met informally with the third grade teacher, emotional support teacher, occupational therapist, and elementary principal to talk about Student's difficulties in the classroom including avoiding work and writing tasks. (N.T. 744-76)
50. There were 23 students in the fourth grade class. Students had special classes, and mathematics, English/language arts, science, and social studies classes. (N.T. 791-92, 799)

51. In the fall of 2013, Student did not exhibit difficulty with transitions in fourth grade, but did have difficulty with non-preferred tasks and demands and exhibited a lack of organizational skills. Student continued to visit the nurse frequently and hide in the restroom, and had difficulty with writing tasks including on tests. Student also picked at Student's fingers and sometimes at Student's face. Student at times continued to become upset and frustrated, particularly going to speech/language therapy. There were also incidents of difficulties with peers. The teacher verbally redirected Student when Student refused to complete work or tasks, and sometimes offered sensory materials, but Student did not typically use those. (N.T. 197-98, 227, 234-35, 745, 748-56, 773-75, 800-01, 953-54, 1019-21, 1256-57; P-1 pp. 201-02, P-7 pp. 8-9, P-18 pp. 273-74, 311, 325)
52. Student participated in classes that Student enjoyed in fourth grade (mathematics, science, and social studies), but did not participate frequently in classes Student did not like. Student did not always use coping strategies in fourth grade, but did so more often toward the end of the school year, telling the teacher when Student was frustrated. (N.T. 766, 781, 788, 798, 801-03, 807-08)
53. The emotional support teacher consulted with the fourth grade teacher about Student's behaviors, and provided support to Student in the classroom. (N.T. 750-51, 771, 788, 794-95, 1047)
54. The Parents reminded Student's teachers at times about Student's difficulties with written expression and necessary accommodations. (P-1 pp. 215, 252-53)
55. The fourth grade teacher implemented the de-escalation plan from December 2012 that was updated in January 2014. She also used the ALERT program in the classroom that provided students with a tool for self-regulation. (N.T. 747-49, 804-06, 814-15)
56. Student used a computer for writing tasks, as well as graphic organizers. Student also took English/language arts tests on a computer. Student was able to ask the teacher for help if needed, and Student did request her help at times. (N.T. 756, 776-77, 779, 792-97, 827-28)
57. The Parents obtained a developmental and behavioral evaluation from CHOP in October 2013. At that time, Student had reportedly shown improvement in ability to manage emotions and express frustration; writing accommodations and opportunities for sensory input had been beneficial. The pediatrician concluded that Student did not meet diagnostic criteria for Autism Spectrum Disorder, but provided diagnoses for Anxiety, Developmental Coordination Disorder, Executive Function Deficit, Learning Disorder NOS, and Sensory Integration Disorder. She made recommendations for, among other things, fading of Student's use of the sensory room, speech/language and occupational therapy and writing strategies and accommodations. (N.T. 190-91; P-10; S-7 pp. 11-25)
58. The Parents had another private neuropsychological evaluation conducted in November and December 2013, with a second NER. Noted concerns were anxiety, language, and fine motor (including writing) skills; however, it was reported that Student's anxiety had improved as well as Student's ability to express anxiety and use coping strategies; social

skills had improved; and behavioral concerns had decreased. The Parents provided this report to the District. (N.T. 203, 218, 1264-65; S-9 pp. 19-36)

59. The second NER reported a Full Scale IQ on the WISC-IV of 117 (high average) with Index Scores ranging from average (Working Memory) to high average (Perceptual Reasoning and Processing Speed). On the Test of Memory and Learning, Student scored in the borderline to high average range. On an assessment of Executive Functioning Student's scores were all in the average to very superior range with the exception of the Letter Fluency subtest (low average). Scores on the WJ-III-ACH were all in the average to superior range with the exception of the Writing Samples subtest. (S-9 pp. 22-24)
60. Rating Scales from the Parents and teacher reflected clinically significant concerns of both raters with respect to Anxiety and the Internalizing Problems composite; the Parents also indicated clinically significant concerns with Hyperactivity and Somatization and at-risk concerns with Withdrawal, Attention Problems, Leadership, Activities of Daily Living, and Functional Communication, and on the Externalizing Problems and Behavioral Symptoms composites. The teacher reported at-risk concerns with Attention Problems and Atypicality. BRIEF results showed clinically significant concerns of the Parents on the Global Executive Composite and Metacognition Index; and at-risk concerns with inhibiting, emotional control, organization of materials, and monitoring, and on the Behavioral Regulation Index. The parents also reflected concerns with most adaptive functioning areas. (S-9 pp. 24-26)
61. The private neuropsychologist again administered two subtests of the CELF-4, with scores in the average and high average range. She continued to note concerns with expressive language skills based on observations during the evaluation. Fine motor skills were improved over her previous evaluation, but remained weak. (S-9 pp. 23, 26-29)
62. The second NER reflected diagnoses of Anxiety Disorder NOS, Communication Disorder NOS, Developmental Coordination Disorder, and a Specific Learning Disorder with Impairment in Written Expression. The neuropsychologist again made a number of recommendations for Student's educational program, to address language and writing difficulties, anxiety, speech/language therapy, occupational therapy, and tutoring. S-9 pp. 26-36)
63. The District issued a Reevaluation Report (RR) in January 2014, with consent of the Parents, following review of the CHOP evaluation. This RR continued to find Student eligible for special education on the bases of OHI and a Speech/Language Impairment and added the pediatrician's educational programming recommendations. (S-7 pp. 1-10, 26-27)
64. Student's IEP team convened in January 2014 to develop a new IEP and discuss Student's transition to a new school building in the fall as well as new evaluation reports. Student's present levels of academic achievement and functional performance were reported with needs identified (participation in class, self-stimulatory behavior, managing emotions and frustration, social perception, avoiding tasks, safety, writing tasks, self-

