

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: C.M.

Date of Birth: [redacted]

Dates of Hearing: 8/25/2015, 8/26/2015, 10/9/2015

CLOSED HEARING

ODR File No. 16476-14-15 KE

Parties to the Hearing:

Representative:

Parents

Parent[s]

Parent Attorney

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Date Record Closed:

November 4, 2015

Date of Decision:

November 30, 2015

Hearing Officer:

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

INTRODUCTION AND PROCEDURAL HISTORY

The student (Student)¹ is a mid-teenaged student in the Pittsburgh Public 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 the federal and state regulations implementing that statute.

The case proceeded to a due process hearing convening over three sessions, at which the parties presented evidence in support of their respective positions.³ The Parents sought to establish that the District failed to propose an appropriate program for Student for the 2014-15 and 2015-16 school years, including extended school year (ESY) programming over the summer of 2015, and sought tuition reimbursement for the private placement Student has been attending. The District maintained that its special education program, as offered, was appropriate for Student and that no remedy is therefore warranted.

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

ISSUES

1. Whether the program proposed by the District for the 2014-15 school year was appropriate;
2. If it was not appropriate, are the Parents and Student entitled to tuition reimbursement for the private placement Student attended for the 2014-15 and 2015-16 school years and for ESY services in 2015?

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 References to the record will be made as follows: Notes of Testimony (N.T.), Parent Exhibits (P), and School District Exhibits (S). References to duplicative exhibits may be to one or the other or both.

FINDINGS OF FACT

1. Student is a mid-teenaged student who is a resident of the District. Student is eligible for special education under the IDEA. (N.T. 33-34)
2. Student was diagnosed with Pervasive Developmental Disorder – Not Otherwise Specified (NOS) and Attention-Deficit/Hyperactivity Disorder (ADHD) at the age of four. Student was provided with speech/language and occupational therapy at ages four and five. (N.T. 314; P-1 p. 2)
3. Student has been diagnosed with anxiety which can fluctuate significantly. (N.T. 45, 67-68, 315-16)
4. Student has a sensory integration disorder and is more sensitive when Student's anxiety level is high. Student has more difficulty regulating Student's self when Student is anxious. (N.T. 44-45, 48-50, 69-70, 192-93, 314; P-1 p. 2)
5. Social interactions are important to Student, particularly with peers. Student is motivated to engage socially with peers, but has difficulty with those relationships without support. (N.T. 47, 58-59, 69, 96, 273-74, 417)
6. Student has an extreme interest in technological devices that access the internet, and sometimes requires prompting and supervision to focus away from those. The Parents do not permit Student to use a computer at home without supervision. (N.T. 278-79, 281-82, 368, 437-38, 455; P-25 p.1 ¶ 4)
7. Student was first evaluated by the District in 2007 pursuant to a request by the Parents. Student was attending a private parochial school at that time. The District conducted cognitive and achievement assessments and obtained ratings scales and other information from the Parents and teachers. Student's Full Scale IQ was reported to be in the average range, and achievement testing revealed low average overall reading skills, borderline overall mathematics skills, and low average written language skills; Student's reading and mathematics skills were weak compared to cognitive ability. Student was identified as eligible for special education based on Autism. (S-2, S-3, S-4, S-5)
8. The District conducted a re-evaluation in the summer of 2009 again at the Parents' request as Student remained in the private placement. Cognitive and achievement assessments were conducted, and parental input was obtained; there was also a Functional Behavioral Assessment (FBA) of Student's behaviors of refusing to work and crying. This evaluation reported a Full Scale IQ in the low average range, and achievement testing continued to reflect weaknesses in reading skills. Student was determined to remain eligible for special education based on Autism (S-6, S-7, S-8)
9. Student began private individual and group counseling services in 2011 that have continued through the time of the due process hearing, with the exception of a period of several months during the 2012-13 school year (eighth grade) when family-based

counseling was provided. This counseling included social skills. (N.T. 42, 81-84, 92-93, 314-19; P-3)

