

*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: A. H.

Date of Birth: [redacted]

### CLOSED HEARING

ODR File No. 16622-15-16 KE

#### Parties to the Hearing:

##### Parents

Mother

Father

##### Local Education Agency

Millcreek Township School District  
3740 West 26 Street  
Erie, PA 16506

Dates of Hearing:

Date Record Closed:

Date of Decision:

Hearing Officer:

#### Representative:

##### Parent Attorney

Charles E. Steele, Esquire  
Steele Schneider  
428 Forbes Avenue, Suite 900  
Pittsburgh, PA 15219

None

##### LEA Attorney

Jennifer E. Gornall, Esquire  
Richard A. Lanzillo, Esquire  
Knox McLaughlin Gornall & Sennett  
120 West 10th Street  
Erie, PA 16501

11/2/2015, 1/13/2016, 1/14/2016,  
1/27/2016 and 1/28/2016

March 4, 2016

March 11, 2016

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

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a mid-teenaged student in the Millcreek Township School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student has attended school in the District since the 2008-09 school year, but was in a private hospitalization program by the fall of 2015.

A series of incidents occurred in the spring of 2015 when Student was repeating eighth grade that ultimately prompted one of Student's Parents<sup>3</sup> to file a due process complaint against the District. In that complaint, the Parent asserted that the District denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,<sup>4</sup> as well as the federal and state regulations implementing those statutes. The complaint was amended pursuant to an order of this hearing officer in August 2015.

The case proceeded to a due process hearing convening over five sessions,<sup>5</sup> at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District failed to provide Student with FAPE throughout the time period in question, specifically with respect to use of physical restraints, functional communication, and planning for changes and transitions, including whether the special education program was responsive to

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<sup>1</sup> 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.

<sup>2</sup> 20 U.S.C. §§ 1400-1482.

<sup>3</sup> Student's mother filed the complaint and was the parent who participated throughout the proceedings; thus, where the singular "Parent" is used, it is in reference to the mother.

<sup>4</sup> 29 U.S.C. § 794.

<sup>5</sup> References to the record will be made as follows: Notes of Testimony (N.T.), Joint Exhibits (J), Parent Exhibits (P), School District Exhibits (S), and Hearing Officer Exhibits (HO). The parties jointly moved into evidence a number of exhibits that were identified and admitted in HO-2. In addition, P-10 is hereby admitted on the hearing officer's own motion, as there was significant testimony about that digital video recording; however, to protect the privacy of all who are depicted on that video recording, P-10 will be sealed. The additional and very brief video recording played at the hearing and described at N.T. 96-101 and 320 was never provided to the hearing officer. The party's agreement on a number of joint exhibits is commendable and appreciated; references to the few duplicative exhibits in the record may be to one or another.

Student's needs. Remedies sought included compensatory education and an Independent Educational Evaluation (IEE). The District maintained that its special education program, as offered and implemented, was appropriate for Student and that no remedy was warranted.

For the reasons set forth below, the Parent will prevail on all claims.

### **ISSUES**

1. Whether the District provided Student with an appropriate educational program during the two-year period immediately preceding the filing of the due process complaint in July 2015;
2. If the District did not provide an appropriate educational program to Student, is Student entitled to compensatory education;
3. Is the Student entitled to an IEE at public expense?

### **FINDINGS OF FACT**

1. Student is a mid-teenaged student who is a resident of the District. Student is eligible for special education on the bases of an Autism Spectrum Disorder and an Intellectual Disability. (N.T. 33-34)
2. At the time of the due process hearing, Student was attending a partial hospitalization program in a local facility operated by a behavioral service agency (BHA). (N.T. 33-34, 1539-40, 1734)

#### **General Background**

3. Student was evaluated at the age of fifteen months when global delays were confirmed, and diagnosed with Autism Spectrum Disorder at eighteen months. Student was provided early intervention services that included Applied Behavioral Analysis (ABA) and introduction to the Picture Exchange Communication System (PECS). Student also began using some sign language approximations at home. Student is nonverbal. (N.T. 1546-49, 1552-54; J-7 p. 5)
4. Student has been seen by a private psychiatrist regularly, every four to six weeks, for the past several years. Student was prescribed a variety of medications for a number of conditions, many by the psychiatrist. Student's medications changed over time, including in early 2015. (N.T. 378, 403-05, 407-08, 967-68, 1633; P-5 p. 3, P-41 p. 2; S-13 p. 2, S-32)
5. Student was taught to request a break at an early age. (N.T. 874-75, 1601-02, 1711)

6. Student's behavior, including aggression toward others and self, has been very inconsistent, variable, and fluctuating over time and over the course of a day, with behaviors more or less pronounced at times. (N.T. 399-400, 423-24, 428, 454, 505, 516-17, 733, 823-24, 932, 948, 1016, 1061-62, 1067-68, 1650, 1685-86, 1690-91, 1751, 1769, 1771-72, 1824-25; S-8, S-19, S-21)
7. Student's parents separated in July 2013 and eventually divorced. The Parent's significant other moved into the home in January 2014. (N.T. 1666-69, 1671)
8. The Parent suffered a serious injury in December 2014 and required assistance in the home. (N.T. 1673-74)

#### Outside Behavioral Health Services

9. Student has been provided behavioral health services provided by the same BHA that operates the partial hospitalization program Student was attending at the time of the due process hearing. A behavior specialist consultant (BSC) and therapeutic staff support worker (TSS) were provided. TSS services were discontinued at school in February 2014, at which time Student's behavior was managed by District staff; and, by January 2015, only BSC services remained. The agency developed treatment plans that were shared with the District and reviewed every thirty days. The treatment plans were authorized every six months. (N.T. 514-15, 761-62, 770-72, 776-78, 1302; P-6 pp. 15-16, P-41; S-8 pp. 26, 28, S-13)
10. The treatment plans targeted the following behaviors which were operationally defined: aggression; elopement; safety; compliance/noncompliance; appropriate play; and manding (requesting). Goals addressed each of these behaviors with detailed interventions for use in the environments where they were then occurring (home, school, and/or community). (P-41; S-13)
11. The treatment plans included a crisis plan to be used in an emergency, such as when Student or others were in danger of harm or injury. The crisis plan dictated that strategies such as redirection, blocking, planned ignoring, and time in the therapy room would be used; if physical harm to Student or others was imminent, a physical restraint by a trained adult using Handle With Care (HWC) procedures (discussed below) was implemented. (N.T. 801-02, 1361, 1433; P-41 pp. 15-16; S-13 pp. 18-19)
12. The BHA treatment plans were implemented by the District at school. (N.T. 942-43, 1806-07)
13. The BSC and TSS worked with District staff on skill transfer, which was a collaborative approach for the professionals from both settings to discuss and share their experiences and make suggestions. The BHA treatment plans specified the methods of providing the skill transfer. (N.T. 799-800; P-41; S-13)

14. The Parent and Student's TSS collected data on the treatment plan at home, and the TSS and District staff collected data at school. The agency provided the data collection sheets but left copies for the District. (N.T. 791-92; S-13; P-41)
15. The agency conducted a functional behavioral assessment (FBA) in May 2013 targeting aggressive behavior. The hypothesis of the function of the behavior was to escape directives or non-preferred tasks. (N.T. 771; P-41 pp. 3; S-13 pp. 3-4)

#### Handle With Care Behavior Management

16. Handle With Care (HWC) is a behavior management system founded by a former psychiatric hospital staff worker that was developed for use by agencies who are required to manage aggressive and suicidal behaviors. Originally targeting psychiatric hospitals, the system expanded over the years to corrections facilities and schools. HWC training includes a participant manual along with a presentation and practice of techniques. (N.T. 117, 119, 497, 1155-56, 1237-40, 1313-14, 1316-17, 1322; S-27, S-37)
17. HWC provides for use of antecedent and prevention strategies, including de-escalation techniques and prompting, which may be followed by physical restraint when a student presents a clear danger to self or others, in a crisis situation. Those general strategies and techniques may be refined and individualized for specific students. (N.T. 143, 501, 801, 815-18, 857, 875-76, 939-40, 947, 1060, 1164, 1236, 1308, 1313, 1314-15, 1366-67, 1487-88)<sup>6</sup>
18. A primary restraint technique (PRT) using HWC procedures involves a skeletal lock. As occurs in a school setting, the adult would remain in very close proximity to the student and follow the student's body movements. The adult is to be close enough to be able to sense when the student is calm and ready to be released. The skeletal lock should also help avoid injury to either the adult or child; for example, the child is less able to forcefully thrust a part of his or her body, such as the head, against the adult when in close proximity. (N.T. 95-96, 103-05, 188-89, 502-03, 857-58, 879-80, 1001, 1060-61, 1241-42, 1323-24, 1380-81, 1754-55)
19. In both types of PRT restraints (standing and seated), the adult has his or her arms around the student's upper arms with the adult's hands on the student's back. In a standing PRT, the adult stands behind the child but at approximately his or her level, with the adult's hands at the child's back and engaging the child's arms. In the seated PRT (sometimes referred to as a kneeling or settled PRT), the adult is kneeling behind the student, who is sitting with his or her legs out in front of him or herself. The seated PRT usually lasts for an extended period of time, at least three minutes and often longer. (N.T. 108-11, 161, 1326-32, 1336, 149, 17543; J-12; P-11)

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<sup>6</sup> The testimony beginning at N.T. 1314 L 18, second word "The", that is attributed to District counsel was, based on the specific recollection of the hearing officer, actually the answer of the witness.