regulation, sensory processing, and visual motor skills). Parent input included incorporation of new recommendations for writing and expressive language. Student no longer exhibited difficulty with speech sound production or sequencing and the speech/language therapist recommended a decrease in that therapy; Student also had not used a behavior chart since the start of the school year. (N.T. 190-92, 968-72, 1259-62; S-8)

65. Annual goals in the January 2014 IEP addressed behavior (using coping strategies with prompts, participation in class), occupational therapy (producing legible written paragraphs with appropriate sizing and spacing), and speech/language (maintaining pragmatic language skills). Program modifications and items of specially designed instruction were similar to the previous IEP, and speech/language therapy, occupational therapy, and social skills continued as related services. Student's program was regular education except for related services, with itinerant emotional and speech/language support; and Student was eligible for ESY services to address social skills and coping strategies. The Parents signed the NOREP without indicating approval or disapproval. (S-8)

2013-14 School Year – Spring

66. Student continued to exhibit problematic behavior in the spring, going to the restroom for extended periods of time, frequently picking and biting at fingers, and failing to participate in class and in sessions with the emotional support teacher. There was also an incident in May when Student was unable to complete a writing assignment in the library, and Student cried. (N.T. 227-28, 784-85, 830-31; P-1 p. 301, P-8; P-18 pp. 423-24)
67. The District issued a Reevaluation Report (RR) in April 2014, with consent of the Parents, to reflect consideration of the second NER. The District school psychologist again saw no need to conduct further assessments for this RR. (N.T. 1608-09, 1617-18; S-9 pp. 1-18)
68. The RR reflected disagreement with the second NER in several respects. The District attributed the findings with respect to Student's memory and executive functioning as weaknesses related to anxiety. The diagnosis of Communication Disorder was criticized as based on inadequate assessment, and the District speech/language pathologist considered Student to demonstrate age-appropriate expressive and receptive language skills. The Developmental Coordination Disorder was rejected based on the private neuropsychologist's own assessment as well as the failure to consider Student's sensory needs. (S-9)
69. The District school psychologist continued to disagree that Student had a disability in written expression, but rather exhibited anxiety, executive functioning, and graphomotor weaknesses that were manifested in written work product and "resistance to writing" (S-9 p. 4). This RR continued to find Student eligible for special education on the bases of OHI – Anxiety Disorder and Speech/language Impairment. (N.T. 1610-11; S-9)

70. The Parents obtained a second developmental and behavioral evaluation from CHOP in April 2014. The Parents reported that student had not had significant behavioral problems during the school year and was better able to manage anxiety. However, the Parents remain concerned about academic needs and were considering a private school. This evaluation provided diagnoses for Anxiety, Developmental Coordination Disorder, Executive Function Deficit, Communication Disorder, and Dysgraphia. The pediatrician's recommendations included a small classroom setting with additional support for reading and writing. (S-11)
71. Student's grades at the end of the fourth grade year reflected that Student met or exceeded expectations in all classes. Student did demonstrate inconsistency throughout the school year with completing work on time, participating in class, listening attentively, and seeking help. (S-15 pp. 7-8)
72. Progress reports on Student's January 2014 IEP goals through the end of the 2013-14 school year reflected that Student was successfully using coping strategies (sensory input) with prompting; made some improvement with handwriting skills particularly in identifying and correcting errors using a checklist, and was using self-regulating strategies during occupational therapy sessions. Student was demonstrating generalization of the speech/language goals for functional pragmatic language with a check-in prompt, but was resistant to speech/language therapy in the third quarter and was pleased to learn that that service would be ending. Student participated in class approximately 15% of the time (toward a goal of 85%). (S-17)