10. The Parents waived reevaluation in 2012. (S-10)
11. Student attended a District school during the 2012-13 school year. In the fall and winter of 2012, several events were occurring in Student's life that were different than before, and Student was very anxious about going to school. Student had somatic complaints, struggled with academics, and began to avoid peers. She (N.T. 46-47, 89-90, 114-15, 319-20; P-1 pp. 1-2)
12. Student was privately evaluated by a psychologist in February 2013. At the time, Student was exhibiting significant problematic behaviors, including self-injurious behavior, and grades had declined; Student also demonstrated difficulties with communication and social skills including understanding nonverbal and other social cues. Cognitive assessment yielded a Global Intellectual Ability score in the average range, with Student's cognitive efficiency a relative weakness. Achievement testing (Woodcock Johnson Tests of Achievement – Third Edition, WJ-III-ACH) reflected average scores overall in reading and written expression, and impaired scores with respect to mathematics. Behavior Functioning based on rating scales completed by one of the Parents (including the Achenbach Child Behavior Checklist, CBCL) reflected significant concerns across all syndrome scales. The psychologist provided diagnoses of Asperger's Disorder, ADHD, Anxiety Disorder NOS, Depressive Disorder NOS, Mathematics Disorder, and Sensory Integration Disorder (by history). In the Recommendations section of this report, the psychologist suggested, among other things, a small, quiet educational setting with a low student to teacher ratio; accommodations to address anxiety and attention; and additional support in mathematics. (P-1; S-11)
13. In April 2013, Student was involved in an altercation with a peer at school.⁴ Student was diagnosed with post-traumatic stress disorder (PTSD) after this incident. Since that time, Student continued to have concerns about Student's safety in the District and the school building where it occurred; and PTSD symptoms including difficulty sleeping, nightmares, and somatic complaints that may be triggered by individuals who were present at the time of the incident as well as circumstances that were similar to those surrounding that event.⁵ (N.T. 52, 53-56, 95, 99-100, 105-07, 120-22, 321-22, 325-26, 328-30, 354)
14. Student kept an appointment with Student's psychiatrist immediately after the April 2013 incident, and was also seen at a hospital emergency room for treatment. (N.T. 322-23)
15. Student returned to school for a few days after the incident with the peer. After a day when the peer was in one or more classes with Student, Student became extremely upset and anxious, and was placed on homebound instruction for the remainder of the school

⁴ To provide confidentiality and avoid inclusion of personally identifiable information, the details of the incident (described at N.T. 134-36, 320-22) are omitted from this decision.

⁵ Again, the details are omitted here, but some of the circumstances are described at N.T. 55, 60, 325-26, 328-230.

year on recommendation of Student's psychiatrist. (N.T. 54, 123-25, 137-39, 140, 323-25, 333, 335; S-13)

16. Student returned to the school building where the incident occurred in June 2013 to clear out Student's locker. Student spoke with the principal and expressed Student's concern with how the April incident had been handled. (N.T. 128-30, 326-27)

2013-14 School Year and District Evaluation

17. Student began attending a private school (Private School) in November 2013 after a short period of time in a parochial school. The Parents paid the tuition to Private School since that time, including the summer of 2015. (N.T. 333-34, 459-61; P-21)
18. The Parents contacted the District in March 2014 to request its agreement to fund Student's placement at Private School. They also indicated a willingness for Student to be evaluated by the District, and asked for a response. The District followed up with a Permission to Evaluate form, and the Parents provided their consent. (N.T. 336, 574-75, 614; P-17 pp. 1-4, 6-8; S-15, S-16)
19. A District school psychologist conducted an evaluation of Student in May 2014. In addition to reviewing available records, he interviewed the Parents at their home without Student present. The Parents and District school psychologist agreed that new cognitive assessment was unnecessary. The Parents also made known during the interview their desire for Student to remain at Private School. (N.T. 148-49, 190-91, 195-96; P-4; S-17)
20. The District school psychologist conducted his assessments of Student at Private School, and spoke with Student's teachers. He did not observe Student in the classroom because he believed doing so would upset Student. (N.T. 150-52, 189)
21. The District school psychologist administered the WJ-III-ACH and Gray Oral Reading Test – Fifth Edition. Student's performance on those instruments revealed strengths in overall reading and written expression and weaknesses in listening comprehension and mathematics skills. (P-4; S-17)
22. Two Private School teachers and the Parents completed behavior rating scales (CBCL). The Parents' forms revealed clinically significant concerns across all scales with the exceptions of Oppositional Defiant Problems (borderline clinical range) and Somatic Complaints and Somatic Problems (average range). Teacher forms reflected clinically significant concerns with respect to Externalizing Problems and Total Problems (both teachers), with at least one teacher reporting borderline clinically significant concerns with Attention Problems, Aggressive Behavior, Rule-Breaking Behavior, Anxiety, ADHD, Oppositional Defiant Problems, and Conduct Problems. (N.T. 202-03; P-4; S-17)
23. Student completed the Beck Depression Inventory, and the results were in the low range, suggesting that Student did not have a pervasive mood of unhappiness at the time. Student reported a history of panic attacks and provided information that supported

