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

FINAL DECISION AND ORDER

Student's Name: M. A.

Date of Birth: [redacted]

ODR No. 17765-1516AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	*Pro Se*
Bensalem Township School District 3000 Donallen Drive Bensalem, PA 19020	David T. Painter, Esq. Sweet Stevens Katz & Williams LLP 331 E. Butler Avenue New Britain, PA 18901

Dates of Hearing: July 6, 2016

Date of Decision: August 23, 2016

Hearing Officer: Brian Jason Ford, JD, CHO

Introduction and Procedural History

This matter concerns the educational rights of the Student, who is a student in the District.[1] On May 17, 2016, the Student's mother (Mother) requested this due process hearing by filing a Complaint with the Office for Dispute Resolution (ODR). On June 9, 2016, the Parent amended the Complaint. The original and amended Complaint present claims arising under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. The Parent proceeded *pro se*.

The District moved to limit the scope of both the original and amended Complaint. The District also challenged the sufficiency of the amended Complaint, and moved to strike portions of the amended complaint that raised issues beyond my jurisdictional authority. On June 17, I issued a Pre-Hearing Order. While I denied the District's motions, I noted that the amended Complaint created significant practical problems, gave guidance to the Parent concerning the limitations of my authority, and cautioned the Parent regarding the particular burdens associated with the claims that are raised.

In substance, the Parent demands an out-of-district placement for the Student, particular transportation accommodations, and compensatory education to remedy an inappropriate extended school year program that the District offered for the summer of 2016.

The hearing convened on July 6, 2016, and concluded in a single session. I received the Parent's written closing statement on July 29, 2016, and the District's written closing statement on August 1, 2016. Although not clearly presented as an issue, in acknowledgement of the Parent's *pro se* status, I will also consider whether the evidence establishes a denial of FAPE for which compensatory education is owed from May 17, 2014 through the present.

For reasons discussed below, I find in favor of the District.

Issues

The issues presented in this hearing are:[2]

1. Did the District offer appropriate extended school year (ESY) programming for the summer of 2016?

2. Has the District offered appropriate transportation?

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[1] Except for the cover page of this decision and order, identifying information is omitted to the greatest extent possible.

[2] The Parent characterizes these issues quite differently, especially in the written closing statement. The Parent points to various pieces of evidence as separate issues. The Parent also raises some new issues and new demands in the written closing statement. I will only address those issues raised in the Complaint, as amended, and as summarized without objection on the record at the outset of this hearing. NT at 30-31. In deference to the Parent's *pro se* status, this includes an overarching demand for compensatory education for the entire period of time in question. Further, a significant portion of the amended Complaint is a demand for the District to alter educational records. I explained in the Pre-Hearing Order that I could compel the District to alter their own records if inaccuracies in those records results in a detail of FAPE, but that different proceedings under FERPA more directly pertain to the content of educational records. The Parent did not pursue this issue at the hearing or in the written closing statement.

3. Does the Student require an out-of-district placement in order to receive a free appropriate public education (FAPE)?

The Parent demands an out-of-district placement, appropriate transportation, and compensatory education as remedies. As explained in the Pre-Hearing Order, I will consider whether the Student is owed compensatory education for the period of time from May 17, 2014 through the present.

Findings of Fact

The entire record was carefully considered, but I make findings of fact only as necessary to resolve the issues presented. In this case, there was significant overlap between the documents that both parties presented as evidence. There were no stipulations in this case, but several facts were not in dispute. I note when a fact is not in dispute, but do not always include pinpoint citation for such facts.

I find as follows:

Background

1. There is no dispute that the Student is a "child with a disability" as defined by the IDEA and, therefore, is entitled to a FAPE from the District.[3] More specifically, the Student is eligible for special education because the Student has been found to have an intellectual disability and a speech or language impairment. S-26, S-44, P-2, P-3. The Student also has been diagnosed with static encephalopathy which presents as symptoms akin to pervasive developmental disorder not otherwise specified (PDD-NOS). S-44, P-12.[4]

2. The Student enrolled in the District in the summer of 2012. At that time, the Student had an IEP from another school district. P-4, NT-122.

3. After enrollment, the Parent and District representatives discussed placement options for the Student. Options included both a Life Skills classroom and a placement that the District calls "intensive learning support." After these discussions, the District proposed intensive learning support and the Parent accepted that proposal. The Student was placed in intensive learning support for the 2012-13 school year (4th grade). NT at 36-37, 42-45, 50-52; P-4; S-12, S-13.