Preparation for 2014-15 School Year

73. Two meetings of the IEP team convened in May 2014 as Student was preparing to move to a different school building in the fall. The second meeting occurred at the school building where Student would attend, and the Parents were able to visit the emotional support classroom. At those meetings, the team discussed concerns about implementation of Student's IEP, particularly with respect to writing tasks and speech/language therapy, ESY, and Student's transition to the school building. (N.T. 216-17, 221, 315, 540-41, 986-89, 1053-56, 1265-68, 1271-72, 1298, 1418-1426, 1500-01; S-10 pp. 1-4)
74. The May 2014 IEP reflected updates to the present levels of academic achievement and functional performance including information from the second NER. Program modifications and SDI were revised with additions including a structured, consistent, predictable environment; a place for sensory items; accommodations for written assignments and tests; wait time; choices with task directives; social skills and self-regulation; and prompts for speech/language skills. Speech/language therapy was increased to sixty minutes per week. The Parents did not approve a NOREP in May 2014. (N.T. 1271-72; P-17; S-10)
75. In late May 2014, Student toured the school building where Student would attend in the fall. Student told the emotional support teacher that Student would not be attending that school. (N.T. 996-97)

76. There is an emotional support teacher at the school building where Student would have attended fifth grade, and she has two instructional assistants. All three provide push-in support in the classroom, and there is also a separate emotional support classroom. (N.T. 1504, 1506-09)
77. The District would have addressed Student's occupational therapy needs for social skills; for self-regulation through a program addressing self-regulation and related social skills; for sensory needs through a sensory diet and strategies; and for fine motor skills by monitoring Student's handwriting in the classroom. (N.T. 1385-91, 1393-97, 1497-98, 1513-16, 1520-29)
78. The Parents advised the District in May 2014 that they were considering a private school. In June 2014, they wrote to the District Superintendent and requested reimbursement for private school tuition. (N.T. 224-25, 1275-77; S-12)
79. The District agreed in July 2014, following a meeting with the Parents, to fund an independent speech/language evaluation. The Parents gave their consent. (N.T. 304-05, 307-08, 1302-03, 1323-24, 1428-33, 1469, 1476; P-1 pp. 308-10; P-25; S-13 pp. 8, 10-11)
80. The independent speech/language evaluation was completed in July and a report issued. The speech/language pathologist administered four subtests from the CELF-4 to obtain a Core Language Score (receptive and expressive language skills), and Student achieved scores in the average to very superior range. In assessment of social-pragmatic language, Student exhibited weaknesses compared to overall language ability; and some difficulty with articulation and intelligibility was also noted. The speech/language pathologist recommended a continuation of services at school and made recommendations for Student's IEP. (N.T. 1434; S-13 pp. 1-7)
81. The Parents and District communicated over the summer of 2014, when the Parents advised of their intention to disenroll Student and seek tuition reimbursement for private school. The District denied that request. The IEP team did meet again in August. (N.T. 224, 280, 283, 308, 315-16; P-1 pp 308-15, 318-19, P-18 p. 483-87; S-14 pp. 1-4)
82. At the August 2014 meeting, the participants discussed the independent speech/language evaluation, and added two goals to address needs for pragmatic language skills including narrative skills. Several items of specially designed instruction were also added for weekly communication between the speech/language therapist and the Parents to discuss Student's pragmatic language skills, and Student's use of those skills in speech/language therapy sessions and in the classroom. The Parents indicated disapproval of the NOREP proposing a District program and rejecting the private school placement on September 3, 2014. (N.T. 565-77, 590, 609-12, 615-17, 619-20, 626-27, 630, 1278-80, 1303-04, 1306, 1311, 1434-42, 1453-54, 1458-59; S-14 pp. 32-34, 43-44, 54-57)

First Private School

83. The Parents applied to the first private school (First Private School) in February 2014. At the time of the application, personnel at First Private School reviewed records submitted

with the application. Following Student's visit to the school in March 2014, it accepted Student for admission despite some concerns with its ability to address Student's anxiety. (N.T. 226, 228, 349, 351-54, 356-58, 359-60, 397-98, 403-04; p-20 p. 17-18; S-21 p. 26)