elevated anxiety. The Parents also completed a Social Communication Questionnaire that exceeded the threshold for Autism Spectrum Disorder. (N.T. 203-04; P-4; S-17)

24. The District school psychologist concluded that Student met the criteria of eligibility on the basis of Autism as well as a Specific Learning Disability in mathematics. He made a number of programming recommendations for interventions and specially designed instruction to address reading comprehension, listening comprehension, attention, mathematics, and anxiety; one suggestion was to use computer-based “mastery instruction” when appropriate (P-4 p. 9). (P-4; S-17)
25. The District issued an Evaluation Report (ER) that provided input from Parents and then-current teachers, a summary of previous records and grades, and the results of the psychological evaluation it conducted. The ER concluded that Student was eligible for special education on the bases of Autism and a Specific Learning Disability. (P-5; S-18)
26. The Parents and District held two meetings to review the ER, which was discussed and revised both at the meetings and via email correspondence. (N.T. 178, 208-09, 338, 362, 576-80; P-17 pp. 9-13)
27. The District also conducted an FBA to address the current teacher concerns with Student initiating and completing tasks and assignments, remaining on task, following rules and directions, participating in class, accepting responsibility, and putting forth effort; and parental concerns with anxiety when routines were changed or when in large groups, managing emotions when feeling overwhelmed or overstimulated, interrupting others, and social skills. The FBA developed a hypothesis for Student’s anxiety and stress in difficult situations, which was to avoid those and to gain adult attention. (P-10; S-21)

Proposed Program for 2014-15 School Year

28. Student’s Individualized Education Program (IEP) team convened two additional meetings at which draft IEPs were discussed and revised, in addition to email correspondence providing additional considerations for revisions. The team discussed accommodations to ease Student’s transition to the neighborhood District high school, such as Skype, using alternative entrances to the building, and varying the times that Student would navigate hallways. The IEP team also discussed daily social skills programming to include small group sessions. The draft IEP provided at an August 2014 meeting proposed regular education programming at the neighborhood high school, with the exceptions of one period per day for mathematics instruction and one period per week for social skills instruction. This draft IEP provided for a supplemental level of autistic, emotional, and learning support. (N.T. 178-79, 344-45, 357-58, 362, 463-64, 576-80, 585-88, 591, 597-98, 621-22, 633-37; P-11, P-12, P-13, P-14, P-16, P-17 pp. 13-17, 19-30; S-19)
29. The final IEP that followed the several meetings contained information on Student’s present levels of academic achievement and functional performance, including teacher input; parent and student input; and behavioral concerns. Student’s strengths were noted to include reading fluency, written expression, some mathematics skills, and some social

skills. Needs were specified as completing assignments, remaining on task, following rules and directions, participating in class, and accepting responsibility; understanding nonverbal and social cues and interpreting others' intentions; assistance managing anxiety and depression symptoms; reading comprehension and functional mathematics; small group instruction with tutoring and direct instruction rather than lectures; preferential seating; prompting and redirection; and counseling. (P-8)

30. The final IEP included post-secondary transition programming. Annual goals with short term objectives addressed listening comprehension, reading comprehension, mathematics including functional math skills, and skills for task completion. Numerous program modifications and items of specially designed instruction included review and discussion of current knowledge when new material was introduced; small group instruction especially for new material; a tutoring approach rather than lectures; multisensory approaches; avoidance of multi-tasking; and computer-based instruction for mastery of concepts. Rehabilitation counseling (for transition programming (*see* N.T. 216, 241-42, 244, 592-93)) and travel training (*see* N.T. 603) were discussed and made part of the transition plan. Student was eligible for ESY services. (P-8)
31. Because the Parents were not in agreement with the neighborhood high school, the final IEP provided for online programming for core academic classes with special education support in an Online Academy (OA), with related services, electives, and social skills in the neighborhood high school. In all other respects, this IEP is identical to that from the draft proposed at the beginning of the August 2014 IEP meeting. (N.T. 581-85; P-8 pp. 36-38 (*compare* P-11 pp. 34-36))
32. The final IEP included a Positive Behavior Support Plan (PBSP) addressing social interactions, self-regulation, and managing anxiety particularly with changes to routine. Additional program modifications and items of specially designed instruction included frequent checks for attention, support of positive peer interactions, and avoidance of large groups with accommodations as necessary. Counseling was also provided as a related service. (P-9)
33. The District members of the IEP team proposed the OA on a temporary basis as a means for transitioning Student to a District high school. The Parents expressed concerns with Student going to a District high school and maintained their belief that Student should remain at Private School. (N.T. 218, 220, 223)
34. In a Notice of Recommended Educational Placement (NOREP), the District's proposed OA placement for core classes would be supplemented by opportunities to attend a drop-in center. Student was also to have autistic support and related services at the neighborhood high school, with the opportunity to participate in elective classes there as Student became more comfortable. That placement was to be reviewed in 45 days to evaluate the program and placement. The Parents did not approve the NOREP. (N.T. 345-46, 367, 580-85; P-7; S-24)

35. Students who enroll in the OA attend an orientation as do their parents. Student's schedules are developed during orientation, and the students are provided with individual laptops. (N.T. 526)
36. The District has a center where students who attend the OA can go for support. The center has three classrooms or labs, typically attended by five to twenty students on a given day; but all students take their statewide assessments there. The three classrooms are for grades four through eight, grades nine through twelve, and students who are in special education, although students can elect to use any of the classrooms on a given day. The classrooms are generally quiet, with students working individually or with staff, and students use headphones for audio/visual content. There is also a common area where students can take a break, and lunch can be provided by the District at the center. The classrooms/labs are not all staffed by certified teachers. (N.T. 171-72, 345-46, 348, 508-10, 512-13, 522, 525, 538-39, 543, 545, 551-52, 565)
37. There is a special education teacher at the drop-in center each day who also meets with OA students virtually on a regular basis and can provide one on one assistance as needed. Other teachers are also available to meeting virtually with students, or speak by telephone; students may also obtain assistance directly through the online program. Staff also conduct home visits at times as needed. (N.T. 511-12, 518, 521-23, 544, 547-48, 562)
38. The OA system will time-out if a student lets the program sit idly for a period of time. District staff are required to reset the system if a student is timed-out. Both staff and parents are able to track a student's activity in the OA. (N.T. 567-69)
39. The District would implement the program modifications and specially designed instruction in Student's IEP through its OA learning management system that automatically breaks down course requirements into daily assignments; and, many of the other items in Student's IEP are already part of the OA online curriculum, such as allowing extended time for assignments and assessments, teacher feedback on assignments, and the availability of virtual classrooms. (N.T. 519-22, 529, 531, 547-48)
40. Some students use public transportation to attend the drop-in center. Student has never used public transportation, but would be required to do so, with one transferred required, to get to and from the drop-in center. Student would be very concerned and question Student's safety if required to use public transportation by Student's self. (N.T. 347-48, 352-53; P-25 p. 1 ¶ 5)
41. The Parents visited the drop-in center and spoke with the OA Principal. They discussed transportation, and the principal explained that that was an IEP team decision. (N.T. 348-52, 465-66, 507-11)
42. The District school psychologist and Private School staff agreed that computer-based instruction for Student should be supplemental to direct instruction such as through a tutoring-type approach. (N.T. 160-63)