20. The District began to have staff trained in HWC prior to 2005 in order to address physical injuries to staff by students during physical aggression. Subsequently, HWC became a universal component of its autistic support programs. (N.T. 1484-86)
21. The District Supervisor of Special Education, Behavior Analyst, autistic support teacher, and classroom aides all had HWC training. The Supervisor of Special Education and Behavior Analyst were also trained as HWC instructors. (N.T. 36, 38-41, 114, 547, 888, 905, 939-41, 996, 1059-60, 1155-56, 1235-40, 1430-31, 1752-53)

#### District Programming

22. Student entered the District in 2008 when Student was in third grade. (N.T. 1553, 1556)
23. Student was in an autistic support classroom beginning in sixth grade (2011-12 school year) through April 2015 when Student repeated eighth grade (2014-15 school year). (N.T. 495-96, 938-39, 1594)
24. There were five students in the autistic support classroom that Student attended, with two classroom aides and a teacher. Student did not have a dedicated one-on-one aide. (N.T. 46, 80-81, 132, 452-54, 464-65, 896-98, 938-39, 986, 1174)
25. The autistic support teacher, classroom aides, and other staff used a timer and verbal prompts with Student, as well as a "First, Then" visual, so Student would be prepared for transitions. Student also had break cards used to request a break; requests made using the break card were always honored. (N.T. 50-51, 53-54, 121-24, 125-28, 565-66, 918-20, 942-46, 1021-22, 1042, 1047-48, 1050-51, 1055, 1063-64, 1756-57, 1758-61, 1858-61)
26. The District Supervisor of Special Education and its Behavior Analyst were in the autistic support classroom regularly. The Behavior Analyst was typically present at least once each week, more frequently when the autistic support teacher was on leave, and also provided consultation and support to autistic support and emotional support teachers. They would discuss strategies that could be used to help de-escalate Student when needed. (N.T. 129-30, 463-64, 947, 1019, 1026, 1065-66, 1749, 1770, 1793-95)
27. District staff used a communication log daily to share information with the Parent such as whether Student engaged in aggressive behavior, if Student ate lunch, and whether Student slept or cried at school. The Parent signed the log each day. (N.T. 134-36, 140, 529-37, 934-35, 951-53, 964, 995, 1710, 1741; P-8; S-19)
28. A Positive Behavior Support Plan (PBSP) was developed in January 2013, identifying the behaviors of concern as pinching, scratching, biting, kicking, and grabbing others. The hypothesis of the function of the behaviors was to gain attention or preferred items or activities, or to avoid/escape tasks or demands. A number of Antecedent Strategies (daily schedule, visual supports, choices, verbal warnings before transitions, timer, social skills instruction, priming and prompting, video modeling, and sensory breaks) were included, with Replacement Behaviors identified (request a break) and Consequences. When Student exhibited aggressive behavior, staff was to use redirection and prompt Student to

move to the therapy room with limited adult attention. HWC procedures were identified as the manner of addressing danger of Student hurting self or others. (J-9B)

29. The District held clinical support team (CST) meetings monthly, attended by the school psychologist, psychiatrist, principal, supervisor of special education, autistic support teacher, behavior specialist, and related service providers as well as the BHA BSC when available. The team discussed all of the students in the autistic support class in those meetings, and kept written notes of each meeting. (N.T. 367-68, 497-99, 506, 845-47, 1215-16, 1224-25, 1244, 1765, 1869-70; P-6; S-8)
30. Parents are asked to submit input into the CST meetings each month, but are not invited to the meetings because the staff discuss all students. The teacher would follow up with an individual child's parents if necessary, and parents could ask to hold an IEP meeting for further discussions that would include the parents. (N.T. 367-72, 498-500, 510-11, 519, 1224-26, 1243-44; P-6 p. 11; S-8 p. 1)
31. Parent input into the CST meeting process through a welcome survey in September 2014 specified her desire to have Student "independently express wants and needs." (P-5 p. 4; S-8 p. 36) The Parent has consistently shared with the District that Student needs to communicate functionally. (N.T. 1557-58; P-5 p. 4; S-8 pp. 36, 38)
32. The September 2014 Parent input to the CST also noted that Student "strongly dislikes hovering over [Student] from behind." She asked to attend the portion of the CST meetings when Student was discussed. (N.T. 446; P-5 pp. 2-3; S-8 pp. 34-35)
33. Student's autistic support teacher was planning to go on maternity leave in early February 2015 and advised the District before the school year began. In late January, the teacher advised parents of the date of the leave and the name of the substitute teacher, and added that the same classroom aides would remain. (N.T. 450-52; P-15)
34. In order to prepare the students in the autistic support classroom for the regular teacher going on maternity leave and the substitute teacher taking on that role, the calendar was used to indicate when the change would occur. A picture of each teacher was placed on the calendar, together with those of the students and other staff, identifying who was present on any given day. Social stories about what happens with a pregnancy and having a substitute teacher in the class were also used with the students. (N.T. 470-72, 543-46, 900-01, 959-60, 1180-81, 1250, 1597)
35. The substitute teacher who replaced the regular autistic support teacher spent two days in the classroom (January 29 and 30, 2015) before the regular autistic support teacher began her maternity leave. The substitute had access to and reviewed the students' IEPs. The substitute was to spend more time in the classroom before the leave began, but the regular autistic support teacher needed to start the leave sooner than expected on her doctor's recommendation. (N.T. 460-63, 465-66, 549-50, 961, 1166, 1169-70, 1174, 1245-47)
36. The substitute teacher was a certified special education teacher who had substituted in other special education classrooms at the District schools, but did not have HWC training. The District staff felt comfortable that the classroom aides who did have HWC

training could provide that intervention as needed. The substitute teacher was trained in providing de-escalation strategies. (N.T. 546-48, 905-07, 1162-66, 1244-45)

37. During those two days, the substitute and regular autistic support teacher co-taught the students. Each shadowed the other on one of those two days. (N.T. 465, 467-69, 898-99, 1166)
38. Also over the two days when the substitute and regular autistic support teacher were in the classroom, the District Supervisor of Special Education and Behavior Analyst were also in the classroom in addition to the two classroom aides. All of the classroom aides and the substitute teacher had a tip sheet regarding Student that described Student's problem behaviors, including triggers for and functions of those behaviors; de-escalation techniques and prevention strategies; and HWC techniques as a "**Last Resort**" (S-23 p. 2) (emphasis in original). (N.T. 46, 131, 462-63, 1066, 1166-67, 1245-46, 1250; S-23)
39. In mid-March 2015, one aide who was injured by Student was transferred to another building, and a different classroom aide transferred to the elementary school. (N.T. 43-44, 48, 119-21, 973)
40. When the new classroom aide took over, he was provided with the tip sheet. The District Supervisor of Special Education and Behavior Analyst also met with this aide to discuss techniques that were successful with Student, including using a calm voice and providing preferred objects. (N.T. 45-51, 84, 120-21, 131, 1250-51; S-23)
41. A second substitute teacher replaced the first in March 2015. She had been a substitute teacher in the autistic support classroom in the past. She was provided the tip sheet and had access to all of the student IEPs. Parents were notified of the second substitute teacher's move into the classroom. (N.T. 1071, 1250-52; P-15 p. 2; S-22 p. 83)
42. The regular autistic support teacher did not return to the classroom until sometime in April 2015. (N.T. 567; S-22 p. 83)