84. The Parents signed a contract and paid a deposit to First Private School in late April 2014. They also enrolled in a tuition refund plan that would allow them reimbursement for 60% of the prorated amount if Student would leave during the school year. (N.T. 382-83, 1292-93, 1324-25; S-21 pp. 14-16, 27)
85. The Parents made the decision to send Student to First Private School during the last week of August 2014 after the IEP meeting. They notified the District on September 1, 2014 that they were sending Student to a private school and requested its financial support. The District denied their request for public funding. (N.T. 1277-78, 1280-81, 1319-20, 1325, 1427, 1439, 1473; P-1 p. 320)
86. First Private School is a college preparatory school for students from kindergarten through twelfth grade. There is a lower school (kindergarten through fifth grade), a middle school (sixth through eighth grades), and an upper school (ninth through twelfth grades) with about 280 total students. Approximately 80% of its students have been identified as having a disability. (N.T. 345-46, 411-12, 420)
87. First Private School does not serve students who have significant behavioral or social/emotional needs, although it does have two student counselors on staff with one at Student's level. Teachers at Student's level are certified for kindergarten through eighth grade. (N.T. 347-48, 365-66)
88. Student began at First Private School in September 2014. Student made the transition without difficulty, but after approximately two weeks, staff noticed Student avoiding work and exhibiting increasingly problematic behaviors. Student was provided strategies to lessen anxiety, including taking breaks until Student felt ready to return to the classroom. By the time of parent-teacher conferences in early November 2014, staff were concerned about their ability to meet Student's needs and began to allow Student to see the counselor as needed. After continuing to try various strategies with Student, by mid December, staff at First Private School recommended several other private schools as possible placements. (N.T. 361, 373-75, 378-80, 388-90, 411, 1281, 1283-86)
89. Student's difficulties at First Private School began around the time that one of Student's Parents was diagnosed with a serious medical condition. Student did meet with staff at First Private School but Student's private LSW also met with Student at the school to provide counseling. (N.T. 374-75, 377, 1190, 1283-86)
90. At First Private School, Student was in smaller classrooms; there were eighteen students and three teachers. Student had opportunities for sensory input throughout the day. In a report of the first trimester, Student was developing and demonstrating literacy skills (reading and writing), beginning to develop or developing mathematics skills, was developing skills in social studies, and was independent in applying skills in science.

Student's skills in special classes, and work and social skills and behaviors, ranged from beginning development to independence. (N.T. 317-18, 416-17; S-21 pp. 1-9))

91. Student had classes for reading, a supplemental reading group, writing, and mathematics. Writing instruction was through a systematic, structured, multisensory approach. (N.T. 362-68)
92. Student did well academically at First Private School, but not with respect to using coping skills. Student had difficulty interacting with teachers, cooperating with peers, maintaining self-control, accepting responsibility for behavior, and responding to feedback appropriately. (N.T. 229-30, 295-96, 361; S-21 pp. 1-9)
93. Student did not have direct occupational or physical therapy at First Private School, and was not provided with emotional support. (N.T. 291-92, 389-91)
94. First Private School does not implement IEPs for students, and did not use the District's IEP for Student. (N.T. 399-400, 403)
95. Staff at First Private School advised the Parents in early December that Student could not return for the second semester. For the final few weeks of the first semester, Student completed schoolwork at home that the Parents picked up and delivered. (N.T. 293-94, 380, 391-92, 1286-87, 1293-94, 1296)
96. The Parents were refunded the amount owed after Student left First Private School based on the plan. (N.T. 385-86; P-20 p. 2-5, 19; S-21 p. 28)
97. The Parents explored a number of other private schools after Student left First Private School. Student's therapist was involved in visiting some of those schools. (N.T. 298, 1192-94, 1218, 1288-89)

Second Private School

98. Student began attending a second private school (Second Private School) in late January 2015. The Parents never informed the District of Student's attendance there. (N.T. 299, 652, 1296-97, 1450, 1454, 1491; P-12 pp. 1-9; S-22 pp. 1-4)
99. Second Private School is an approved private school for children who are eligible for special education. It develops and implements IEPs for all of its students, and created an IEP for Student in February 2015. (N.T. 653-55, 695, 733, 739)
100. Student exhibited difficulties when first attending Second Private School, including refusal to complete non-preferred tasks such as handwriting and failing to interact with peers. Student began attending half days for several days. (N.T. 656-59)
101. Second Private School provided accommodations for Student's dislike of handwriting, such as decreasing the number of questions or problems on a test and using a format such as multiple choice. (N.T. 657-58, 682-83)