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[3] *See* 20 U.S.C. § 1401.

[4] Static encephalopathy is a form of permanent or unchanging brain damage. PDD-NOS is typically associated with Autism for purposes of IDEA eligibility categories. While the Student was previously placed in an Autism Support classroom in a different school district, the parties do not dispute the Student's current eligibility categories. Evaluations have concluded that the Student does not have Autism Spectrum Disorder. S-26, S-44. P-8. *See also*, NT-64-65. Testing is also consistent with the Parties' agreement that ID is a proper category for the Student. The Student's full scale IQ is consistently found to be below the first percentile across several years of testing. S-26, S-44; P-2, P-3, P-8, P-12.

2013-14 School Year (5th Grade)

4. During the 2013-14 school year (5th grade), the Student was placed into partial hospital day programs on three separate occasions. S-44; P-6, P-12.

5. The last 5th grade partial hospitalization started in April 2014. P-8.[5]

2014-15 School Year (6th Grade)

6. On June 24, 2014, the Student was placed into a residential treatment facility (RTF). The RTF placement was made by a third party. The RTF placement was funded by Medicaid and managed by the Managed Care Organization (MCO) serving the area in which the Student resides. S-26, S-27, S-31, S-34, S-44; P-8, P-9, P-10, P-12.

7. The RTF is located in another school district (the Host District). Under Pennsylvania law, the Host District assumed primary responsibility for the Student's IEP while the Student was placed in the RTF.[6] Consequently, the Host District revised the Student's IEP shortly after the RTF placement started to reflect the fact that the Student was placed in a Life Skills setting inside of the RTF. S-26, S-27. The Host District also reevaluated the Student, and drafted a Reevaluation Report (RR) in October 2014. S-26.

8. On April 19, 2015 (6th grade) the Student's RTF placement ended. *See id.*

9. After the Student's discharge, the District again assumed primary responsibility for the Student's IEP.[7] The District convened an IEP team meeting for the Student on April 23, 2015. S-31; P-10; NT at 138-140.

10. The District offered an IEP during the April 23, 2015 meeting. Under that IEP, the Student would attend a half day of school for six weeks as part of the transition back from the RTF. During those half days, the District proposed a life skills placement with inclusion for lunch and special area classes with one-to-one (1:1) support. The District also offered curb-to-curb transportation as an IEP service. S-31, S-59.

11. The April 2015 IEP also noted the Parent's concerns. Specifically the IEP noted that the Parent was concerned about possible regression during the RTF placement, and further regression that may occur as a result of the transition back to school. Around this time, the Parent expressed a desire for the Student to attend an Approved Private School (APS). That desire was also noted in the IEP. S-31, S-59, NT at 141-142.

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[5] There is some ambiguity in the record about when the April 2014 hospitalization ended. Despite this, no preponderant evidence was submitted concerning the period of time between May 17, 2014 (the start of the period in question in this case) and the end of the 2013-14 school year. It is clear that the Parent, naturally, had very serious concerns about the Student's education during this period of time. *See,* NT 122-127. However, the Parent did not present preponderant evidence concerning the appropriateness of the Student's education from May 17, 2014 through the end of 5th grade.

[6] 24 P.S. 13-1306.

[7] 24 P.S. 13-1306.

12. The Parent approved the April 2015 IEP via a Notice of Recommended Educational Placement (NOREP). S-32.

13. The Student exhibited no behavioral problems in school while attending the half-day Life Skills program and performed well on the work that was presented in that setting. S-41, S-60.[8]

14. On May 19, 2015, about four weeks after the half-day Life Skills placement started, the District proposed ending the half-day Life Skills placement and starting a full-day placement. The Parent rejected that offer via a NOREP and requested a due process hearing. S-35, S-36.

Summer 2015

15. The District approved the Student for ESY services from June 29, 2015 through August 6, 2015. The Parent expressed a preference for the Student to attend a private ESY program during the summer of 2015. *See, e.g.* NT at 83. Despite that preference, the Student attended ESY in the District until July 15, 2015. S-41, P-11.

16. The Parent ended the 2015 ESY placement prematurely after an incident in which the Student wrote negative, self-directed comments on a math paper. Before the District could address the problem, a TSS worker sent a photograph of the comments to the Parent. This upset the Parent, who then withheld the Student from the ESY program for the rest of the summer of 2015. See, NT 230-234.