#### Communication

43. Some of Student's problematic behaviors were a result of Student's inability to communicate functionally. (N.T. 796-97)
44. Prior to the 2010-11 school year, Student used a Dynavox as an augmentative communication device that Student used in the classroom. Student would respond to questions using the Dynavox when prompted to do so, but not independently. At times, Student also used picture cards when prompted. Student did not use much sign language at school in part because of Student's fine motor skill weakness. (N.T. 363-66, 569, 574-77, 597-98, 670-71, 691, 726-27, 918-21, 974, 1554-56, 1558-61, 1750-51; P-22 p. 3)
45. Student had individual speech/language therapy four times per month for twenty minutes as specified in the IEPs (2013-14 and 2014-15). Student also participated in group speech/language therapy with the rest of the class at times. After Student went on



homebound instruction, the District speech/language pathologist went to the home on two occasions to provide therapy. (N.T. 491-92, 648-49, 679-80, 731-35; S-10, S-39)

46. In 2012, a trial of an iPad with a specific communication application, Proloquo2Go, was conducted. That trial was not successful for Student, who used the application and device for purposes other than to communicate. The Parent also did not find the Proloquo2Go program appropriate for Student. (N.T. 477-79, 571-72, 1565-66)
47. It is important for a communication device to be used solely for that purpose. Student became confused if the device were used for other reasons, and following such use engaged in aggression when redirected from using the device for purposes other than communication. (N.T. 479, 526, 581-85, 747, 1696-97)
48. In the summer and fall of 2014, a suggestion as made to investigate other augmentative communication devices, such as an iPad, that would use Proloquo2Go. At that time, the reliability of Student's Dynavox was a concern and the model Student had was becoming obsolete. (N.T. 476-77, 485, 572, 639-40, 646-47, 686-87, 689, 693-95, 787-88, 835, 1567-69)
49. The District completed the SETT process<sup>7</sup> to evaluate Student's functional communication needs in September 2014. (N.T. 690; P-22; S-10 pp. 32-37)
50. The District speech/language pathologist had difficulty reaching the Parent to discuss options for Student's communication needs in the fall of 2014. (N.T. 694-98, 710-12, 741-42; S-10 pp. 11, 44, 46, 65)
51. A meeting convened in November 2014 for the Parent, teacher, speech/language pathologist, and assistive technology consultant to discuss a change in Student's communication device. The Parent was concerned that the new device should be similar to the Dynavox that Student had been used to using, and also that the previous trial of Proloquo2Go was unsuccessful. She also again shared her interest in functional communication using the device. The District speech/language pathologist explained the improvements to the application, and worked on Student's iPad so that the folders and icons were the same as those on the Dynavox. The Parent then agreed to trial the iPad with Proloquo2Go. (N.T. 480-82, 484-85, 579-80, 612, 641-42, 646, 652-53, 700-03, 713-16, 1559, 1573-74, 1577; P-22 p. 13; S-10 p. 12)
52. Several District staff worked to individualize Student's iPad and Proloquo2Go application for Student after the iPad was received, adding sight word vocabulary and icons for words that Student would use, such as to request items or activities. For some period of time, Student had both the Dynavox and iPad available and was able to choose between them. (N.T. 485-88, 572-73, 579-80, 586, 607, 647-48, 651-52, 666, 671-72, 699-705, 709, 909-14, 980-81, 989, 1104; S-10 pp. 12-13)
53. Student began to use the iPad successfully much as Student had used the Dynavox, with prompting and not spontaneously as a means of functional communication. The District

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<sup>7</sup> The process guides assistive technology decisions focusing on the Student, Environment, Tasks, and Tools.

collected data on Student's use of the iPad during the trial period of four to six weeks. The CST documented in December 2014 that the iPad had helped with decreasing aggression and with functional communication; however, through March 2015 Student still did not use the iPad independently and progress was inconsistent. (N.T. 203-04, 579-81, 586-87, 662, 671-73, 705, 707-09, 718-20, 727-29, 916-17, 977-79, 988-91, 1305; P-6 pp. 8, 10; S-8 pp. 5, 18, 40-42; S-10 pp. 9-10, 28-31)

54. One other student in the autistic support classroom began using an iPad with Proloquo2Go at the same time Student did. (N.T. 490, 910; S-12 pp. 4-5)
55. Student at times did not bring the iPad to school. (N.T. 164, 204-05)
56. In January 2015, District staff became concerned that Student had been using the iPad for entertainment over the holiday break. The speech/language pathologist reminded the Parent of the need to use the device solely for communication, and the Parent explained extenuating circumstances but understood and agreed the iPad should be for communication only. (N.T. 526, 582-84, 674-75, 721-23, 747, 1067-68, 1694-1700; P-23 pp. 7-9; S-8 pp. 19, 42, S-10 pp. 14-15, S-26)
57. The District speech/language pathologist and the Parent planned to meet in January 2015 for training on the iPad. Because of the Parent's injury, she was not able to meet at that time. (N.T. 722-23; S-10 pp. 14-17)

#### Student's Behavior

58. The District kept data on Student's behavior even after March 2014 when there was no behavior goal because Student had mastered that goal (asking for a break). Staff tallied instances of tantrums, aggression, and elopement, as well as compliance and cooperative play. (N.T. 562-64, 1757-59, 1762-64, 1822-23; S-21)
59. At the end of the 2013-14 school year, Student's behavior had become very unstable, and consideration was given to a partial hospitalization program. (N.T. 516)
60. At the beginning of the 2014-15 school year, Student appeared to have regressed in many areas, including waiting for activities, crying instead of eating lunch, and engaging in physical aggression toward peers. Student was not easily redirected at that time and was often tired or sleepy. When Student was tired, Student tended to engage in aggression more frequently than when not tired. (N.T. 520-22, 948-49, 953-55, 1037-38, 1292; S-8 pp. 16-17)
61. Student could frequently be redirected from physically aggressive behavior using de-escalation strategies. Student went to the therapy room every day for de-escalation. (N.T. 78-79, 88, 1440-42)
62. In January 2015, District staff were concerned that, compared to the fall of 2014, Student was more tired and sleepy and was engaging in more frequent aggressive behavior. Efforts to redirect Student were less successful than in prior school years. The Parent

similarly observed that Student engaged in more aggression than before, including self-injurious behavior, and was more difficult to manage at home. (N.T. 538-39, 1179, 1586-87, 1592-94, 1628-29, 1651, 1657-59, 1678-83, 1782; P-3 p. 10; S-8 pp. 45-47, S-19 p. 29)

63. Aides and other staff were sometimes injured by Student's aggressive behavior, resulting in scratches, bleeding, bruising, and bites. (N.T. 178-79, 192-94, 889-94, 928, 937, 999, 1087-88, 1102-03, 1189, 1777-78; S-15 pp. 26, 30, S-25A, S-25B)
64. Student at times scratched Student's self and/or arrived at school with scratch marks on Student's body. (N.T. 141, 149-50, 1069, 1287-88; P-8 p. 37; S-8 p. 47)
65. Student engaged in an extreme number (relative to the first half of the school year) of incidents of aggressive behavior (53) on January 29, 2015, particularly in light of reports that Student slept through most of the morning. (S-8 p. 46, S-16 p. 3,<sup>8</sup> S-19 p. 21, S-21 p. 20)
66. On March 3, 2015, Student was physically aggressive toward the bus driver at the end of the school day before being transported home. One of the classroom aides entered the bus and spoke to Student but Student did not calm down. The aide and the substitute teacher removed Student from the bus, then permitted Student to return to the seat on the bus. Student then engaged in physical aggression against the aide, pushing her up against the dashboard. Other staff then removed Student from the bus and escorted Student to the therapy room until the Parent arrived to take Student home. The aide suffered an injury to her back during this incident and had to seek medical attention. The substitute teacher was also injured. (N.T. 926-29, 958, 967-68, 1692; S-6A, S-21 p. 27)
67. Data on Student's tantrum and aggressive behaviors between September 2014 and April 2015 was quite variable, with a significant increase in aggression in the latter half of the school year. (P-7; S-21)

#### Restraints of Student

68. Student's autistic support teacher, who has been trained in HWC several times, had to physically restrain Student once during the 2011-12 school year and twice during the 2012-13 school year. (N.T. 496-97, 1591-92; S-15 pp. 41-45)
69. Staff used standing and seated PRTs with Student at times. Sometimes, after a seated PRT was used with Student until Student demonstrated compliance, Student would engage in physical aggression again immediately after release of the PRT, so that provision of restraint was not always successful. (N.T. 94, 100-02, 108-10, 128-29, 161, 167, 503-04; *see also* table below)
70. Student was physically restrained on a number of occasions between January and April

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<sup>8</sup> The graph at S-16 p. 5 incorrectly reflects the date of the 53 incidents of aggression (S-20 pp. 20, 23).