102. Student had an IEP at Second Private School. At the time of its development, Student was not exhibiting behaviors that required intervention beyond the school-wide PBSP. Annual goals addressed self-regulation; requesting and accepting help; social skills/reciprocal peer conversations; social skills/appropriate peer interactions; using coping strategies; pragmatic language; and written expression. Program modifications and SDI were included for communication with Student, social skills and support, classroom routine and environment, materials, organization, behavior and emotion, and tests and assignments. The IEP also provided for speech/language and occupational therapy as related services. (N.T. 687; P-22)
103. IEP goals were written with a baseline of 0 or no baseline. However, Student's performance on those goals was likely higher, up to 20%, at the time the IEP was created. (N.T. 704, 706-08, 710-13, 71819, 738-39)
104. Second Private School implemented a behavior system with an individualized point sheet where Student earned rewards for demonstrating core values (safety, responsibility, respect, and readiness) Student earned a point by demonstrating a behavior one time during the class period. (N.T. 661-64, 708; P-21 pp. 13-14)
105. Second Private School has a school-wide positive behavior system with a token economy for exhibiting good behavior. The combination of Student's point sheet and the school-wide plan was successful for Student. (N.T. 665-68, 691)
106. Second Private School addressed Student's difficulty with handwriting through accommodations, and by structuring those activities through providing graphic organizers and other prewriting strategies, and use of a computer. The format of Student's written tests was also modified. These strategies were successful for Student. (N.T. 657-59, 669, 682, 684-87, 721)
107. Second Private School addressed Student's sensory needs by providing a variety of sensory items and activities, although Student was not receptive to using sensory items. (N.T. 669-72)
108. Second Private School addressed Student's social skill and coping skills needs (N.T. 673-76, 727)
109. At Second Private School, Student was in a class of five students and had reading/language arts, mathematics, health, social studies, and science. The reading/language arts and mathematics classes were grouped by levels of ability; Student was on grade level in reading. (N.T. 677-81, 698)
110. Second Private School reported on Student's progress toward IEP goals in March and June 2015. Student showed progress in self-regulation (from no baseline to 91%); requesting and accepting help (from no baseline to 96%); social skills/reciprocal peer conversations (a developing skill); social skills/appropriate peer interactions (a developing skill); using coping strategies (from no baseline to 85% throughout the school day); pragmatic language (from no baseline on interpreting body language to 85%); and written expression (inconsistent progress on a developing skill). (P-21)

111. Student achieved final report card grades at Second Private School in the A to B range, and meeting or exceeding expectations in ungraded subject areas. (P-12 p. 12)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible, testifying to the best of their recollections based on their individual perspectives. It should also be noted that the Parents presented as caring and devoted parents and advocates for Student; additionally, all of the District personnel presented as qualified and dedicated professionals. There can be no question that the parties share a common concern for Student and Student’s education, despite their conflicting positions at the hearing.

In reviewing the record, the testimony of every witness, and the content of each exhibit,

were thoroughly considered in issuing this decision,⁵ as were the parties' thorough and well-written Closing Arguments. One evidentiary issue merits mention before proceeding to the substantive claims. The parties' viewpoints on what information this hearing officer should consider with respect to the 2015-16 school year were polar opposites. (*See* N.T. 1198-1205; District's Closing Argument at 1 n.2) The Parents appeared reluctant to let it be known that Student had returned to the District for the current school year, while the District asserted that this decision by the Parents was relevant, particularly with respect to consideration of the equities in any tuition reimbursement analysis. All evidence relating to the 2015-16 school year was excluded as immaterial to the issues in the Due Process Complaint and Amended Complaint, and the arguments of both parties regarding this evidence have been well developed and preserved. Nevertheless, and despite the efforts to keep from me any knowledge that the parties had been meeting and working together to collaborate on Student's current program, those circumstances can only be viewed as positive for both the Parents and District, even if not probative of the issues presented.

General IDEA Principles

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services, another aspect of Child Find. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); 22 Pa. Code §§ 14.121-14.125. School districts are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not required to identify a

⁵ It merits mention, however, that the sheer volume of email messages introduced and admitted (particularly P-1 and P-18) created a likely unintended distraction from the important evidence in the case, and served to minimize, if not obscure, the significance of any single electronic communication between the parties.

disability “at the earliest possible moment.” *Id.* (citation omitted). Nevertheless, when a school district has reasonable suspicion of a disability, the obligation is triggered. *P.P. v. West Chester Area School District*, 585 727, 738 (3d Cir. 2009). Child Find is an ongoing requirement. *Id.*

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 20 U.S.C. § 1401; 34 C.F.R. § 300.8(a). With respect to the second prong of IDEA eligibility, “special education” means specially designed instruction which is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a). “There is no precise standard for determining whether a student is in need of special education, and well-settled precedent counsels against invoking any bright-line rules for making such a determination.” *Chelsea D. v. Avon Grove School District*, 2013 U.S. Dist. LEXIS 98125 *24 (E.D. Pa. July 15, 2013) (quoting *West Chester Area School District v. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002)).

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Local education agencies (LEAs) meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is

“‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

An LEA “need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a ‘basic floor of opportunity.’” *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 533-534 (3d Cir. 1995) (quoting *Rowley*, *supra*, at 201); *see also Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Nevertheless, the U.S. Supreme Court over thirty years ago recognized that a child with a disability who is “advancing from grade to grade” is not necessarily a child who has been provided with an appropriate education. *Rowley*, *supra*, at 203 n.25; *see also* 34 C.F.R. § 300.101(c)(1) (“Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.”) An appropriate education, thus, encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (citing *M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir. 1996)).

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood*, *supra*, at 253. Thus, the IDEA and Section 504 claims will be addressed together.

Child Find

The first issue is whether the District identified Student in a timely manner. The Parents contend that the District had sufficient reason to suspect during second grade that Student was a child with a disability such that an IEP should have been in place no later than the start of school

in the fall 2012, while the District argues that its actions during the 2011-12 school year, and through in the fall and winter of the 2012-13 school year when Student's difficulties became more consistent and indicative of a need for a special education evaluation, were timely and appropriate.