2015-16 School Year (7th Grade)

17. In August 2015, the Parent requested an independent educational evaluation (IEE) and the District agreed to fund an IEE.[9] The IEE was conducted by evaluators who work for the same organization that the RTF is a part of. The IEE was completed and a report of the IEE was drafted in October 5, 2015. S-41, S-44.

18. The IEE includes a report of an in-school observation of the Student. At the time of the observation, the Student was appropriately and positively engaged with a Personal Care Assistant (PCA) assigned to the Student, as well as a classroom aide. The Student's behaviors in school were all observed to be appropriate. S-44.

19. Academically, the IEE concluded that Student's overall cognitive abilities were "extremely low" in relation to same-aged peers. S-44. This is consistent with all prior evaluations.

20. The IEE made general recommendations to the IEP team. These mostly highlighted the importance of setting a slow pace for assignments, the need for meaningful, functional

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[8] At the hearing, the Parent acknowledged the District's description of the Student's performance as documented at S-60. The District describes this testimony as the Parent's agreement with that documentation. I disagree with that characterization of the Parent's testimony. In context, the Parent testified as to a lack of basis to disagree with the District's description of the Student's presentation in school – which is not quite the same thing as an outright agreement. NT at 152-153.

[9] The Parent was represented by an attorney at this time.

academics, and establishing basic math and reading skills (with a suggestion for further assessment by a reading specialist). S-44.

21. At the time of the IEE, the Student was attending a supplemental Life Skills program in the Student's neighborhood school. The IEE is silent about the appropriateness of that placement, but does not recommend a placement change. S-41, S-44.

22. On March 7, 2016, the Student's IEP team reconvened. The resulting IEP included a supplemental level of Life Skills Support in the Student's neighborhood school. S-64. The IEP also included ESY for the summer of 2016. The Parent approved the IEP via a NOREP. S-65.

23. Prior to the 2015-16 school year, when the Student was able to attend school, the Student was assigned to a bus with a bus aide (that is, an aide assigned to the bus as opposed to a particular student). NT at 89-91.

24. During the 2015-16 school year, the District did not assign an aide to the Student's bus. NT at 89-91.

25. None of the Student's IEPs have required the District to provide an aide on the Student's bus. NT at 89-91.

26. The Parent drove the Student to and from school each day that the Student attended school during the 2015-16 school year. NT at 118. On April 2, 2016, the Parent asked the District to place an aide on the Student's bus. P-6. At that time, the Parent stated that the Student was a victim of bullying in the past, and that a bus aide was needed for that reason.[10] The Parent also requested either that a video monitoring system be installed on the Student's bus, or that the Student be assigned to a bus with such a system already installed.[11] The District did not honor the request for a bus aide, and the Parent continued to transport the Student.

27. During the 2015-16 school year, the Parent and school personnel communicated frequently. P-14, P-15; NT at 34-238. Those communications covered a very wide range of topics, including toileting. *Id.* The Parent asked the District's Occupational Therapist (the OT) to develop a visual aide to help the Student with a proper toileting and bathroom hygiene routine. *Id.* The OT created a checklist, showing a cartoon picture of each step involved in toileting from entering the bathroom through proper hand washing. *Id.*

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[10] For clarity, in context, the Parent did not ask for an aide to be assigned to the Student, but rather to the bus. Regardless of the particular language of the request for a bus aide, the Parent testified regarding the basis of the request. The Parent was concerned because: 1) a different student was dropped off at an incorrect bus stop, 2) the Parent believes that it is not possible for a bus driver to drive and watch children, 3) [an individual known to the Student] is a registered sex offender who lives in the District, 4) lack of a bus aide would cause the Student to be "triggered" and "regress." NT at 67-69, 101, 117. No evidence was presented establishing that the Student was bullied, let alone bullied on the bus. No evidence was presented linking the Parent's concerns about busing in general to the Student's bus. No evidence was presented establishing how the lack of a bus aide did or could result in triggering or regression.

[11] Evidence of when the request for video surveillance was first made is a bit murky. It is clear, however, that the request was made, and is presented as a demand in this hearing.

28. Before implementing the checklist, the OT shared the checklist with the Parent. Upon reviewing the checklist, the Parent concluded that the checklist was the end result of an intentional effort to mock the Student or Parent, or to make them the butt of a joke. *See,* NT at 104-107; P-14, P-15.