Private School

43. Private School has a very small enrollment of approximately thirty students with varying learning styles and abilities. The curriculum at Private School is college preparatory, and most students go on to higher education. Class sizes range from one to four students with groupings generally based on academic performance and interest. (N.T. 256-58, 275-76, 283, 383-84, 387, 417-18)
44. Private School is private school licensed by the Pennsylvania Department of Education (PDE). All of the teachers at Private School are state certified, including one special education teacher. The Private School Curriculum is approved by PDE as part of its licensing process. (N.T. 256, 260-62; P-20)
45. Instruction is generally by lecture, but because of the small class sizes, the teachers are able to vary instruction based on the students' learning style and needs on a day to day basis. Classes are one hour, with time provided during class to begin homework with teacher assistance if necessary. The school day includes a study hall where students also have teacher assistance. Students have access to computers on the school premises, but do not rely on technology in the classroom. (N.T. 257-58, 266, 279-80, 382, 384, 389-90, 397, 428, 430, 436-37)
46. At the time of the due process hearing, approximately one quarter of students at Private School had IEPs developed by their home school district. Private School does not follow the IEPs but does provide accommodations for individual students. The special education teacher consults with the other teachers on accommodations. (N.T. 264-65, 294, 301-02, 304-05, 308-09)
47. Student exhibited anxiety about transitioning to Private School as well as motivation to complete assigned work. Within several months of making the transition, Student made friendships with peers of Student's age and was motivated to attend school. (N.T. 267-69, 335, 390-91, 416, 418, 439-40, 461-62)
48. Teachers at Private School provided Student with extended time for tests, prompting to remain focused, chunking of assignments, and frequent checks for attention. Audiobooks were used for readings, and teacher notes were provided if available. Teachers at the Private School provided all of the recommendations in the District's 2014 ER to Student. (N.T. 392-96, 424-25, 426-35)
49. Student did not have an IEP at Private School. (N.T. 190, 308)
50. Student expressed concerns with safety and social relationships with peers at the District to staff at Private School. (N.T. 271-72)
51. Student's anxiety and depression significantly improved after Student began attending Private School. (N.T. 58-59)

52. Student is not comfortable in larger group settings, including those at the Private School that include all of the students (thirty students or less), and would “feel terrified” at a large public high school (P-25 p. 1 ¶ 6). (N.T. 435; P-25 p. 1)
53. The Parents advised the District at the August 14, 2014 meeting that they were returning Student to Private school for the 2014-15 school year; and the Private School issued an enrollment contract for the Parents signed by its Director on August 17, 2014. (N.T. 346; P-21 p. 1)
54. The Parents signed the enrollment contract for the 2015-16 school year on August 8, 2015. (P-21 p. 5)
55. By the time of the due process hearing, Student continued to be motivated to attend Private School, achieved success in the classroom, and had developed friendships with peers. Student did require prompting from teachers to remain on task, and benefitted from review of previous materials and reminders that Student understood the information being presented. (N.T. 70-71, 272-74, 277-80, 281-82, 332, 384, 387, 390-91, 396, 398-99, 402, 416, 426-27, 429-32, 451-52)

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 credible, and were remarkably consistent in their recollection and testimony. It should also be noted that the Parents, as well as the District personnel, all presented as dedicated individuals focused on 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, as were the parties' Closing Arguments.

IDEA Principles

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 including school districts 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). Most critically, the IEP must be appropriately responsive to the child's identified

educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993). In evaluating a program, it is important to keep in mind that an appropriate education 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)). Pennsylvania regulations describe the facets of public education that go far beyond academics. 22 Pa. Code § 4.11.

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). This legal standard at times may contrast sharply with the wishes of caring parents who understandably want what is best for their child.

The Parents’ Claim

The first issue is whether the program ultimately proposed for Student for the fall of 2014 was appropriate for Student. To reiterate, the final proposal was for Student to attend the OA, with opportunities to go to the drop-in center, and also attend the neighborhood high school for related services, electives, and social skills. There are several aspects of the proposal that would reasonably address some of Student’s needs. For example, a gradual and incremental return to the public school building would address Student’s difficulty with transitions and changes to routine; Student’s schedule would be individualized for Student; small group instruction would be provided in the neighborhood high school; and accommodations could be put in place to

allow Student to avoid crowded hallways and building entrances. There are some features of the OA program that might encourage and allow Student to seek assistance as needed, and some special education and related support could be provided if Student were to attend the drop-in center. The final proposal does reflect careful consideration of the Parents' concerns with Student returning to a public school program.

However, there are other, more troubling aspects of the proposal that weigh against its appropriateness. The evidence overwhelmingly establishes that Student has difficulty completing assignments and remaining on task; and that instruction in the form of small group instruction and/or a tutoring approach provides the structure that Student requires, whereas Student would not benefit from presentation of instruction via lectures. Additionally, it is uncontroverted that Student's use of a computer for learning is appropriate only for practice and mastery of skills rather than for presentation of new material. Even the District school psychologist stopped short of recommending online programming for Student. (N.T. 168-70, 227) Furthermore, Student requires structure and consistency, including continual prompting and checks for attention, that cannot be provided in a virtual environment even with periodic telephone contact and computer-generated meetings. Moreover, it is questionable whether, given Student's anxiety, Student could be adequately reassured through reminders of and links to current knowledge when introduced to novel concepts, or would take advantage of a "Help" button or similar feature.

The drop-in center aspect of the program does not eliminate these flaws. Even assuming that arrangements could satisfactorily be made for Student's daily transportation and access to this environment, Student could not be provided with the individualized and direct support and attention of a teacher to any significant extent. It is also unclear how, if at all, Student would

have the ability to develop and maintain positive peer relationships, as described in the PBSP, without a consistent peer group and an environment that promotes individual rather than group participation. In short, the drop-in center would not provide the structure and consistency that Student needs to remain on task, manage Student's anxiety and emotions, and complete tasks and assignments.

The proposal is further insufficient with respect to Student's social skills needs identified in the ER and final IEP. The PBSP provides for social skills programming on a weekly basis. Although there was some testimony that Student could have this need addressed daily (N.T. 582-83, 624-25), the IEP and PBSP that the Parents were asked to approve did not include this provision. This hearing officer does not conclude that, in a case such as this where the parties met on numerous occasions to develop Student's educational program and had extensive discussions outside of those meetings, one may not consider any evidence outside the four corners of the IEP itself; indeed, one of the key functions of an IEP meeting is to encourage open dialogue and meaningful participation, so that the parties can discuss all concerns and hopefully reach a consensus. Nevertheless, testimony that is in direct contradiction of the plain language of an IEP or PBSP [may] be disregarded when evaluating the appropriateness of the program. *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). Taken as a whole, the approach to Student's significant needs for social skills and successful peer interactions could not be successfully met through the combination of an online

program, drop-in center participation, and weekly social skills group.

The District points out that it had no knowledge in August 2014 of Student's tendencies when using technology with access to the internet. (District's Closing Argument at 11-12) While this circumstance certainly sheds some light on the reasons for its placement proposed in the final August 2014 IEP and NOREP, it is also reasonable to conclude that had this proposal been seriously discussed prior to or at that meeting, the Parents would have had an opportunity to raise this concern and the team would have recognized critical flaws in making OA a significant component of Student's program. In any event, the appropriateness of the District's final proposal was not limited to this factor; and, the evidence presented at the hearing clearly establishes that Student's participation in OA was not reasonably calculated to allow meaningful educational benefit in light of Student's needs.

With respect to the inclusion of the neighborhood high school as part of the program, I cannot conclude that the size of the building or number of students alone render that component of the NOREP inappropriate. There was significant evidence presented about Student's difficulties when in a large group of people that suggested that Student could not be successful at the neighborhood high school. (*See, e.g.*, N.T. 73-74, 283, 355, 400-01, 434-35; P-25 p. 1 ¶ 6) However, the District proposed a number of wholly reasonable and appropriate accommodations to ease Student's transition to that environment. Additionally, there can be no question that Student needs to acquire the skills to function in a large group setting. Nevertheless, Student's anxiety about even entering a large crowded building such as the neighborhood high school would require very careful and thoughtful planning should the parties consider this placement again.

One other concern expressed by the Parents also merits brief discussion. The District's

final proposal included a review after 45 days in order to assess how the placement was meeting, or not meeting, Student's needs. The Parents appeared to consider this element of the proposal to essentially be an acknowledgement by the District that it was not confident in its program. (N.T. 466-47) However, this recommendation does not render the proposal inappropriate; importantly, such an interim review is not uncommon, and inclusion in the NOREP would serve to mandate a timely revisitation of whether and how Student's needs were and were not being adequately addressed, particularly given the lapse of time since Student had been in a public education setting. Thus, this provision in the NOREP was not considered evidence on the FAPE question.

In sum, the flaws in the District's proposed program are significant and compel a conclusion that it was not appropriate for Student. Thus, the Parents' requested remedy will be considered.

Remedy

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*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

Private School is licensed by PDE. It has a very low enrollment of students who are instructed by certified teachers. Class sizes are quite small, and students are grouped together by ability and other factors. While IEPs are not implemented, content area teachers are able to and do vary instruction based on the child's individual needs, even with lectures; and a special education teacher consults with those teachers. Teacher assistance is available in all classes including study hall. For Student, all of the recommendations in the District's ER were being provided, and Student's use of a computer for learning has been limited. Student had friendships at Private School, was having success academically, socially, and emotionally, and was motivated to attend.

The District points to several aspects of Private School that it believes render it inappropriate for Student, including some confusion over Student's classes and grades earned, and the curriculum Private School follows. (District's Closing Argument at 13, 17-19) Although the grades introduced at the hearing lacked some clarity, the testimony of the teachers and director that Student was demonstrating academic success was credible and persuasive. With respect to the curriculum, I cannot conclude that the materials submitted for licensing purposes to PDE constitute the entire spectrum of educational programming of its students; the

evidence instead establishes that Private School is providing Student with the opportunity to make meaningful growth academically, socially, and emotionally. For purposes of the tuition reimbursement analysis, the Parents have established that Private School is appropriate for Student.

The last prong of the test is consideration of the equities. The District contends that the Parents did not have an open mind, and never seriously considered its final proposed IEP and NOREP. (District Closing Argument at 19-23) One can infer from the record that the Parents did believe throughout most of Student's educational career that a private education, including at Private School, was the best place Student. However, holding such an opinion is not the same as refusing to consider alternatives. Here, the Parents did not make the commitment to Private School until after the August 2014 IEP meeting. I further find that both parties engaged in thoughtful and extensive efforts to work together to develop a collaborative educational program for Student, and that the equities do not favor one party or the other. Accordingly, the award of reimbursement will not be reduced in this step of the analysis.

Finally, since Student was determined by the District to be eligible for ESY services, and the Parents incurred expense in providing Student with a private program for the summer of 2015, the award will include reimbursement for that specific program. The Parents are also entitled to the associated transportation costs as part of their remedy.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District's final proposed program for Student in August 2014 was not

appropriate and that the Parents are entitled to reimbursement for expenses associated with Private School for the school years in question.

ORDER

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

1. The District did not offer FAPE to Student for the 2014-15 school year, and the Parents are accordingly entitled to tuition reimbursement at Private School for the 2014-15 and 2015-16 school years, as well as programming for the summer of 2015.
2. The Parents are also entitled to reimbursement for transportation expenses incurred for the 2014-15 and 2015-16 school years and the summer of 2015.
3. Within thirty calendar days of receipt of itemized invoices for the expenses in ¶¶ 1 and 2 of this Order, the District shall issue reimbursement to the Parents.

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: November 30, 2015