Student certainly exhibited concerning behavior and difficulty with writing tasks during second grade. (Finding of Fact (FF) 6, 9, 10, 11) The District responded by engaging the instructional support team, and the teacher implemented several classroom strategies to address Student's behavior and difficulty with writing tasks. (FF 7, 9, 10) Student's visits to the nurse did decline, and the teacher believed her regular education interventions were successful overall. (*Id.*) Even factoring in the one, perhaps more serious, behavioral incident in the principal's office at some unknown time in second grade, I cannot conclude that the District's response to Student's difficulties during the 2011-12 school year amounted to an unreasonable delay in suspecting that Student had a disability and recognizing a duty to perform evaluation for special education.⁶ Moreover, the Parents' inquiry in March 2012 regarding a potential occupational therapy evaluation did not go so far as to actually make that request, which would have prompted a more definitive response from the District. 20 U.S.C. § 1414(a)(1)(B), 1415(b)(3); 34 C.F.R. §§ 300.301(b), 300.503(a)(2); 22 Pa. Code § 14.123(c). The occupational therapy screening that followed provided the teacher and Parents with a new recommendation for addressing Student's handwriting, a suggestion that required some time to implement and evaluate. Viewing the circumstances throughout the 2011-12 school year in their entirety and as they occurred, I cannot conclude that the District's responses to Student's difficulties in second grade were

⁶ The Office of Special Education Programs has cautioned against delaying special education evaluations through implementation of Response to Intervention programs when a disability is suspected. Memorandum to State Directors of Special Education 11-07, 56 IDELR 50 (OSEP 2011).

inappropriate. Nonetheless, the circumstances did serve to place the District on notice that it should carefully monitor Student at the beginning of the 2012-13 school year.

Student began engaging in frequent, significant problematic behavior as soon as third grade began. (FF 21, 22, 23) As of the first week of September 2012, the District was aware that the Parents had had Student privately evaluated. Additionally, Student began to engage in serious behaviors involving hiding in the restroom, crying, and Student hitting Student's self. (*Id.*) These incidents were significant enough during the first few days of the school year for the teacher to track, and within a few weeks' time also involved the principal and emotional support teacher. (*Id.*) There can be no question that these behaviors had an adverse impact on Student's learning as well as that of Student's peers. In the meantime, although the evaluation process had gotten underway, the emotional support teacher recognized the need for immediate interventions, and developed a temporary course of action that included a de-escalation plan. (FF 29, 31)

The record establishes that, based on the difficulties throughout second grade, the District should have been carefully monitoring Student at the beginning of the 2012-13 school year. Had it done so and acted promptly when Student immediately began to exhibit the numerous and serious behaviors in the fall of 2012, an ER could have been completed to form the basis for an IEP no later than the end of November 2012.⁷ 22 Pa. Code § 14.123(b) (allowing sixty calendar days for completion of an evaluation); 34 C.F.R. § 300.323(c) (providing for development of IEP within thirty days of determination of eligibility with services provided as soon as possible thereafter). While the emotional support teacher did try a number of interim interventions while the ER was completed and before IEP could be implemented, this approach could not be based on a comprehensive evaluation given the District's delay in that process, and the temporary

⁷ Although there is no school calendar in the record for the 2012-13 school year, it is not unreasonable to conclude that school began around September 1, 2012.

solutions did not adequately address the difficulties Student experienced throughout the school day. Thus, the evidence demonstrates that the District failed in its Child Find obligation by failing to hold the IEP meeting until January 2013.

In a related argument, the Parents assert that the District's ER was not appropriate to guide development of Student's educational program. The law does impose certain requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained in conducting a special education evaluation.

Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

- (i) Whether the child is a child with a disability under § 300.8; and
- (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(b); *see also* 20 U.S.C. § 1414(b)(2). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

The ER did rely extensively on the NER, but that evaluation was comprehensive, and the parties understandably agreed that no further assessments were needed. The District concluded that Student was eligible on the basis of OHI and a Speech/Language Impairment, but rejected the determination that Student had a disability in written expression. The Parents suggest that this conclusion, and the District school psychologist's belief that Student had an autism or emotional disability, render the District's evaluations inappropriate. However, and as the District observes, Student's educational program must be evaluated based on what was and was not provided in terms of Student's needs, rather than on what categories or labels may have been used.