29. After the Parent reacted to the checklist, the District did not implement the checklist.[12]

30. After careful review of the record, I find that the checklist was not intended to embarrass or humiliate the Student. The checklist was nothing more than the District's good faith effort to comply with a reasonable parental demand. The images are not explicitly scatological, and do not depict anything inappropriate in a school setting.[13]

31. Sometime towards the end of the 2015-16 school year, the Parent came to believe that the Student's Life Skills teacher yelled at the Student and called the Student a liar. NT at 102, 205. There is preponderant evidence in the form of the Parent's own testimony that the Parent truly believed that the Life Skills teacher acted this way. There is no evidence (beyond hearsay) that this actually happened.

32. Around the time that the Complaint was filed (May 17, 2016), the Parent stopped sending the Student to school. This decision was due, in part, to the Parent's belief that the teacher yelled at the Student. The District offered an ESY program for the summer of 2016, and the Parent did not send the Student to the ESY program for the same reason (that is, the Parent believed that the Student would have the same teacher during ESY). NT at 103, 121, 196-97.

33. The March 2016 IEP included an offer of ESY services for the summer of 2016. This included a Life Skills placement, four days per week with transportation, and 30 minutes per week of pull out Speech/Language Therapy. This level of service would be provided from July 5, 2016 through August 4, 2016. S-64.

34. The Parent did not present evidence concerning the Student's academic, behavioral, or social progress while attending the District's programs. The Parent did not dispute the District's evidence of the Student's progress in those domains, and either agreed with or did not dispute the District's characterizations of that progress as substantial. *See, e.g.* NT at 206; S-64.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement

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[12] The term "checklist" is something of a misnomer, as the actual object was intended to be a laminated reminder chart for the Student – not something to check off during a toileting routine.

[13] The extent to which the toileting and hand-washing process are broken down are consistent with both the Parent's request and the Student's evaluated needs. The Parent's extreme reaction to the checklist, however, is evidence of the Parent's misperception of the District's actions. The Parent's continued insistence of the improper motives behind the checklist during the hearing undermine the Parent's credibility.

to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

The Free Appropriate Public Education (FAPE) Obligation

The IDEA requires the states to provide a “free appropriate public education” to a student who qualifies for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an 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). 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.

More specifically, in *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034. 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district’s efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.”

Benefits to the child must be ‘meaningful’. Meaningful educational benefit must relate to the child’s potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

However, a school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than “trivial” or “*de minimus*” benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time

it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool,* 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorsees this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia,* 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endured by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and, more recently, the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that [the child] would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount of what type of compensatory education is needed to put the Student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

"… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the

LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.,* 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F., Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006)*; *M.L. v. Marple Newtown Sch. Dist.,* ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.,* ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona.* If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Standard for Preemptive Out-of-District Placement

School districts must make a continuum of alternative placements available to children with disabilities. 34 C.F.R. § 300.115(a). That continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b)(1). In addition, school districts must make supplementary services (such as resource room or itinerant instruction) available in conjunction with regular class placement. 34 C.F.R. § 300.115(b)(2). At the same time, school districts must educate students in the least restrictive environment. 34 C.F.R. § 300.114.

All together, this means that if a student can receive FAPE in more than one placement on the continuum, the school district must offer the least restrictive of those placements. The same regulations also require schools to place students into "special schools" – be they public or private – if such a placement is necessary for those students to receive a FAPE. As such, when seeking a prospective, out-of-district placement, parents must establish either that their demanded placement is necessary for the provision of FAPE, and that less restrictive options available within the District are inappropriate and cannot be made appropriate with various supports and services.

There are cases in which parents can overcome this burden, but it is a very high threshold. It is important to note that the standard for prospective placement is quite different from the standard for tuition reimbursement. IDEA case law establishes a mechanism by which parents can obtain

tuition reimbursement – that is, situations in which parents disagree with a school district's offer, place their children in a private school, and then request a hearing to seek tuition reimbursement. Those cases establish a three-part test under which hearing officers first determine whether the school district offered a FAPE, then determine whether the private school is appropriate, and then determine whether any equitable considerations favor or disfavor reimbursement. *See Burlington School Committee v. Department of Education of Massachusetts,* 471 U.S. 359 (1985); *Florence County School District v. Carter,* 510 U.S. 7 (1993); *Lauren W. v. DeFlaminis,* 480 F.3d 259 (3rd Cir. 2007). In this case, the Parent is not seeking reimbursement. Rather, the Parent is arguing that the Student cannot be educated within the District. It is the Parent's burden, therefore, to prove just that.[14]

Discussion

2016 ESY

The first issue presented in this matter is whether the District proposed appropriate ESY services for the summer of 2016. The Parent argues that the proposed ESY program was inappropriate, and demands compensatory education as a remedy.