2015,<sup>9</sup> all following unsuccessful de-escalation strategies. (S-15)

1/29/15	Student was in the gym and became physically aggressive toward an aide and teacher. Staff implemented a seated PRT (2 minutes) then a two-person escort to the therapy room. The aide suffered a shoulder injury during the incident. (N.T. 537-38, 891-94, 955-58; S-15 pp. 1-3)
3/12/15	Student was using a computer during break and signed for help, then became aggressive toward the aides. After other students were removed, staff implemented a seated PRT (4 minutes). The aide reinjured her shoulder during the incident. The nurse documented that Student had a red mark at the upper arm from the restraint. (N.T. 969-73, 1043; P-3 p. 3; S-3 pp. 4-5)
3/18/15	Student refused to transition to the next activity, was guided to the therapy room and became aggressive toward staff who implemented a seated PRT (4 minutes). The nurse documented that Student had red marks at the upper arm from the restraint. (N.T. 1772-73; P-3 p. 4; S-15 pp. 6-7). (P-3 p. 4)
3/18/15	Student became aggressive toward an aide after being offered two break choices, was guided to the therapy room and continued to engage in aggression. Staff implemented a PRT (3 minutes). (N.T. 1276-77; S-15 pp. 8-9)
3/18/15	Immediately after the second PRT, Student refused to sit down as directed and became aggressive toward staff, who implemented a PRT (2 minutes). (N.T. 1276-77; S-15 pp. 10-11)
3/23/15	Student became aggressive toward staff while working on the computer, was guided to therapy room where Student continued aggressive behavior. Staff implemented a standing PRT (2 minutes). The nurse documented that Student had red marks on the upper back after the restraint. (N.T. 143-46, 149, 1041-42, 1282-84; P-3 p. 7; S-15 pp. 12-13)
3/23/15	Student became aggressive in gym class toward staff, who implemented a PRT (3 minutes). (N.T. 1283-83; S-15 pp. 14-15)
3/23/15	Immediately after release from the second PRT, Student resumed aggressive behavior toward staff who implemented a seated PRT (7 minutes). (N.T. 1283-84; S-15 pp. 16-17)
3/26/15	Student became aggressive in gym class; after returning to the classroom, Student continued aggressive behavior and was guided to the therapy room where staff implemented a seated PRT (4 minutes) due to ongoing aggression. (N.T. 152-53; S-15 pp. 19-20)
3/31/15	Student became aggressive during toileting, was guided back to the classroom but continued to engage in aggression toward staff, who implemented a seated PRT (3 minutes). The nurse documented red areas on Student's chest and scratches on either side of the face from the restraint. (N.T. 1036-38, 1100-01; P-3 p. 8; S-15 pp. 24-25)
4/1/15	Student attempted to leave the gym during class, and engaged in aggression toward staff who blocked the exit. Staff implemented a seated PRT (2 minutes). The nurse documented a red area on Student's upper arm and upper chest from the restraint. (N.T. 1776-77; P-3 p. 9; S-15 pp. 26-27)
4/8/15	Student began to engage in aggressive behavior during mathematics instruction,

<sup>9</sup> A report of a restraint on March 27, 2015 (S-15 pp. 22-23) was in error. (N.T. 158-59, 1285)

	was directed to take a break and guided to the therapy room where Student continued aggression toward staff. A seated PRT (2 minutes) was implemented. (N.T. 159-61, 1188; S-19 pp. 28-29)
4/8/15	While in the office to be checked by the nurse, Student attempted to leave the area and became aggressive when redirected, and an aide was bitten. Staff implemented a standing then seated PRT (12 minutes). The nurse documented redness at Student's upper chest and left thumb after the restraint. (N.T. 164-67; P-3 p. 13; S-19 pp. 30-31)
4/8/15	Immediately after the second PRT, Student became aggressive toward the aide and principal, was guided to the therapy room where Student continued aggressive behavior toward the aide who implemented a standing then seated PRT (9 minutes). (N.T. 167-70; S-19 pp. 32-33)
4/9/15	During a morning group activity, Student engaged in aggressive behavior toward a peer. Student was redirected to the therapy room but continued aggression toward staff. Staff implemented a standing then seated PRT (5 minutes), with the latter involving 3 staff members. The nurse documented a red area on Student's forearm but did not attribute that to a restraint. (N.T. 172-74, 997-1001, 1093-94, 1290-92; P-3 p. 14; S-19 pp. 34-35)
4/9/15	While still in the therapy room after release of the first PRT, Student resumed aggressive behavior toward staff who implemented a standing then seated PRT (8 minutes). (N.T. 174-76, 179, 1094-96; S-19 pp. 36-37)
4/13/15	Staff removed Student from the bus after incidents of aggression (described in detail below), after which staff implemented a standing then seated PRT (7 minutes). (S-15 pp. 38-39)

In addition to the injuries noted above, Student may have sustained bruises as a result of the April 9, 2015 restraints. (N.T. 1223-24, 1291-92)

79. After all restraints, the nurse would examine Student. Staff would debrief, and each instance was followed by an IEP meeting that did not always include all members of the team. All staff were advised of any changes to the IEP and PBSP following the meetings. (N.T. 91, 151-52, 157, 170-71, 1001-03, 1018, 1020, 1045-46, 1053, 1103, 1185-87, 1193, 1204, 1253, 1262-63, 1274-76, 1284-85, 1294, 1617-18, 1715, 1789, 1792-94; P-3; S-16)
80. Following physical restraint, Student could be compliant with other tasks and activities. (N.T. 110, 148-49, 154-55, 163-64, 176-88, 1099-1100, 1101-02, 1195-96, 1282, 1434-35; S-19)
81. In approximately March 2015, the nurse was asked to check Student at the end of the school day for any marks, scratches, or bruises, but this was not implemented consistently because Student would become upset with that change to the daily schedule. (N.T. 1273-74; P-3 pp. 12, 16-17, P-6 p. 2; S-6E p. 1, S-8 p. 12, S-22 p. 3)

### Bus Incident on April 13, 2015

82. Student had an assigned seat at the front of the bus. Student was permitted to listen to music using a personal device while on the bus. (N.T. 54-55, 124-25, 250, 259-60, 948)
83. Student engaged in mild physical aggression walking through the school building to the last activity before boarding the school bus. One of the classroom aides tried to redirect Student and allow Student to become calm, and gave Student the personal device for listening to music. Student walked to the bus with the aide and boarded, but Student remained agitated and had continued to engage in aggressive behavior just before arriving at the bus. (N.T. 181-83, 228-31, 233, 250-51, 253, 260-61)
84. Student's sibling got on the bus after Student, and several other students were also on the bus. At that time, Student was sitting in the assigned seat and listening to music. After the bus left the building and proceeded a short distance, Student began to engage in physical aggression against the bus driver. The bus driver pulled over and Student sat down as requested, but after the driver proceeded to drive the bus again, Student resumed the behavior. After this sequence occurred several times, the bus driver returned to the school. (N.T. 55-57, 60, 183, 261, 264-66)
85. Someone called the classroom to assist Student on the bus due to aggression, and the two classroom assistants went to assist. (N.T. 56-57, 183, 1074-75)
86. When the aides arrived at the bus, Student's sibling and the bus driver explained that Student had been aggressing towards others. The aides entered the bus where Student was sitting in a seat. One of the aides spoke with Student to explain that Student needed to exit the bus, but did not employ any de-escalation strategies. (N.T. 56-60, 63, 184, 267-68, 1075-76)
87. One aide placed his hands on Student's shoulders to provide a physical prompt and assist Student in standing up to exit the bus. The other aide moved Student's legs and feet to a position to get up from the seat. Student engaged in physical aggression toward and struggled against the aides, resisting their efforts to remove Student, and the aides physically assisted Student to get off of the bus. (N.T. 67-71, 184-85, 268-70, 1076-78)
88. The aides escorted Student to the calming room. Student was able to walk to that room with the aides in close proximity, and Student did drop to the floor along the way several times. Student continued to engage in some physical aggression toward them during the walk and once in the therapy room. In that room, the aides spoke with Student, but Student lunged toward them several times. (N.T. 72-76, 86-87, 186-87, 270, 1081-84)
89. One of the aides used a physical restraint with Student in the therapy room after the bus incident because he believed it was necessary for Student's safety. Specifically, the aide initiated a standing PRT and then moved into a seated PRT with Student. This restraint lasted approximately seven minutes while Student continued to resist and engage in physical aggression toward the aide, until he believed Student was calm enough to be released. (N.T. 93-94, 100-12, 105-11, 190-92; J-12; P-11; S-6E, S-15 pp. 38-39)