Provision of FAPE

Careful review of the January 2013 IEP in light of Student's overall profile reveals that it is responsive to Student's identified speech/language weaknesses, and provided for Student's sensory and self-regulation needs; but is also flawed in other respects. First, with respect to Student's difficulties with writing tasks, the related IEP goal only provided that Student would "demonstrate functional motor skills" with four objectives relating to writing samples, copying, using adapted scissors, and managing zippers and shoelaces. (S-4 p. 54) The SDI provided for materials that would assist Student in the physical task of writing, and extended time to complete them, but there is nothing in the IEP that addresses Student's consistent inability to create a written work product without significant prompts and supports and problematic behavior. Regardless of whether the District accepted Student's difficulty in the area of written expression as a Specific Learning Disability, the IEP omitted any means of addressing Student's longstanding failure to complete writing assignments and execute all writing tasks.

Second, while Student's behavior clearly impacted Student's learning and that of others,

the only behavioral goal was to manage frustration through use of a self-monitoring system, a sticker in the assignment book. This goal had no baseline, and it is unclear how the targeted 85% mastery would be measured, and whether Student's self-monitoring actually reflected an ability to manage, or even recognize, frustration. Although the FBA conducted in February and March 2013 could and should have provided valuable information on which to base behavioral programming, the FBA targeted only two specific behaviors despite the existence of many other more significant concerns, such as Student hiding in the restroom. The BCBA did not recommend a PBSP and instead suggested only that Student receive social skills instruction. Thus, rather than improving the District's response to Student's continuing difficult behaviors, the FBA yielded little useful information for Student's educational programming needs.

For the remainder of the 2012-13 school year, and into the start of the 2013-14 school year, Student persisted in exhibiting many of the same behaviors as in the prior year, and continuing to experience difficulty with all aspects of writing tasks. (FF 46, 51, 52) When the team met to develop the January 2014 IEP, Student's needs were similar to the prior year, yet again there were no measurable goals addressing Student's specific behaviors or needs with respect to producing written work. While it appears to have been wholly appropriate to decrease the amount of speech services given Student's increasing frustration with that service, and Student's improvement with expressive and receptive language skills, the flaws in the previous years remained. And, not surprisingly, Student's behaviors and difficulty with writing went largely unchanged.

Taken individually and together, the omission of specific educational programming for these two areas of critical need amounts to a substantive denial of FAPE. The remedy for the deprivation will be addressed in the next section of this decision.

The May 2014 IEP increased the level of speech/language support in, and added SDI to the January 2014 IEP; and the August version added speech/language goals and additional SDI. It is noteworthy here that the Parents challenged the testimony presented on the 2014-15 program, arguing that a fact-finder may not consider any evidence outside the four corners of the IEP itself. The evidence was admitted in order to provide further explanation of the program proposed, not to directly contradict the plain language of an IEP. *See R.E. v. New York City Department of Education*, 694 F.3d 167 (2d Cir. 2012) (accepting evidence that explains or justifies provisions in an IEP, but not testimony that alters its terms); *see also John M. v. Board of Education*, 502 F.3d 708 (7th Cir. 2007) (explaining that one ordinarily should only consider the language in the IEP document itself, but that extrinsic evidence may help explain the intentions of the participants where particular language is not included). Still, and as before, there was nothing in Student's program to address Student's ongoing failure to produce written work product, or to provide positive behavioral support as Student would make an important transition to a new school building. Thus, even with the extrinsic evidence, the program was not sufficiently responsive to Student's needs to render it appropriate.

In short, for the same reasons I found a denial of FAPE in the January 2013 IEP, the program for part of the 2012-13 school year, the entire 2013-14 school year, and proposed for the 2014-15 school year were inappropriate and denied Student FAPE.

Remedies

Compensatory Education

It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem.

M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* Compare *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Cmwlth. 2006) (rejecting the *M.C.* standard for compensatory education, and holding that “where there is a finding that a student is denied a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district’s failure to provide a FAPE.”); *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Based on the foregoing, I conclude that Student should have been provided with appropriate, consistent educational services and interventions to address Student’s needs in written expression and behavior, including critical assessment of the reasons for those longstanding deficits and specially designed instruction for remediating those areas of need including through a system of positive behavioral support. Having found that an IEP should reasonably have been in place no later than December 1, 2012, the compensatory education shall begin on that date and continue through the end of the 2013-14 school year.

Assessing the amount of compensatory education is admittedly difficult. There is no evidence from which to apply the *B.C.* approach. Thus, this hearing officer finds that the *M.C.* hour-for-hour remedy for the period of deprivation is equitable. I conclude that written assignments were part of each school day for Student during the relevant time period, and that written work was part of most classes. Using the District’s 30 minute writing block during the

school day (N.T. 897) as a basis, I equitably estimate that one hour is the minimum amount of time that Student should have been provided special education support for writing tasks, 30 minutes for the actual writing block and 30 minutes for additional class assignments. With respect to the absence of appropriate positive behavioral interventions, Student's behaviors were inconsistent and difficult to quantify. However, it is reasonable to conclude from the record that the majority of Student's concerning behaviors (going to the nurse and restroom frequently and for prolonged periods) were at least indirectly related to inadequate writing support.

Accordingly, an additional one hour per day of compensatory education shall be awarded for the lack of appropriate behavioral programming. Thus, Student is entitled to two total hours of compensatory education for each day that school was in session beginning on December 1, 2012 and continuing through the end of the 2012-13 school year, and for the entire 2013-14 school year.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age sixteen (16).

Tuition Reimbursement

Parents who believe that a public school is not providing FAPE may unilaterally remove their child from that school and place him or her in a private school and seek tuition reimbursement for the cost of the alternate placement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); *Mary Courtney T.*, 575 F.3d at 242. Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). Consideration of equitable principles is also relevant in deciding whether reimbursement for tuition is warranted. *Carter, supra*; see also. *See Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that tuition reimbursement award may be reduced where equities warrant, such as where parents failed to provide notice). In considering the three prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not controlling in evaluating parents' unilateral placements. *Ridgewood, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*.

Having concluded that the District denied Student FAPE in its proposed program for the 2014-15 school year, the next question is whether each of the private schools was reasonably calculated to provide an appropriate education.

With respect to First Private School, the program of college preparation by certified teachers and small class sizes was certainly appropriate for Student's academic needs; and, Student received academic instruction and made progress in the areas of reading, mathematics, social studies, science, and special classes. However, First Private School did not provide any

special education or related services to Student, including emotional support and occupational therapy. It was unable to meet Student's needs to develop coping skills and manage anxiety. Student exhibited many of the same concerning behaviors that were demonstrated in the District. First Private School could not provide appropriate counseling; indeed, Student's private therapist served in that role. Student exhibited very concerning behaviors within two weeks of enrollment, and staff concluded within a short two month time period that Student could not continue in the program due to Student's significant needs.

In sum, First Private School was not appropriate in addressing Student's emotional and behavioral needs, which was a major complaint of the Parents with respect to the District program. And, despite the contention that Student's needs arose after Student began at First Private School and are likely due to an unforeseen circumstance (Parents' Closing Argument at 40), the hesitation of its admissions director to admit Student because of Student's anxiety, coupled with the very short period of time within which that placement could possibly have met Student's emotional needs, weighs against a finding of appropriateness.⁸

Second Private School, on the other hand, is an approved private school that implements IEPs. It created an IEP for Student shortly after Student's enrollment that included self-regulation, social skills, using coping skills, speech/language, and written expression; all of these areas are identified needs for Student. After a short transition period, Student did not exhibit problematic behaviors there, so no individual PBSP was needed, but Second Private School implemented its school-wide behavior plan with an individualized point sheet that together were effective for Student. Student demonstrated academic success, including completing writing

⁸ While it is not necessary to examine the equities, I would conclude that the Parents gave the District ample notice of their intention to seek reimbursement for private school tuition in the summer of 2014, and further that the Parents did not make the final decision until after the August IEP meeting. (FF 85)

assignments and developing skills for written expression; and made gains with respect to social skills, coping skills, and requesting and accepting help. Student was successful at Second Private School and I conclude that it was appropriate.

Turning to the step of equitable considerations, the equities do not favor one party or the other. The District contends that the Parents' failure to advise it of Student's enrollment at Second Private School favors it because they failed to comply with the ten-day notice provision. (District's Closing Argument at 34) While this factor is a consideration, to the extent it is applicable under these circumstances, denial of reimbursement is discretionary, not mandatory. 20 U.S.C. §§ 1412(a)(10)(C)(iii)-(iv). Moreover, given the situation that the family was facing in the fall of 2014, the Parents' lack of notice of to the District of Student's attendance at a second private school is understandable. Thus, in this hearing officer's estimation, the failure to give this specific notice is not fatal to their claim. Accordingly, I find no equitable basis to reduce or deny tuition for Second Private School.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District denied Student FAPE; that Student is entitled to compensatory education; and that the Parents are entitled to a portion of their claim for tuition reimbursement.

ORDER

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

1. The District failed in its Child Find obligation in the fall of 2012.

2. The District's educational programs provided and implemented during a part of the 2012-13 school year and the entire 2013-14 school years were not appropriate, and denied Student FAPE.
3. Student is entitled to, and the District is ordered to provide, compensatory education as follows:
 - a. Two hours of compensatory education for each day that school was in session for students from December 1, 2012 through the end of the 2012-13 school year, and for the entire 2013-14 school year.
 - b. The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's educational and related services needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age sixteen (16).
4. The Parents are entitled to, and the District is ordered to provide, reimbursement for Student's tuition to Second Private School for the time that Student was enrolled there during the 2014-15 school year. Within thirty calendar days of receipt of an itemized invoice(s) for that tuition expense, the District shall issue reimbursement to the Parents.
5. The Parents are not entitled to reimbursement for Student's tuition to First Private School, and the District is not required to take any further action with respect to that expense.
6. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: December 2, 2015