There is no dispute about what ESY services were offered. The Parent presented no evidence to establish the type or quantity of offered ESY services is inappropriate. Rather, the Parent asserts that the offered ESY services are inappropriate because they will be delivered by the same teacher who yelled at the Student at the end of the 2015-16 school year. As I found above, however, the Parent did not prove that the incident occurred. I do not doubt the sincerity of the Parent's belief, but the only factor detracting from the appropriateness of the offered ESY services was not proven by preponderant evidence.

It is not clear that the negative interaction between the teacher and Student would have rendered the ESY program inappropriate even if the allegation was substantiated. I need not resolve that conundrum to resolve this issue. The Parent alleged that the ESY offer was inappropriate because of a particular factual circumstance, and then did not prove the existence of that factual circumstance. Consequently, the Parent has not proven that the offered ESY services for the summer of 2016 were inappropriate. I will not award compensatory education for this period of time.

Transportation

The Parent makes specific demands concerning transportation. The Parent demands transportation with a bus video camera and an aide (either assigned to the bus or to the Student). During the hearing and in the written closing statement, the Parent also demands to have the transportation provided by an outside agency, and a desire for the Student to travel with peers who have similar needs (described by the parent as "like peers").

The Parent is concerned about the Student's safety. The Parent is aware that another student was dropped off in the wrong location, and fears that the same thing will happen to the Student. This is a particular concern for the Parent because [an individual known to Student] is a registered sex offender (according to the Parent's testimony), and so the consequences of

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[14] The Parent demands placement in a parochial school, located in a different school district. This demand appears for the first time in the Parent's written closing statement. Prior to the written closing statement, the demand was only for an unspecified out-of-district placement.

dropping the Student off at the wrong location are dire. NT at 67-68. These factors are important. However, not every safety issue is related to a student's special education needs. No evidence was presented to establish that the Student is more likely to get off at the wrong bus stop as a result of the Student's disability. No evidence was presented to establish that a bus driver, acting alone, cannot prevent the Student from getting off at the wrong bus stop. Most importantly, no evidence was presented to establish how any of the requested accommodations would prevent the Student from getting off at the wrong bus stop. The legitimacy of the Parent's fears notwithstanding, no evidence links those fears to the Student's educational needs or rights under the IDEA.

The analysis is less straightforward when it comes to the Parent's concerns about bullying on the bus, and the bus driver's ability to manage the Student's behaviors without an aide. The Parent drove the Student to school for the entirety of the 2015-16 school year, and so there is no evidence of the Student's behaviors on the bus during that year. The Student spent almost the entirety of the 2014-15 school year in the RTF. Consequently, there is no current evidence to establish the Student's need for a bus aide. At the same time, the IDEA does not require the Student to receive inappropriate services only to prove that those services are inappropriate. Said differently, the IDEA does not force a student to fail in an inappropriate placement only to obtain evidence that the placement is inappropriate. Therefore, I must extrapolate from the evidence concerning the Student's current behavioral needs to determine whether a bus aide (or video camera) is necessary.

As found above, the District presented preponderant evidence to establish that the Student had made significant strides. This is especially so in regard to the Student's behaviors in school during the 2015-16 school year. The Parent presented no evidence and made no argument to the contrary. In fact, the Parent's testimony (generally) suggests agreement with the District's reporting and characterization of the Student's progress. Similarly, the Parent did not present preponderant evidence to establish that the Student is a victim of bullying. Consequently, the Parent has not established that a bus aide is necessary for the provision of FAPE.[15] The Parent has not established the necessity of a bus camera or third party transportation for the same reason. Consequently, I will not order the District to provide the transportation accommodations that the Parent demands.

Out-of-District Placement

The Parent has not proven that the Student requires an out-of-District placement in order to receive FAPE. As discussed above, the District presented evidence that the Student is making meaningful progress. The Parent presented no evidence to the contrary. Moreover, the Parent agreed with the District's progress reports and the District's characterization of that progress (or, in some cases, could not disagree with that characterization).

As described above, it is the Parent's burden to prove that the Student cannot receive FAPE in the District. The evidence presented in this hearing establishes that the Student is receiving

[15] It is more likely than not that the IDEA does not give the Parent the right to transportation from a third party regardless of the facts. I need not reach that conclusion here. It is also important to note that I find only that a bus aide is not necessary for the provision of FAPE under the facts proven in this hearing. It is entirely possible that providing a bus aide is a good idea, regardless of the District's legal obligations.