90. Student's sibling followed Student and the aides into the building. The sibling took a cell phone photograph of Student in the seated PRT. In that picture, Student is seated and leaning forward, with the upper half of Student's body parallel to the floor close to Student's legs; the aide is kneeling behind and in close proximity to Student also leaning forward with his body nearly parallel to the floor. Student and the aide stayed in that posture for some period of time that was less than the full seven minutes. (N.T. 93-96, 102-03, 270-71, 281, 283; J-12; P-11)
91. After Student was released from the PRT, Student remained seated in the therapy room until the Parent arrived to take Student home. (N.T. 111-12, 285, 288)

#### Program Documentation

92. Student's PBSP developed in January 2013 identified behaviors of concern as pinching, scratching, biting, kicking, and grabbing others. The hypothesis of the function of the behaviors was to gain attention or preferred items or activities, or to avoid/escape tasks or demands. A number of Antecedent Strategies (daily schedule, visual supports, choices, verbal warnings before transitions, timer, social skills instruction, priming and prompting, video modeling, and sensory breaks) were included, with Replacement Behaviors identified (request a break) and Consequences. When Student exhibited aggressive behavior, staff was to use redirection and prompt Student to move to the therapy room with limited adult attention. HWC procedures were identified as the manner of addressing danger of Student hurting self or others. (J-9B)
93. Student's IEP developed in the spring of 2013 noted that Student had communication and assistive technology needs, and that Student's behavior impeded that of Student or others. Present levels of academic achievement and functional performance was included, and described Student's educational program as focusing on daily living, communication, socialization, and functional academic skills in addition to behavior management. At the time, Student's demonstrated needs included recognizing social and physical boundaries, functional communication, prompting for most activities and tasks, behavior management, and supervision outside of the school building; also noted were Student's tendencies to cry and engage in physical aggression when upset or frustrated, and to grab clothing of others. Student's current academic, occupational, and speech/language skills were also provided. At the time, Student used the Dynavox with prompting, and would independently request a break during speech/language therapy sessions. (J-2)
94. Annual goals in the March 2013 addressed remaining on task in teacher-directed activities and requesting a break; numbering objects; and typing sight words. Program modifications and items of specially designed instruction were visual schedules and redirection; small group and community based instruction, verbal and physical prompts; social skills instruction; behavioral intervention; support of an aide; modified curriculum; a key lock; and individual and small group practice with expressive communication skills. Speech/language and occupational therapy, in addition to transportation, nursing, and personal care assistance, were identified as related services. Student was eligible for extended school year (ESY) services. (J-2)

95. Student's March 2013 IEP provided for inclusion in regular education for lunch, gym, chorus, and special classes, with academic instruction in the autistic support classroom. Student was to be provided a replacement curriculum with a supplemental level of autistic support. (J-2)
93. A new IEP was developed for Student in March 2014. That document noted that Student would remain in the middle school for the following school year. Present levels of academic achievement and functional performance were similar to the prior IEP, but Student's initiation of peer interactions had significantly decreased. A report of Student's aggression reflected only February and March 2013 actions. Occupational therapy and speech/language information was also provided. At the time, Student continued to use the Dynavox only when prompted, and used signs or gestures rather than the device to express basic wants or needs such as a break. Needs were similar to the prior IEP. (J-3)
94. Annual goals in the March 2014 IEP were similar to the previous IEP, with the expectation for typing sight words increasing and the task completion goal directed toward functional life skills. A break card and communication skills instruction were added to Student's program modifications/specially designed instruction. In all other respects, the IEP was essentially the same as in the prior school year. (J-3)
95. Student's PBSP was also revised in March 2014. A new behavior of dumping a cup of water was identified with the hypothesis of the function to escape activities, and for sensory stimulation, as well as to avoid non-preferred activities and sensory stimulation. A new Antecedent Strategy was providing water in small doses in an unbreakable cup, but the PBSP was otherwise essentially the same as in the previous version. (J-9A)
96. The March 2014 IEP was revised in January 2015 to reflect that the speech/language therapy was individual rather than group. (J-3 pp. 2, 6, 17; P-23 p. 7)
97. A re-evaluation report (RR) issued on March 3, 2015 based on the recent FBA. After summarizing available information from previous evaluations and speech/language and occupational therapy reports, the RR described the recent restraints and PBSP. The FBA identified the targeted behaviors as Aggression, Tantrums, Self-Injurious Behavior, and Elopement, with aggression categorized into Mild (less than ten seconds) and Severe (more than ten seconds). A PBSP was to follow the FBA. (J-7)
98. The March RR also included speech/language and occupational therapy input. The iPad with Proloquo2Go was determined to be appropriate, although at the time, Student "still [did] not show a great desire to utilize the iPad for spontaneous, functional communication to meet [his/her] wants and needs," (J-7 p. 5) and continued to rely on sign language and gestures. In occupational therapy, Student requested breaks during every session but used a break card rather than the iPad. (J-7)
99. A new IEP was developed for Student in March 2015. Present levels of academic achievement and functional performance described skills in reading, mathematics, and writing skills, as well as functional skills (participating in tasks, social/emotional development, and medical needs) and the recent FBA was summarized. Occupational



therapy and speech/language input was also included. At the time, Student communicated primarily using sign language, gestures, vocal approximations, and the iPad, which Student was generally using successfully but with prompting. Parent concerns at the time included the transition to high school. Needs were identified in the areas of pre-academic reading, mathematics, and writing skills; a PBSP; functional communication and language; and daily living skills including safety awareness and recognizing personal boundaries. (J-4)

100. Annual goals in the March 2015 IEP addressed basic mathematics skills, typing sight words, and increasing tolerance of lessons without aggression or tantrums. This IEP included the PBSP as revised identifying Antecedents, Behaviors of Concern (Mild and Severe Aggression, Tantrums, Self-Injurious Behavior, and Elopement), and Consequences. Other new or revised program modifications and items of specially designed instruction were small group instruction and group speech/language therapy. This IEP was otherwise similar to the previous year. (J-4)
101. After the January 29, 2015 restraint, the IEP team met on February 11, 2015 to discuss Student's behaviors and how to support Student. The Parent expressed concern about the use of the seated PRT, which was the first time such a restraint had been used with Student, particularly since Student did not like to be held from behind. The team discussed using a seated PRT only when necessary with a plan to have the adult move away from Student as soon as possible so Student could calm self. A new goal to decrease tantrums and aggression during short lessons and activities was added, with the perceived function of those behaviors as attention, sensory stimulation, and avoidance or escape of non-preferred activities; and there was an addition to the PBSP to incorporate preferred activities throughout the school day. Content of the existing PBSP was also incorporated into the IEP. The team also decided to conduct another FBA and the Parent gave her consent. (N.T. 558, 1210, 1232-33, 1253-60, 1262-63, 1610-11, 1614-15, 1719, 1765, 1767-68, 1779, 1780-82;; J-3A; P-5 p. 2; S-8 p. 9, S-24A)
102. The CST team documented several other behavioral suggestions at its February 11, 2015 meeting (also following the January 29, 2015 restraint), including limiting a particular activity as reinforcement to times when Student was not engaging in physical aggression. (P-6 pp. 4-5)
103. The Parent completed an Interview Form for the FBA, describing her concerns with increased aggression, self-injurious behavior, not sleeping, not following directions that Student previously followed, and unexplained crying for long periods of time. She provided detailed explanations of the behaviors including possible contributing factors and when they first began to occur. She noted that aggression had been a concern for some time, but that self-injurious behavior was more recent and more intense than previously. (S-2, S-8 p. 47)
104. One revision to Student's program involved implementation of a red-green system, implemented for several children in the autistic support classroom, wherein a student began the day at a green level with access to all activities. If a student engaged in aggressive or other significant behaviors, the student moved to the red level wherein his

or her preferred activities were restricted, such as the ability to use the computer during free time. Students could move back to the green level by demonstrating compliance with several demands. Student's picture would be placed on a green or red paper next to the visual schedule depending on the level Student was in at the time. The District staff considered this system to be nothing more than a strategy of visual support for the existing PBSP that limited access to preferred activities. The Parent disagreed with removing preferred activities, believing that this form of punishment would not be successful with Student. (N.T. 1003-16, 1020-24, 1028, 1052, 1054-56, 1057-59, 1107, 1208-09, 1280-81, 1624-25, 1722-23, 1774-75; P-2 p. 30, P-6 p. 4)

105. Other revisions to the IEP in the second half of the 2014-15 SY included adding visual supports, using calming and reassuring statements to Student, moving away from Student and allowing Student to stay seated and calm self, and additional priming. (N.T. 1201-02, 1271-72, 1615, 1781-82)
106. The IEP team met again on March 9, 2015 to make revisions based on the completed FBA. The targeted behaviors were Aggression, Tantrums, Self-Injurious Behavior, and Elopement, with aggression categorized into Mild (less than ten seconds) and Severe (more than ten seconds). The Behavior Analyst devised a tip sheet for collecting data on Student's specific aggressive behaviors, following the behavioral health agency's procedure and using its form and sharing that data with the agency. The behavior goal remained, and the PBSP provided further detail on Antecedents, Behaviors of Concern (Mild and Severe Aggression, Tantrums, Self-Injurious Behavior, and Elopement), and Consequences with a clearer emphasis on breaks and break training. (N.T. 1263-67, 1782-88, 1850-54; J-4 pp. 9-10)
107. The IEP team met again on March 18, 2015, and discussed the restraints on March 12 and 18. The team decided not to make any revisions to the IEP or PBSP. (N.T. 1277-80, 1720-21, 1789-91; J-4A)
108. The IEP team met again April 1 and the team again decided not to make any revisions to Student's IEP or PBSP. (N.T. 1288-90, 1789-91; J-4B)

#### Programming Decisions After April 13, 2015

109. After the April 13, 2015 bus incident, the Parent did not send Student to school because of concerns with Student's restraints. (N.T. 1457-58, 1713)
110. The Parent immediately took Student to the psychiatrist, who wrote a letter on April 14, 2015, recommending that Student remain home with the Parent. This letter was considered a request for homebound instruction. The psychiatrist's diagnosis on the homebound instruction form, provided to the District on April 30, 2015, was a form of Autism Spectrum Disorder. (N.T. 383-86, 392-93, 419-20, 1513-15, 1705-06, 1891; P-17; S-9 pp. 9-16)
111. Student's psychiatrist observed Student to exhibit symptoms of Post Traumatic Stress Disorder after April 13, 2015, but did not make a formal diagnosis of that disorder. A

series of physical restraints would, nonetheless, create fear for Student and diminish Student's level of trust with District staff. (N.T. 388-90, 423-24, 428-29)

112. The IEP team met again on April 15, 2015. The team discussed strategies to prepare Student for the bus ride home, and added a harness for Student's safety on the bus. The Parent explained her intention to explore an acute partial hospitalization program. Another revision to the IEP was made on April 17, 2015 to provide for seating on the bus and additional staff support. (N.T. 1294-96; J-4C, J-4D)
113. The Parent did not provide consent to the District to communicate with Student's psychiatrist. (N.T. 1708-09; S-9 pp. 47-48)
114. In early April 2015, the Parent applied for Student to be admitted to an acute partial hospitalization program. In that program, which lasts 15 days, children are provided with medication management while staff arrange for services to be provided upon discharge. Student was admitted to that program on April 20, 2015 and the District provided transportation. (N.T. 1126, 1128-30, 1137, 1306-07, 1469, 1533, 1644; P-20 pp. 2-6)
115. On the date that Student was admitted, the Parent advised staff at the acute program that she would not permit staff to utilize restraint other than a standing PRT. The program determined that it could not accommodate the Parent's request and asked the Parent to take Student home before the end of the day. There was no one-on-one aide for Student that day. (N.T. 1131-33, 1138-40, 1503, 1533-36, 1540-41; P-20 pp. 8-9)
116. A meeting convened on April 22, 2015 involving District representatives, staff of the acute program, and the Parent. The acute program asked the District to provide a one-on-one aide for Student in the program. The District understood the reason for the one-on-one aide was for behavior intervention and management due to the Parent's restriction on restraint, and for that reason as well as the fact that this placement was medical not educational, it declined to provide the aide. (N.T. 1133-34, 1137, 1227-29, 1458-68, 1470, 1505-06; S-22 pp. 29-29-31)
117. The Parent submitted the homebound instruction request to the District on April 22, 2015. The District did not consider the request to be for instruction in the home, a special education placement, but rather a temporary excusal from school for medical reasons. The District tried to explain the difference to the Parent, and homebound instruction was arranged and in place by approximately May 12, 2015 but not always for five hours per week. (N.T. 1303, 1471-75, 1509-10, 1513-15, 1517-18, 1641-43, 1739-40; S-9 pp. 1-3, 7, 39-40, 43)
118. An IEP meeting convened on May 15, 2015. The revised IEP document reflected Student's homebound instruction and a recommendation for a follow-up meeting in May or June. (N.T. 1303, 1519-20, 1646, 1742-43; J-4E; S-9 pp. 21-22)
119. Another IEP meeting convened in early June 2015 to plan for ESY for that summer. (J-4F)

## **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 Parent 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 with respect to the factual matters important to deciding the issues, testifying to the best of his or her recollection; discrepancies may be attributable to a lack of precise memory and differing perspectives. It should also be noted that the Parent is clearly a loving and devoted advocate for Student who knows Student and Student’s challenges very well, and has taken a very active role in Student’s educational programming throughout Student’s lifetime. Additionally, all of the District personnel presented as knowledgeable and experienced professionals dedicated to their fields.

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

were carefully considered in issuing this decision, as were the parties' extremely thorough Closing Arguments that judiciously struck a balance between advocacy and fairness.

### 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. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. In this case, there is no question that Student is IDEA-eligible and has been a resident of the District throughout the time period at issue. Thus, the District was required under the IDEA to provide Student with a “free appropriate public education” (FAPE). 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 v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP that 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). Substantively, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. 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). In other words, the IEP need not “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Importantly, “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); *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same).

Further, a child’s educational placement must be determined by the IEP team based upon the child’s IEP, as well as other relevant factors. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.116. A critical consideration regarding placement is the IDEA obligation for eligible students to be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); 22 Pa. Code § 14.145; *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). All local education agencies are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa Code § 14.145(5). FAPE and LRE are related, but separate, concepts. *A.G. v. Wissahickon School District*, 374 Fed. App’x 330 (3d Cir. 2010) (citing *T.R.*, *supra*, at 575, 578); *see also L.G. v. Fair Lawn Board of Education*, 486 Fed. Appx. 967, 973 (3d Cir. 2012).

It is also crucial to recognize that parents play “a significant role in the IEP process.” *Schaffer*, *supra*, at 53. Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's

educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any “concerns” parents have “for enhancing the education of their child” when it formulates the IEP.

*Winkelman v. Parma City School District*, 550 U.S. 516, 530 (2007).

### Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). Relevant to this matter, the obligation to provide FAPE to a child with a disability is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm.w. 2005). Thus, the IDEA and Section 504 claims will be addressed together.

### Provision of FAPE

The first issue is whether the District’s educational program for Student was appropriate. The evidence on this issue relates to the entire 2013-14 and 2014-15 school years. The Parent challenges the programming as it related to functional communication, behavioral support, and overall academic and functional performance. Because Student’s behavior was a major focus of the proceedings, that issue will be addressed first.

### Behavior

The uncontroverted evidence is that Student’s behavior, including aggression, has been extremely variable over the years. It is also beyond doubt that Student’s aggressive behaviors increased significantly in January 2015 and continued through Student’s removal from school in

April 2015. The question is whether the District appropriately responded to the intensified aggression. The record unequivocally compels the conclusion that it did not.

The District staff involved in Student's programming are unquestionably qualified and experienced. It is thus perplexing that, given Student's continuous exhibition of aggressive behavior over the years that clearly impeded Student's learning, the March 2013 IEP removed the single behavioral goal (asking for a break). That IEP and those that followed did not provide any form of instruction for teaching Student how to manage behaviors. The March 2015 IEP added a behavioral goal toward decreased tantrums and aggression, but provided no indication of how Student was expected to have the ability to reduce their occurrence. The PBSP essentially remained unchanged from March 2014 until Student left the District in April 2015, with the exception of resuming focus on asking for breaks in March 2015, a skill that Student had mastered at least one year prior. Even recognizing Student's variable behavior patterns over the years in the District, there was no consistent focus on Student acquiring skills to manage behaviors rather than engaging in aggression.

The use of physical restraints is at the heart of the Parent's concerns. Pennsylvania regulations mandate the implementation of positive, rather than negative, behavior support. 22 Pa. Code § 14.133(a).

(c) Restraints to control acute or episodic aggressive or self-injurious behavior may be used only when the student is acting in a manner as to be a clear and present danger to himself, to other students or to employees, and only when less restrictive measures and techniques have proven to be or are less effective.

(1) The use of restraints to control the aggressive behavior of an individual student or eligible young child shall cause the school entity to notify the parent of the use of restraint and shall cause a meeting of the IEP team within 10 school days of the inappropriate behavior causing the use of restraints, unless the parent, after written notice, agrees in writing to waive the meeting. At this meeting, the IEP team shall consider whether the student or eligible young child needs a functional behavioral assessment, reevaluation, a new or



revised positive behavior support plan, or a change of placement to address the inappropriate behavior.

\* \* \*

(f) School entities have the primary responsibility for ensuring that positive behavior support programs are in accordance with this chapter, including the training of personnel for the use of specific procedures, methods and techniques, and for having a written policy and procedures on the use of positive behavior support techniques and obtaining parental consent prior to the use of restraints or intrusive procedures as provided in subsection (c).

22 Pa. Code § 14.133.

Student's IEPs and PBSPs provided for appropriate de-escalation strategies as needed, and included a provision for physical restraint when Student posed a danger to self or others, as permitted by the above regulations. However, Student had required restraint on only a few occasions over the course of the previous several school years. The parties disagreed over whether seventeen physical restraints in the short time period is excessive. It is not necessary to make that determination based solely on the number. Rather, the sudden severity of Student's behaviors that purportedly required physical restraint is a significant concern. It is also crucial to recognize that Student did not care for physical contact from behind, as the Parent explained on several occasions.

The HWC system may be wholly effective for certain individuals; and the District professionals who are trained in and employ its techniques clearly believed in the program. Nevertheless, the record in this matter demonstrates that Student's behavior plans were not responsive to Student's needs, and that continued use of PRT with Student was not appropriate or effective in managing aggressive behavior. There was no indication that consideration was given to a possible change of placement, rather than continue to employ physical restraint. Moreover, the existence of the BHA treatment plans did not excuse the District from its

responsibility to respond appropriately to Student's behavioral manifestations at school.

The District did present testimony that the increase in aggressive behavior may be attributed to the ABA concept of extinction burst. (N.T. 1194-98, 1790-92, 1837-41) As that principle was described (and as it is understood by this hearing officer),<sup>10</sup> an undesired behavior may actually increase following implementation of a new intervention (removal of a reinforcement) before it begins to extinguish. The critical flaw in this explanation, however, is that Student's PBSP was not materially revised during the relevant time period, nor is there any indication that reinforcements were removed prior to the series of restraints, such that one might understand and even expect an extinction burst. The PBSP revisions on February 22, 2015 added a goal to decrease tantrums and aggression, but there was no mention of any new intervention, program modification, or specially designed instruction that would support and assist Student in achieving that goal. That PBSP also incorporated preferred activities throughout the school day, a practice that was certainly not a new behavioral intervention for Student. The March 11, 2015 PBSP revision after the FBA similarly left the PBSP intact, and its emphasis on breaks and break training was a continuation of previous programming. Indeed, the testimony of the District professionals was consistent throughout the hearing that they believed Student's PBSP as it existed at the beginning of January 2015 was a good plan that needed time to become effective.

In addition, the implementation of the red-green system likewise was, to the District, nothing more than a visual support of strategies that were already implemented pursuant to the existing PBSP. It is also significant that the Parent did not understand, or agree with, the use of

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<sup>10</sup> See, e.g., John O. Cooper, Timothy E. Heron, & William L. Heward, Applied Behavior Analysis (2d Ed. 2007) at 462. That the authors of this text suggest that, based on available research, the increase in behaviors targeted for extinction should increase for a few sessions rather than for a prolonged period of time. *Id.*

such a strategy limiting preferred options for Student. Removing preferred activities from Student's available repertoire of incentives unquestionably contravenes the Commonwealth's mandate for positive, not negative, reinforcement of behavior, even if Student understood the theory behind this approach. In any event, the use of the red-green strategy in combination with the other components of Student's PBSP clearly were ineffective in managing Student's aggressive behavior without resort to continued physical restraint.

The former BHA BSC testified, persuasively, that the new pattern of multiple physical restraints was a clear indication that the something was not meeting Student's needs, whether it was the level of service, the personnel involved, the environment, or other factors. (N.T. 816-18, 880-84) Student clearly presented with behaviors that challenged the District professionals, as they did the Parent. The District posited throughout the hearing that numerous factors may have influenced Student's level of aggressive behavior, such as the Parents' divorce, new people in the home, Student's physical maturity and growth, and medication changes as sources of the need for physical restraints. While it may well be that these and other dynamics played some role in Student's performance, including behavioral presentation, over the course of the relevant time period, identification of extraneous possible causes for the notable changes does not negate the underlying obligation that the District had to respond appropriately to Student's identified needs as they emerged and fluctuated. Children are affected by countless influences throughout the course of their educational careers, and there is no provision in the IDEA for excusing the provision of FAPE under changing circumstances. And, while the District noted that Student's behaviors were addressed differently at home than at school, resulting in inconsistency among approaches, it also recognized that parents do not typically have the same resources available in the home environment that would allow implementation of the same behavior plan that is used at

school. (N.T. 759-60, 1198-99, 1268-69)

For all of the above reasons, this hearing officer concludes that the District denied FAPE to Student with respect to its behavioral programming. That FAPE denial necessarily includes the extensive use of physical restraints between January and April 2015.

This issue leads to a related claim that the District failed to provide Student with adequate preparation for the transition to the substitute teacher in late January 2015. The District staff used a number of approaches to help the students in the autistic support classroom understand the upcoming change beginning early in the school year. One must also consider that the teachers and other staff were understandably unprepared for the autistic support teacher's need to begin her leave sooner than expected. Events can occur without adequate opportunity for preparation, which can be quite challenging for children who have difficulty with change. Additionally, despite the Parent's contention that the substitute teacher was ill-equipped to take over the class without, *inter alia*, HWC training, other District staff were available and present with Student to implement the existing IEP and PBSP, despite the flaws in those documents.

It is not insignificant that, on the very first day that the substitute teacher became part of the autistic support classroom, Student engaged in an alarming number of incidents of aggressive behavior, and was physically restrained for the first time since the start of the school year. Nevertheless, as everyone agrees, Student's aggressive behavior has fluctuated throughout Student's life, and no further restraints were necessary until early March. Viewed from the perspective of the District's knowledge prior to late January 2015, the steps taken by the District appear to have been thoughtfully planned to assist Student in accepting the transition to a new teacher, and do not amount to a separate denial of FAPE.

Lastly on this issue, the Parent challenges the District's decision to remove Student from

the bus on April 13, 2015; this particular restraint was the most troubling to the Parent and prompted her to keep Student from school for the rest of the school year. Having concluded that the program provided, including the use of repeated physical restraints, was not effectively meeting Student's behavioral needs, this particular incident is part and parcel of the denial of FAPE and need not be discussed further.

### Communication

The evidence overwhelmingly demonstrates that Student had and has a need for functional communication. That deficit is almost certainly one major reason for Student's aggressive behaviors. However, the parties disagree over what is functional communication for Student and what is not. There was also significant testimony presented regarding the introduction of the iPad in the fall of 2014, including the difficulties the District encountered trying to contact the Parent to discuss communication options for Student, as well as the Parent allowing Student to use the iPad for entertainment over a holiday break. Once the process of introducing the iPad began, staff spent considerable time working with that device to have it resemble the Dynavox so that Student could make the transition, which Student successfully did in terms of locating and using appropriate icons when prompted to do so. The use of the iPad for other purposes, while unfortunate, was a relatively isolated circumstance that was apparently remedied rather quickly.

What is most concerning about Student's program as it relates to communication is that, despite years of exposure and prompting, Student does not even attempt to use the current communication device independently and, thus, it is not truly functional for Student. Instead, Student continues to rely on gestures and sign approximations that are not readily understood by those who did not know Student, and on behavioral manifestations, in order to communicate.

Although it is evident that Student was continually working on communication skills throughout the school day including using the device when prompted, there were no goals in the IEP or other indications of whether and how Student was truly developing functional communication, a significant deficit that Student must acquire as Student continues to grow closer to adulthood. Absent measurable goals targeting functional communication skills, such as decreasing Student's dependence on prompting to use a device, and progress monitoring toward mastering those goals, it is impossible to determine whether Student was acquiring communication skills that can be generalized across environments so that Student has a functional means of expressing Student's wants and needs outside of the classroom. The failure to program for truly functional communication amounts to a denial of FAPE.

#### Academic and Functional Programming

The last area about which the Parent complains is the program addressing Student's other educational and related service needs. The relevant IEPs identified needs in the following: pre-academic reading, mathematics, and writing skills; a PBSP; functional communication and language; daily living skills including recognizing social and physical boundaries; prompting; and supervision outside of the school building.

The IEP goals throughout have addressed Student remaining on task; numbering objects; typing sight words; basic addition and subtraction; and reducing tantrums and aggression. There is no indication that other needs, such as recognizing boundaries, were meaningfully addressed in the program. Moreover, the goals that were in the IEPs lack discernable definition and objective measurement (*e.g.*, "Given functional life skills, [Student] will complete tasks, with 80% accuracy in 10 consecutive trials.") (J-3 p. 20) It is unclear what need the goals for typing sight words addresses, or what sight words are given to Student and in what manner; thus,

whether or not Student made progress toward the goal of 50 words cannot be determined.

Similarly, the progress monitoring on the various goals merely provides percentages of accuracy without describing the activities involved or, most critically, specifying whether Student needed prompting. (S-17, S-18) For example, for the functional life skills goal above, the progress monitoring suggests that some of the skills were “teeth,” “wash hands,” “locker room,” and “undressing,” with nothing more than percentage of accuracy indicated. (S-17 p. 4) While it is apparent from the testimony that Student had very dedicated teachers, related service providers, and aides who worked with Student on a daily basis on a variety of tasks, the anecdotal reports unsupported by documented and reliable progress monitoring data that clearly set forth how Student is performing are simply insufficient. Thus, the record supports a conclusion that Student was denied FAPE in these additional areas.

## 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). As such, hearing officers, like courts, have broad discretion in fashioning such relief. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712 (3d Cir. 2010) (relying on *Lester C.*, *supra*, and *Burlington*, *supra*). "Appropriate remedies under the IDEA are determined on a case by case basis." *D.F. v. Collingswood Borough Board of Education*, 694 F.3d 4888, 498 (3d Cir. 2012).

Having found that the District denied FAPE to Student in its educational programming with respect to behavior, communication, and academic and functional needs, compensatory education is warranted. There was no evidence presented from which one could arrive at an award that would place Student in the same position Student would be in absent a denial of FAPE. Thus, despite a difficulty in quantifying an hour for hour award, as discussed below, that will be the basis for the relief.

The Parent's claims relate to the two year period prior to the filing of the Complaint in July 2015, as amended in August 2015. Many of the flaws described above apply to the entire 2013-14 and 2014-15 school years, with the exception of the time period over which the physical restraints occurred. In her Closing Argument, the Parent requested full days of compensatory education throughout that two year period, continuing until Student returns to a District placement. This hearing officer concludes that the remedy must encompass the entire 2013-14 and 2014-15 school years, because Student was removed from the District in April 2015 due to the behavior management employed by the District. Once Student entered the partial hospitalization program in the fall of 2015, and while Student remains there, however, the



District cannot be held responsible for the educational programming.

There was testimony that Student did successfully participate in activities at school, including exposure to and interaction with peers, during the two school years. In addition, Student's aggressive behavior varied significantly from hour to hour and day to day, and there were clearly times of the day that Student's behavior did not impede access to the educational program. This is especially so for the period prior to January 29, 2015, which will be the dividing line between partial and full days of compensatory education.

Based on the record as a whole, this hearing officer equitably estimates that Student should be provided a remedy equal to half the number of hours of the school day from the start of the 2013-14 school year through January 28, 2015. Beginning with January 29, 2015 when behaviors markedly increased and pervaded the entire school day, it is impossible to quantify the amount of time that Student may have derived educational benefit. As a matter of equity, then, Student will be awarded full days of compensatory education from that date through the end of the 2014-15 school year. *See Keystone Cent. School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). The District is entitled to credit for documented hours of homebound instruction including speech/language therapy in the spring of 2015. No relief will be awarded for the current school year beyond directives to the IEP team.

Student's most recent IEP specifies 6.75 hours in a school day; using that as a basis, the number of hours for compensatory education purposes will be rounded up to 7 per school day. For partial school days, only days that Student attended all or part of the day shall be counted. The hours of compensatory education are subject to the following conditions and limitations.

Student's Parent 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, including social/emotional/behavioral, and related service 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 Parent. The hours of compensatory education may be used at any time from the present until Student turns age twenty one (21).

#### Independent Educational Evaluation

The final issue is the Parent's request for an independent evaluation of Student. When parents disagree with a school district's educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Ordinarily, when a parent requests an IEE, the local education agency must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). In this case, the parties apparently proceeded with an evaluation in July 2015, but there was no assertion made throughout the testimony that that evaluation was inadequate or inappropriate, and that RR was not moved into evidence for this hearing officer to consider. However, the Parent did request an IEE in her due process complaint.

After careful consideration, this hearing officer concludes that ordering the requested IEE would provide the parties with an objective and impartial assessment of Student's strengths and needs together with recommendations for programming that should assist the parties in moving forward with collaborative IEP development. The IEE must include a comprehensive

psychoeducational evaluation as well as speech/language and behavioral assessments, and any other measures that the identified private evaluator determines are necessary to understand Student's unique and complex profile. It is respectfully suggested that the Parent provide consent to the independent psychoeducational evaluator to communicate directly with Student's behavioral health service providers, including the psychiatrist.

The parties will be directed to convene a meeting of Student's IEP team as the IEE gets underway and after it has concluded with reports issued.

### **ORDER**

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

1. The District failed to provide an appropriate program to Student for the 2013-14 and 2014-15 school years.
2. Student is entitled to 3½ hours of compensatory education for every school day that Student attended at least part of the day for the entire 2013-14 school year, and from the first day of the 2014-15 school year through January 28, 2015.
3. Student is entitled to 7 hours of compensatory education for every school day that school was in session from January 29, 2015 through the end of the 2014-15 school year. The District is entitled to credit for documented hours of homebound instruction including speech/language therapy for this time period.
4. The hours of compensatory education are subject to the following conditions and limitations. Student's Parent 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, including social/emotional/behavioral, and related service 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 Parent. The hours of compensatory education may be used at any time from the present until Student turns age twenty one (21).
5. Within ten calendar days of the date of this Order, the District shall offer three dates to the Parent to convene Student's IEP team within the next twenty calendar days to

consider the directives in this Order and decide whether to proceed with a plan to transition Student to a District placement pending completion of the IEEs.

6. Within ten calendar days of the date of this Order, the Parent shall provide to the District, in writing, a list of three individuals to perform an Independent Psychoeducational Evaluation, a list of three individuals to perform an assessment of behavioral functioning by an Independent Board Certified Behavior Analyst, and a list of three individuals to perform an assessment of communication needs by an Independent Speech/Language Pathologist.
7. Within five calendar days of receipt of the list of individuals, the District shall notify the Parent whether the evaluators proposed meet its criteria as provided by 34 C.F.R. § 300.502(3).
8. If the Parent does not provide the three lists of evaluators within ten calendar days of this Order, or if all of the evaluators proposed by the Parent in any of the three categories (psychoeducational, behavioral, and speech/language) do not meet the District criteria, the District shall within fifteen calendar days of the date of this Order provide to the Parent a list of not less than three qualified individuals to perform an Independent Psychoeducational Evaluation, and/or a list of not less than three qualified individuals to perform an Independent Behavioral Evaluation, and/or a list of not less than three qualified individuals to perform an Independent Speech/Language Evaluation of Student. The Parent shall make her selection(s) within seven calendar days of receipt of the list(s).
  - a. If the District responds with any list of qualified individuals, and the Parent does not notify the District, in writing, of the selection(s) within seven calendar days of sending such list or lists, the District shall make the selection(s) and notify the Parent in writing that same day.
  - b. The selected evaluators shall be given access to Student's education records, and shall determine the scope of the evaluations, including what assessments and observations are necessary.
  - c. The selected evaluators shall each provide a written report of his or her Independent Evaluation within a reasonable time, not to exceed 45 calendar days from the date of engagement, unless otherwise agreed by the parties.
  - d. The Independent Psychoeducational, Behavioral, and Speech/Language Evaluations shall be at public expense. Any additional evaluations deemed by the Independent psychoeducational evaluator to be necessary to educational programming decisions shall also be at public expense.
9. Following completion of the Independent Evaluation Reports, and within 15 calendar days of receipt of those reports, Student's IEP team shall meet to consider the Reports and all other relevant information and develop a new educational program to include a plan to transition Student to the new program and placement.

10. 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*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: March 11, 2016