FAPE in the District. Consequently, I will not order the District to place the Student in an out-of-District school.

Compensatory Education Fund

At every stage of this hearing, from complaint through written closing statements, the Parent has demanded a monetary compensatory education fund. The Parent continued to press this demand even after I issued the Pre-Hearing Order, explaining that I do not have authority to award money damages. Moreover, compensatory education is a remedy – not an issue unto itself. As stated above, three issues were presented for adjudication. The only issue that compensatory education could remediate is the District's alleged failure to provide appropriate ESY services in the summer of 2016. The Parent demands specific performance (particular transportation accommodations, and an out-of-district placement) to remedy the other two issues. It is unnecessary, therefore, for me to determine whether the Student is owed compensatory education for any other period of time.

Despite the foregoing, I recognize that the Parent is *pro se*, and has had difficulty clearly articulating the issues presented. This difficulty was the catalyst for the District's motions to limit the scope of this hearing, and the impetus for both my guidance in the Pre-Hearing Order and my clarification of the issues at the outset of the evidentiary hearing. Even so, in recognition of the Parent's difficulty, and in an abundance of caution, I will consider the evidence for the entire period of time from May 17, 2014 through the conclusion of the hearing to determine whether that evidence establishes a denial of FAPE.

Said simply, the Parent presented no preponderant evidence to establish a denial of FAPE from May 17, 2014 through the present.

The 2013-14 school year was the Student's 5th grade year. The Student was placed in a partial hospitalization program in April 2014. The record does not clearly establish when the Student returned to school after the partial hospitalization ended. Regardless, I will assume that the Student spent some time in school between May 17, 2014 and the end of the 2014-15 school year. The Parent argues that the Student's placement during this time was inappropriate because the Student attended the "intensive learning support" program instead of a Life Skills program. Recommendations from third parties around this time suggested a need for Life Skills program. *See, e.g.* P-8. This does not render the District's placement inappropriate. The name of a placement is not always a good indicator of what happens in school. In this case, the District presented evidence that its "intensive learning support" program is designed to accommodate students who have the same needs as students who are typically placed in a Life Skills program, but are capable of comparatively higher level academic work. *See, e.g.* NT 222-223. As found above, the IEP team considered both Life Skills and "intensive learning support," and then chose the latter. No evidence was presented to establish that choice was inappropriate when it was made, and no evidence was presented to establish that "intensive learning support" was substantively inappropriate in any way.

The 2014-15 school year was the Student's 6th grade year. The Student spent the majority of that school year in the RTF. When the Student left the RTF in late April 2015, the IEP team crafted a program to transition the Student back to school. That program was so successful, the District proposed accelerating the Student's transition. The Parent rejected that proposal and requested a due process hearing. That hearing ended without a decision. No evidence was presented in this hearing other than evidence of the Student's progress, prompting the District to propose an accelerated transition. The Parent has not proved by preponderant evidence that

FAPE was denied from the Student's return to school from the RTF through the end of the 2014-15 school year.

In the summer of 2015, after some debate, the Parent accepted the District's ESY offer. While attending the ESY program, the Student wrote negative, self-directed remarks on a math worksheet. Those remarks were first seen by the Student's TSS worker. Rather than report those remarks to the teacher, the TSS worker photographed the paper with her phone and sent the picture to the Parent. Rather than contacting the teacher, or anybody else in the District, the Parent removed the Student from the ESY program. The Parent's swift response on the day of the incident is laudable. The Parent's refusal to work with the District to address the problem and return the Student to the ESY program, under the facts of this case, is inexplicable. No evidence suggests that the Student was in any actual danger in the ESY program. All evidence suggests that the teacher and the District would have responded appropriately if the TSS worker had brought the Student's writing to the teacher's attention. Moreover, there is no evidence that the ESY program was substantively inappropriate when it was offered and accepted, or that its substantive content should have been adjusted after the incident.

The 2015-16 school year was the Student's 7th grade year. Unlike the prior two school years, the Student spent the 2015-16 school year attending the District's schools. While the relationship between the Parent and the District had clearly soured, the evidence establishes that the Student received FAPE. As discussed above, the Parent presented no evidence concerning the Student's academic, social, or behavioral progress. The District did present such evidence. Then, the Parent agreed with the District's evidence. As such, the Parent did not prove a denial of FAPE. I cannot award compensatory education because the Parent did not prove a denial of FAPE.

ORDER

Now, August 23, 2016, it is hereby **ORDERED** that all of the Parent's claims and demands are **DENIED** and **DISMISSED.**

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER