

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:

E. Y.

Date of Birth:

[redacted]

ODR File 18799 16 17

CLOSED HEARING

Dates of Hearing:

5/4/17, 7/6/17, 7/7/17, 8/7/17

Parent(s):

[redacted]

Mark W. Voigt, Esquire, Law Office of Mark W. Voigt, Esquire, Plymouth
Meeting Executive Campus, 600 West Germantown Pike, Suite 400,
Plymouth Meeting, PA 19462
Counsel for Parents

School District:

Southern York County School District, 3280 Fissels Church Road, P. O. Box 128,
Glen Rock, PA 17327-0128

Karl A. Romberger, Jr., Esquire, Sweet, Stevens, Katz, Williams, 331 East
Butler Avenue,
New Britain, PA 18901
Counsel for School District

Date of Decision:

9/7/17

Hearing Officer:

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

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)¹ is a resident of the District named in this matter (District), and is enrolled currently in a private school (School). The District has classified Student under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disabilities of Other Health Impairment and Speech or Language Impairment. (NT 13-14.)

Parents assert that the District failed to offer Student a free appropriate public education (FAPE) pursuant to the IDEA; section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504); and the respective implementing regulations. Parents withdrew Student from the District unilaterally on February 17, 2017, and placed Student in the School.

Parents request an order that the District provide three remedies. They ask for compensatory education for the period during which they allege a failure to provide a FAPE, encompassing part of Student's first-grade (2014-2015) school year, starting February 21, 2015; all of Student's second grade (2015-2016) school year; and part of Student's third grade (2016-2017) school year, until they withdrew Student from the District on February 17, 2017². They request that the District reimburse Parents for the tuition and costs of Student's private school placement for about half of the last school year and the coming school year. They also seek reimbursement of the cost of a private educational evaluation that they obtained, as well as the

¹ Student, Parents and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality. References to Parent in the singular refer to Student's Mother, who engaged in most of the interactions with the District discussed herein.

² Parents explicitly limit the time for which they assert a claim for the denial of a FAPE to the two year period prior to the filing of their complaint under the IDEA. (NT 18-19.)

private evaluator's fees for appearance in these proceedings.³ The District asserts that it has offered and provided a FAPE at all relevant times, and it seeks dismissal of all claims.

The hearing was completed in four sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District has offered and provided a FAPE to Student at all relevant times, and I therefore dismiss Parents' claims.

ISSUES

1. Did the District offer and provide a FAPE to Student during the relevant period from February 21, 2015 to February 17, 2017, in compliance with the IDEA and section 504?
2. Should the hearing officer order the District to provide Student with compensatory education on account of all or any part of the relevant period?
3. Should the hearing officer order the District to provide Student with compensatory education on account of its refusal to provide Student with ESY services during the summers of 2015 and 2016?
4. Is the School an appropriate placement for Student?
5. Considering the equities, should the hearing officer order the District to reimburse Parents for tuition and fees that they incurred for Student's attendance at the School from February 21, 2017 to the end of Student's third grade school year, for Student's fourth grade (2017-2018) school year, and for summer programs at the School in the summers of 2015 and 2016?
6. Should the hearing officer order the District to reimburse Parents for the fees of a private evaluator, including fees for the evaluation and for appearing to testify in the present matter?

FINDINGS OF FACT

1. Student is elementary school age and a resident of the District. Student attended a District elementary school from kindergarten through part of third grade, withdrawing from the

³ I have no jurisdiction to order reimbursement of fees for appearance in these proceedings. 34 C.F.R. §513(a)(1).

District on February 17, 2017, in Student's third grade year, and enrolling in the School on February 21, 2017. (NT 13-14, 35-36.)

2. Student has average range cognitive ability and a history of diagnoses of pervasive developmental disorder, autism spectrum disorder and anxiety disorder. (NT 46-48; P 1, 2, 3, 4, 6.)
3. In school settings, Student has displayed deficits in communication, social interaction, safety awareness, self-regulation, transitioning and adaptive play behavior. Student had twelve disciplinary referrals in kindergarten for aggressive behavior toward peers. (NT 46-48; P CC, 1, 2, 3, 6.)

EVALUATIONS PRIOR TO THE RELEVANT PERIOD

4. In March 2014, Parents obtained a private evaluation that endorsed the diagnosis of autism spectrum disorder and recommended supports in school, including one-to-one supports in unstructured parts of the school day; a safe place to decompress as needed during the school day; avoidance of school bus transportation; and speech/language and occupational therapy evaluations. Parents shared this report with Student's school personnel. (NT 53-54; P 3, 6.)
5. On March 26, 2014, the District sent a Permission to Evaluate form seeking parental consent for an initial evaluation of Student for special education, and Parents returned the form with their consent on April 1, 2014. (S 1C.)
6. In March 2014, the District performed a Functional Behavioral Assessment (FBA), dated March 31, 2014, that found Student's aggressive behavior to be a function of receiving attention from peers and adults. (P 2.)
7. In May 2014, Parents provided parental input to the District's evaluation for special education, reporting Student's diagnoses and asking specifically for one-to-one services, speech and occupational therapy, social skills support, and a behavior intervention plan, through either a section 504 service agreement or an Individualized Education Program (IEP). (P 4.)
8. In May 2014, Parents obtained an occupational therapy evaluation through area behavioral services that found sensory defensiveness and sensory seeking, as well as deficits in activities of daily living. It recommended sensory diet and interventions with functional skills such as buttoning, snapping and zippering. (P 5.)
9. Beginning in the spring of 2014, Student received private occupational therapy sessions that addressed Student's upper extremity and core strength; sensory needs; and visual-perceptual skills while writing sentences. (P 5.)
10. The District issued an evaluation report on May 31, 2014, finding Student eligible for special education under the IDEA category of Other Health Impairment. (P 6.)
11. Student's kindergarten teacher reported that Student was very capable of grade level work in reading, mathematics and writing, but was very distractible in school, and rushed

through assignments. Student's reading comprehension was a relative weakness and Student wrote assignments that were not responsive to the prompt, reducing Student's overall writing to a below-grade level, despite grade-level performance in writing conventions. Student also exhibited inappropriate attention-seeking behaviors, including hugging adults at inappropriate times, spitting, and touching, pinching, pushing and pulling peers and adults. (P 6; S 7.)

12. Student performed at grade level in kindergarten for reading, mathematics and writing, except for phonological segmentation. (P 6.)
13. Student's kindergarten teacher reported about 45 accommodations and modifications used in the classroom for Student, including interventions addressing attention to task, social interactions, behavior, sensory needs and emotional self-regulation, and anxiety. (P 6.)
14. The District school psychologist obtained extensive input from Parents and teachers, through both informal questionnaires and formal behavior inventories. The evaluator conducted standardized cognitive and achievement tests, as well as a series of behavior inventories aimed at differential diagnosis of Student's prominent behavioral problems in school. The psychologist administered seven different inventories to respondents including Parents, kindergarten teacher and library teacher, and Student. (P 6.)
15. Standardized achievement tests demonstrated that Student's reading, writing and mathematics performance were all in the average to superior ranges. (P 6.)
16. The District school psychologist concluded that the data did not support classification with Autism, and that the data supported classification with Other Health Impairment due to Student's difficulties with anxiety, impulsivity and inattention, especially as related to social interactions with peers and adults. (P 6.)
17. The evaluation report included an occupational therapy evaluation. This evaluation found no needs with regard to gross and fine motor skills, but qualified Student for occupational therapy to address Student's sensory regulation needs. (P 6.)
18. The evaluation report included a speech/language evaluation. This evaluation found that Student exhibited average to superior abilities in receptive and expressive language; age appropriate for pragmatic language; and normal speech and articulation skills. It recommended no need for special education for speech or language. (P 6.)
19. The evaluation report included a functional behavioral assessment, which concluded that Student's inappropriate and aggressive behaviors were supported by the function of attention from peers and adults; it recommended a positive behavior support program. (P 6.)
20. The May 2014 evaluation report recommended interventions including: strategic monitoring of reading comprehension and writing focus; study skills, independent work habits and attention/focus; peer relationships and impulsivity in social interactions; modulating emotional response to anxiety producing situations; and sensory processing and self-regulation. (P 6.)

IEP AND REVISION OFFERED FOR FIRST GRADE AND PARENTAL PARTICIPATION

21. In June 2014, the District offered a draft IEP, placing Student in itinerant learning support, with explicit instruction in social skills (60 minutes per cycle) and anxiety reducing techniques. The IEP provided four measurable goals, addressing self-regulation, maintaining personal space, learning pro-social behaviors, and obtaining peer attention through positive peer interactions. The IEP provided monitoring of academic performance; fading of rewards for appropriate behavior; supports for writing on topic and for completing assignments independently; a sensory diet; and many of the recommended antecedent interventions recommended in the FBA. The IEP offered accommodations to address inattentiveness, including preferential seating, multisensory instruction, rewards for task completion and a visual daily schedule. The IEP also offered 30 minutes of direct occupational therapy services monthly. (S 7.)
22. The June 2014 offered IEP did not find Student eligible for Extended School Year (ESY) services. (S 7.)
23. The June 2014 offered IEP included a positive behavior support plan, which included explicit teaching of social skills to include maintaining personal space, appropriate touching, and a variety of self-calming techniques. The plan included a variety of sensory objects and activities, as well as classroom modifications and accommodations. (P 8, 9.)
24. On June 4, 2014, the District issued a NOREP to Parents that stated that special education services would not be commenced unless Parent signed the NOREP indicating consent to provide services. (P 10.)
25. On June 13, 2014, the District proposed a psychiatric evaluation of Student, in order to obtain a differentiated diagnosis of the cause of Student's social and behavioral difficulties in school, and requested Parents' consent. (P 11.)
26. On June 16, 2014, the IEP team met with Parents present and updated the proposed IEP to revise the goals by removing the self-regulation goal; adding modifications to train staff to address peer misinterpretations of Student social overtures; and adding 30 minutes of social skills instruction per cycle in the general education setting. (S 13, 17A.)
27. On June 22, 2014, Parents refused the proposed IEP and requested an informal meeting, asserting that the proposed IEP did not offer a FAPE. At the same time, Parents refused the proposed psychiatric examination and requested an informal meeting. (P 11, 12.)
28. On July 8, 2014, the District invited Parents to an IEP team meeting to discuss the proposed IEP, sending the revised draft IEP by separate email message. (S 14A, 14B.)
29. On July 14, 2014, the District sent a Notice of Recommended Educational Placement/Prior Written Notice (NOREP) reflecting its recommendation for a psychiatric evaluation. (P 15.)

30. On July 15, 2014, the District convened a meeting with Parents and discussed their concerns with the proposed IEP and placement. It provided a NOREP proposing to begin providing Student with special education services in itinerant learning support. The NOREP form indicated that services would not begin unless Parents authorized it by signing the NOREP. (P 16; S 17A.)
31. Parents did not consent to initiate special education services in response to the July 2014 NOREP proposing such services. (P 15, 16.)
32. Parents disagreed with the Evaluation Report because it did not classify Student with Autism, and because Parents believed that the school psychologist inappropriately had given reduced weight to the Parents' input that had indicated clinically significant behavioral problems in numerous areas of functioning. (S 16.)
33. On August 19, 2014, the District convened a meeting with Parents to further discuss their concerns. (S 17A.)
34. On September 3, 2014, Parents obtained the report of a psychological evaluation provided through the behavioral services program that was providing Student with home services. The report endorsed a diagnosis of Autism Spectrum Disorder. The report included standardized cognitive and achievement scores that were discrepant with the scores reported in the District's Evaluation Report; specifically, the behavioral services report noted low average verbal comprehension. Parents conveyed this report to the District. (NT 66-67; P 17.)
35. On September 9, 2014, District personnel reached Parents by telephone and discussed their concerns further, offering to convene additional meetings. (S 17A.)
36. On October 3, 2014, the District's Director of Special Education sent a letter to Parents reiterating the District's request for consent to initiate special education services and reminding Parents that services could not begin without parental consent. (S 17A.)
37. On October 7, 2014, Parents declined to sign the NOREPs for initiation of special education and for psychiatric evaluation and asked for an informal meeting. (P 15.)
38. On November 11, 2014, the District convened an IEP team meeting including Parents. The team discussed the September 3, 2014 private psychological evaluation and the discrepancies among standardized cognitive, achievement and social behavioral measures. It did not conclude that Student should be classified with autism. It discussed how discipline and manifestation determinations would be conducted, as Parents were concerned with this. (S 19A, 19B, 20.)
39. At the November 11, 2014 meeting, the IEP team revised the proposed IEP, redrafting a goal related to self-regulation of anxiety, and adding a newly formulated measurable goal for respecting personal space. It added a modification requiring a daily communication log between home and school. (S 19A, 19B.)
40. At the November 11, 2014 meeting, the District again submitted a permission to evaluate form to Parents, proposing to obtain a psychiatric evaluation of Student. On November 18,

2014, Parents again declined to consent to the proposed evaluation and sought an informal meeting. (S 19C.)

41. Subsequent to the November 11, 2014 IEP team meeting, Parents provided the District with a sixteen page rebuttal to the statements of various team members made during the November 11, 2014 meeting. Parents expressed a concern that they were not equal members of the IEP team because other team members did not seem to consider Parents' arguments in favor of the autism diagnosis or their disagreements with statements made by other team members, including the school psychologist responsible for the Evaluation Report. (P 21.)
42. Parents struggled to conceptualize Student's first grade special education program, and disagreed with the District's refusal to classify Student with Autism; for these reasons, Parents hesitated to consent to the services being proposed. (NT 337-338; P 23 p. 3, 24 p. 5; S 22E.)
43. On February 3, 2015, the District convened an IEP team meeting to discuss Parents' concerns and revise the proposed IEP. At the meeting, the District Director of Special Education advised Parents that special education services could commence upon receipt of a signed NOREP providing parental consent to the initiation of services, even if the IEP were not finalized. (S 22F.)
44. The February 3, 2015 IEP revision indicated that Student's behaviors no longer impeded learning; this was based upon teacher reports that Student's previously reported aggressive and attention-seeking behaviors were no longer being seen in the school setting. The team removed the personal space goal and the Positive Behavior Support Plan from the proposed IEP. (S 22E, 22F.)
45. The IEP team agreed to make revisions to the most recent FBA to reflect Parents' concerns that Student's behaviors in kindergarten may have been misinterpreted due to peer and staff lack of understanding of Student's autism and Student's consequent social initiation and other social skills deficits. (S 22F.)
46. The team agreed to withdraw its recommendation for a psychiatric evaluation to differentiate Student's diagnosis. Instead, it agreed that there would be no more testing at that time; a re-evaluation would consist of records review, classroom observations and the use of a behavior checklist. The District presented a Permission to Evaluate form to Parents on February 13, 2015, reflecting this decision. (S 22D.)
47. On February 13, 2015, the District conveyed to Parents a NOREP reflecting its proposal to initiate special education services upon receipt of parental consent; the NOREP stated that no services would be initiated until Parents should sign the NOREP indicating their consent. (S 22G.)
48. On February 13, 2015, Parents sent a message to the District's Director of Special Education. The message suggested that Parents would consent to the initial provision of special education services although the IEP had not yet been finalized. It also suggested revised language for the parental input section of the proposed IEP and suggested that further consideration of re-evaluating Student be delayed. (S 22E.)

49. Also on February 13, 2015, the Director of Special Education advised Parents to wait on signing the NOREP for initial services until the IEP was finalized. Parent followed this advice because Parent believed that the parties were close to signing the IEP. (NT 76-78; P 69.)
50. During the first half of first grade and into February 2015, Student continued to have behavioral incidents involving interventions by school personnel for behavior perceived as aggressive or inappropriate touching of others. Parents also became aware of incidents in which other children behaved aggressively toward Student, which Parents interpreted as examples of Student's vulnerability to bullying. (NT 74-75, 94-96, 108-111, 566-600; P 20, 25 pp 10-11, 29.)
51. Student's vice principal and principal investigated alleged incidents of bullying and intervened to resolve the situations revealed in those investigations. (NT 566-571, 588-600.)

STUDENT'S PROGRESS IN FIRST GRADE

52. On February 27, 2015, Parent obtained a psychiatric evaluation for Student through a behavioral services agency. Parent reported that Student was doing well in school, both academically and behaviorally. Parent also reported that Student had improved social skills and that Student's anxiety was well controlled without medication. (P 23.)
53. Student made progress in first grade, including the second half of first grade. Student's experience was positive and better than Student's kindergarten experience. Student graduated to second grade. Student met all grade level expectations for: reading (except demonstrating comprehension); writing (except sequencing of information and legibility); mathematics (except sequencing and identifying fractional parts of regions); work habits (except completing work neatly); social skills; listening; speaking; science, social studies and health. (NT 280-281; P 25.)
54. By the end of first grade, Student demonstrated needs for occupational therapy intervention for sensory processing, sensory motor, and visual motor skills. These needs were affecting Student's coordination, strength, posture, written legibility, and ability to tie shoes and fasten and unfasten buttons. Student continued to have difficulty managing social boundaries and self-regulating response to outside stressors. The occupational therapist reported that Student needed extra time for classroom performance. (P 25.)

IEP AND REVISION OFFERED FOR SECOND GRADE AND PARENTAL PARTICIPATION

55. In May 2015, Parents provided to the District a 27 page summary of Student's school experience since kindergarten, many meetings and communications between Parents and school staff and administration, and a detailed description of the disagreements that had arisen among Parents, other members of the IEP team and District personnel. Parents

described a substantial number of incidents of altercations with peers, in which they indicated that Student had been mistreated, either by peers or staff. (P 24.)

56. Parents' May 15 summary reviewed the proposed goals and presented numerous questions about how those goals would be administered. Parents disagreed with the quantity of related services being offered. Parents disagreed with the modifications and specially designed instruction set forth in the proposed IEP as inadequate to address Student's "myriad" needs. (P 24.)
57. Parents' May 15 summary requested that they receive training on assessment instruments and techniques so that Parents could better understand assessment as participants in the IEP team. Parents asked for training of peers especially in the playground environment. Parents asked that the IEP include safeguards against disciplining Student for manifestations of Student's autism. Parents requested consideration of physical therapy for gross motor needs, services to address Student's functional skills, and ESY services. (P 24.)
58. Parents' May 15 summary suggested that the issues they raised needed to be resolved before they could agree to an educational program for Student moving forward. (P 24.)
59. The District convened an IEP team meeting on May 21, 2015. The Director made suggestions that Parents found acceptable, about preparing for the coming school year, including training of Parents and staff. (NT 82-84, 344-345; S 23A p. 4, 24B.)
60. The District did not send an amended IEP to Parents between May and August 2015, as Parents had expected; however, the May 21, 2015 meeting did not result in a change to the IEP itself, despite the positive discussion of Student's program and staff training that Parents anticipated would be added to the IEP. Parents on August 19, 2015, asked the District to include in a proposed IEP a twenty page statement of parental concerns. (NT 419-420; P 47 p. 3, 69 p. 8.)
61. On August 19, 2015, The District's Director of Special Education sent a message to Parents, reiterating the District's readiness to implement the District's proposed IEP upon receipt of parental consent, and that it could not implement initial special education services without Parents' signature on the NOREP offering the proposed services, signifying parental consent to the initiation of special education services. (S 24B.)
62. On September 1, 2015, the District convened an IEP team meeting to continue developing the Student's IEP. At this meeting, the Director proposed editing the IEP to remove unnecessary detail on past evaluations that had been copied from the past evaluation reports. (S 24C, 24D.)
63. In September 2015, the IEP team met and revised the IEP to incorporate the editing revisions proposed by the Director, add an extensive summary of Parents' May 15 summary comments, and update Student's academic and occupational therapy status. (P 25.)
64. The September 2015 proposed IEP added measurable occupational therapy goals addressing writing legibility. (P 25.)

65. On October 4, 2015, Parents signed a NOREP, consenting to the initial provision of special education services. (P 26; S 25A.)
66. From October 2015 and during the school year, Parent had monthly meetings with school staff to discuss Student's program. (NT 294, 439-446.)
67. Student's second grade principal directed some restriction of direct communications between Parents and staff, and for a brief period of time, most communications went through the principal or were copied or referred to the principal. This policy did not continue through Student's second grade year, nor did it restrict Parents from communicating as part of the Student's IEP team. (NT 94-96, 406-409, 507-511, 572-3, 580-587, 641-645, 680-684, 686, 791-793.)

STUDENT'S PROGRESS IN SECOND GRADE

68. In second grade, Student made progress on Student's IEP goal for identifying feelings and pro-social strategies to address anxiety-producing events at school. (P 28.)
69. In second grade, Student made progress on Student's IEP goal for maintaining personal space. (P 28.)
70. In second grade, Student made progress on Student's IEP goal for demonstrating pro-social behaviors. (P 28.)
71. In second grade, Student made progress on Student's IEP occupational therapy goal for writing legibility, in the area of line awareness, but made negligible progress in letter formation and size, and letter spacing. (P 28.)
72. In second grade, Student made progress in social skills, but continued to need intervention in this area. (P 29.)
73. In second grade, Student made academic progress in reading. Student started third grade on grade level and at or above the District third grade benchmark for reading fluency and accuracy, and approximately at benchmark for reading comprehension, with below benchmark scores for answering comprehension questions in writing. Student's grades were "A"s and showed improvement in independent reading and fluency. (NT 512-514; P 34, 74.)
74. In second grade, Student made some academic progress in writing, scoring below benchmark for second grade materials in all areas of the writing rubric, with one exception in the third marking period, where Student scored at benchmark in one such area, conventions. Student's grades were "A"s and "B"s, and showed improvement in content, organization and legibility. (P 34, 74.)
75. In second grade, Student made academic progress in mathematics, scoring at benchmark in some skills, but below benchmark in a substantial number of mathematics skills. Student's grades showed improvement in some aspects of numbers and operations, measurement and geometry. (P 34, 74.)

STUDENT'S SUMMER PROGRAMS, 2015 AND 2016

76. Parents placed Student in a summer program in the summers of 2015 and 2016 that was provided for free through a local health agency. (NT 288.)

IEP AND REVISION OFFERED FOR THIRD GRADE AND PARENTAL PARTICIPATION

77. On August 16, 2016, Parents received the report of a private evaluation that they had obtained at their own expense. The evaluation was based upon testing conducted on August 4, 2016. (P 30.)
78. The private evaluation recommended classification with Autism, Other Health Impairment, Specific Learning Disability and Speech or Language Impairment. It recommended interventions including working memory training; wait time and word finding training; specialized instruction to address receptive and expressive language; specially designed social skills instruction; and classroom accommodations and modifications. The report also recommended that Parents enroll Student in a private school for children with learning disabilities, such as the School. (P 30.)
79. Parents and District personnel met on September 16, 2016 to discuss Student's program. Student was viewed as having a good start to third grade, with good behavior and a developing friendship. District personnel indicated an intent to address Student's academic needs. (P 32.)
80. Parents and District personnel met again on September 27, 2016, and discussed a draft IEP that had been provided in September 2016; Student's academic levels; and the assessment instruments used to determine those levels. (P 33.)
81. The September 2016 proposed IEP offered updated present levels. It offered five measurable goals addressing maintenance of personal space; pro-social behavioral responses; fine- and visual- motor skills related to writing legibility; mathematics computation; and reading comprehension. It offered specially designed instruction and accommodations in addition to those provided in previous IEPs, including small group or one-to-one instruction for reading comprehension, mathematics concepts and facts, and social skills; testing accommodations; multisensory learning; wait time in class; and chunking of directions. It offered increased training for staff. (P 34.)
82. The September 2016 proposed IEP retained Student's placement in itinerant learning support, but provided for higher tiered levels of support for English Language Arts and mathematics, a more supported general education setting. (P 34.)
83. District personnel discussed the proposed IEP further with Parents at an October 2016 IEP team meeting at which Parents expressed a desire for changes to the proposed IEP. (NT 124; P 38, 42.)

84. After the October 2016 meeting discussion of the proposed IEP, Parents provided to District an eight page chart containing 38 itemized needs of Student and recommended ways of addressing those needs. (P 36; S 36.)
85. At the same time, Parents forwarded an edited version of their May 2015 summary of concerns that had been conveyed to the District in the form of a statement for inclusion in a previous iteration of Student's IEP. (P 37.)
86. On October 27, 2016, the District forwarded a NOREP to Parents for continuation of special education placement and services. In response, Parents requested an informal meeting on November 4, 2016. (P 39.)
87. On November 8, 2016, Parent sought permission for Student to be absent from school for three days in November and December 2016, for the purpose of attending the School as a possibly more appropriate educational environment that would better address Student's needs. (P 41.)
88. On November 29, 2016, Parents' counsel conveyed the August 2016 private evaluation report to counsel for the District. (S 39B.)
89. On January 4, 2017, the District convened a continued IEP team meeting at which further revisions were made to the proposed IEP. (P 42.)
90. The IEP team reviewed the August 2016 private evaluation at its meeting on January 4, 2017. The team added many of the report's recommendations to the proposed IEP. It added a measurable goal to the IEP to monitor Student's progress in written responses to reading comprehension questions. It added the classification of Speech or Language Impairment and a measurable speech goal, with related services of speech/language therapy. It added the classifications of Specific Learning Disability and Autism to Student's IEP. It found Student eligible for ESY services to address Student's working memory. (P 30, 42.)
91. The IEP team decided to add an occupational therapy accommodation to the IEP for legible writing and to add thirty minutes per month of occupational therapy to help Student generalize handwriting skills in the classroom. (P 30, 42.)

STUDENT'S PROGRESS IN THIRD GRADE

92. In the first two marking periods of third grade, Student made grade-level progress in all academic areas. Student demonstrated progress on all IEP goals, although progress was slight in the occupational therapy goal and Student regressed slightly during the second marking period in some components of Student's IEP goals. (P 74; S 44D, 44E, 44F, 44G.)
93. In the first two marking periods of third grade, Student continued to have difficulty demonstrating consistent social behavior, leading to an incident in PT class in which a teacher physically intervened in Student's unwanted hugging of a peer. (NT 183-185, 588-600; S 41B.)

PARENT'S UNILATERAL PLACEMENT OF STUDENT AT THE PRIVATE SCHOOL

94. On February 3, 2017, Parents announced their rejection of the offered IEP and their intention to withdraw Student from the District after ten business days. (P 44.)
95. Parents signed an enrollment contract with the School on February 17, 2017. (P 55.)

FINDINGS RELATED TO RELIABILITY AND WEIGHT ACCORDED TO TESTIMONY

96. Parent sincerely believed that Student was not being educated or protected appropriately; however, Parent received much of her information from reports by Student, other parents, the assigned one-to-one aide (TSS) and teachers. Parent did not always interpret such reports accurately. (NT 268-269, 287, 331-334, 382, 499-500, 501-503, 507; P 24 pp. 1, 6, 20-23.)
97. Parent's perceptions and conclusions about Student's needs and progress in school were substantially more protective and negative than reports of others who knew Student's behaviors, strengths and weaknesses. (P 6, 17, 30.)
98. Parent's assertions about Student's progress were sometimes contradictory. (P 21, 23.)
99. The Parents' private evaluator offered a number of opinions about services provided by the District without any attempt to verify the facts upon which those opinions were based. (NT 160-168.)

CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.⁴ In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief

⁴ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁵ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claim, or if the evidence is in “equipoise”, the Parents cannot prevail under the IDEA.

CREDIBILITY/RELIABILITY

It is the responsibility of the hearing officer to determine the credibility and reliability of witnesses’ testimony. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I reach the following determinations.

⁵A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

Considering the testimony in light of the documentary evidence, I find all of the District witnesses to be credible and reliable. All of these witnesses' statements were substantially in accord with the documentary record. I found the demeanor of these witnesses to be consistent with truth, and their manner of answering questions to be suggestive of an effort to be truthful and accurate.

I accord reduced weight to Parent's testimony, although I found her to be a devoted, responsible and an entirely sincere and credible witness. Parent evinced a thoughtful and intelligent effort to understand both the psychology of Student's complex needs, and the specialized techniques of special education and general education teaching that were needed to address those needs. As Student's mother, Parent demonstrated an edifying degree of protectiveness and skepticism when attempting to participate as a member of Student's IEP team. Unfortunately, the record shows preponderantly that the Parent's skepticism devolved into a profound lack of trust in District educators, and a failure to perceive and give appropriate weight to the expertise of those educators⁶.

The record is preponderant that Parent's lack of trust – and the limits on knowledge and day to day factual information that are inherent in the demanding dual role of a working parent-- led to misperceptions that permeated Parent's working relationship with District educators. I find that Parent's information was necessarily based in large part on hearsay, and that Parent frequently misperceived or misinterpreted what was said to Parent. Parent was often unclear or confused about what services were being proposed, leading to voluminous requests for detailed information

⁶ The record also shows preponderantly that this lack of trust was due in large part to events in Student's kindergarten year, not within the scope of this decision, that again cause me to credit Parent's judgment that skepticism was in order to a reasonable degree. Unfortunately, though understandably, Parent's skepticism burgeoned to an unreasonable extent during the times relevant to this decision.

about how proposed IEPs would be implemented. Therefore, I accord reduced weight to Parent's testimony in this matter.

I also accord reduced weight to the opinions of Parents' private evaluator who testified in this matter. This highly qualified and experienced clinician offered opinions about the District's programming for Student that were not grounded in a reasonable effort to ascertain the underlying facts upon which those opinions were based.

THE DISTRICT DID NOT FAIL TO OFFER OR PROVIDE A FAPE DURING THE RELEVANT PERIOD OF TIME

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE is "special education and related services", at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be "reasonably calculated" to enable the child to receive appropriate services in light of the child's individual circumstances. Andrew F. v. Douglas County Sch. Dist., RE-1, ___ U.S. ___, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017). The Court of Appeals for the Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d

Cir. 2009). In appropriate circumstances, a District that meets this Third Circuit standard also can satisfy the Endrew F. “appropriate in light of the child’s individual circumstances” standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

In order to provide a FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S. Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Endrew F., 137 S. Ct. above at 999 (requiring what is reasonable, not what is ideal); Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid.

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Endrew F., 137 S. Ct. above at 999; Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) The program’s appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Applying these standards to the above findings and the record as a whole, I conclude that the District offered and provided a FAPE to Student during the relevant period. I conclude that the

offered program was reasonably calculated to provide educational benefit that was meaningful and appropriate in light of Student's circumstances. I reach this conclusion for four reasons. First, the District offered services based upon an appropriate understanding of Student's educational needs. Second, it offered services that addressed all of those needs appropriately in light of Student's circumstances. Third, District educators implemented the IEP appropriately in view of Student's circumstances and needs. Fourth, retrospectively, the record shows that Student made appropriate progress during the relevant period of time.

THE PROGRAM WAS BASED UPON APPROPRIATE UNDERSTANDING OF STUDENT'S NEEDS

By February 21, 2015, the evidence shows preponderantly that the District was proceeding on the basis of an appropriate understanding of Student's needs, based upon the information available to it. The District had conducted a comprehensive and thorough initial evaluation, which included a searching effort to address the autism diagnoses of private reports that the evaluator reviewed. The evaluation considered data regarding all aspects of Student's cognitive, developmental and adaptive behavior, based upon multiple sources of data, including both an occupational therapy evaluation and a speech and language evaluation.

Disagreement with the District psychologist's conclusions is not a reason to find the evaluation to be inappropriate. The IDEA requires school districts to consider contrary opinions and data, not also to agree with them. Nor does the later contrary conclusion by Parents' private evaluator in August 2016 render the District's evaluation inappropriate. That report did not show that the District's methods were fundamentally flawed, and the later evaluator's data was different because Student was more than a year older. Even if the District psychologist's conclusion against classification with autism were incorrect, this would not inevitably lead to the conclusion that the

consequent offer of services was inappropriate. Therefore I conclude that the District's evaluation was appropriate on this record.

I also conclude that the District revised its understanding of Student's needs as it became aware of new data on Student's functioning. The District revised its proposed IEPs repeatedly in response to teacher reports of Student's struggles in school, additional and later private evaluations, and Parents' concerns. Therefore there was not a period of time relevant to this decision in which the District misunderstood Student's needs due to a negligent or willful ignoring of data indicating new needs.

THE DISTRICT PROPOSED AN IEP THAT ADDRESSED ALL AREAS OF NEED

The resulting proposed IEPs addressed all areas of Student's educational needs. Although the parties revised the District's proposed draft IEPs several times, reflecting disagreement over how to address the needs uncovered in the evaluation reports, this is not an indication of a failure to address Student's needs appropriately. On the contrary, while evaluation reports must be considered by the IEP team, it is the IEP team that is responsible for determining how to address needs, and what special education and related services are appropriate to the child in view of the child's circumstances. 34 C.F.R. §300.306(c)(2), 300.320(a). Agencies have the right under the IDEA to select their own educational methodology and exercise their professional judgment, as long as they provide appropriate services. K.C. v. Nazareth Area Sch. Dist., 806 F.Supp.2d 806, 813-814 (E.D. Pa. 2011); See, Leighty v. Laurel School Dist., 457 F.Supp.2d 546 (W.D. Pa. 2006)(IDEA does not deprive educators of the right to apply their professional judgment).

As the present record preponderantly shows, the salient circumstances, Andrew F. 137 S. Ct. above at 999 (2017), were that Student functioned on grade level in all core and special subjects

in first and second grades, with some exceptions. Student was passing Student's subjects and was progressing from grade to grade. Student's academic performance was consistent with Student's tested cognitive potential, and Student benefitted from and remained motivated in the regular education environment, with all of its social educational benefits. I conclude that the District consistently proposed draft IEPs that appropriately addressed Student's educational needs, taking into account these circumstances.

The May 2014 initial evaluation report identified educational needs in social skills; behavior impeding education; attention to task; rushing through assignments; writing in response to writing cue; sensory self-regulation; and reading comprehension, although Student was performing at grade level in reading. Beginning with its proposed IEP of June 2014, and continuing through its many revisions of that document for Student's first, second and third grades, the District offered appropriately to address these identified needs.

In view of the benefit to Student of placement in regular education classes, rather than in more restrictive learning support environments, the District proposed a placement that permitted the delivery of an itinerant level of learning support in the regular education setting with explicit, specially designed instruction for social skills in the learning support classroom environment. I conclude that this was an appropriate placement. Contrary to Parents' arguments, there is no evidence that this was a predetermined placement.

Within that placement, the proposed IEPs offered to address Student's social skills deficits through a combination of services. The IEPs offered explicit instruction, on a one-to-one or small group basis, for both social skills and emotional/sensory self-regulation techniques. The June 2014 proposed IEP offered three measurable goals to address Student's social skills and behavior, along

with relevant modifications and accommodations. It also offered a Positive Behavior Support Plan. I conclude that these interventions were appropriate.

The proposed IEPs offered to address Student's difficulties with attention to task and rushing to finish classroom assignments through accommodations and specially designed instruction, including preferential seating, visual schedules, allowing Student to do class work in a quiet area or to use headphones, and training in self-calming techniques. As the attention problems appeared to be related to anxiety, based upon the facts known at the time, these were appropriate interventions.

The proposed June 2014 IEP offered to address Student's difficulties with writing responses relevant to the writing cues through accommodations and specially designed instruction, including positive reinforcement; and daily check-ins and check-outs with teaching staff. It also offered to monitor Student's performance throughout the IEP year on a periodic basis, which it called "strategic monitoring". These were appropriate interventions in view of the available data on this need, including Student's generally grade-level performance at the time of the proposed IEP.

The proposed June 2014 IEP offered to address Student's difficulties with sensory self-regulation through three interventions. It offered explicit instruction on self-calming techniques, addressed sensory needs in the behavior support plan, and required classroom accommodations to reduce loud noises. These were appropriate interventions based upon District knowledge at the time.

The proposed June 2014 IEP offered to address Student's difficulties with reading comprehension through a minimal intervention. For this and all academic performance, the District offered to provide "strategic monitoring" of Student's performance throughout the IEP year. In

view of Student's measured strengths in reading and consistent on-grade or above-grade performance, this was an appropriate way to address measured weaknesses in reading comprehension that did not indicate a lack of progress in reading at the first grade level.

Notably, the occupational therapy evaluation found no deficits in fine or gross motor functioning in May 2014. The speech and language evaluation similarly found no identifiable deficits in either expressive or receptive language, and no speech deficits, at that time. Thus, as of May 2014, there was no data to require interventions in those areas. I reach this conclusion despite the circumstance that Parents and private evaluators may have called for more robust interventions based upon an autism diagnosis with which Parents agreed. The IDEA entitles Student to an appropriate educational opportunity, but an IEP does not have to incorporate every educational service that parents desire for their child. Ridley Sch. Dist. v. M.R., 680 F.3d 269 (3d Cir. 2012).

The proposed supports included goals and/or specially designed instruction and modifications that addressed all of Student's educational needs; as the IEP team repeatedly revised the draft IEP, the draft IEPs addressed these needs through goals and modifications, providing for utilization of assistive technology as appropriate. The last proposed IEP in January 2017 offered goals addressing written expression; mathematics fluency; attention, focus, impulsiveness and self-monitoring in the classroom; organization; and occupational therapy needs. It offered specially designed instruction and accommodations addressing all of these needs⁷. I conclude that these offered services were appropriate for Student and were reasonably calculated to provide Student with the opportunity for meaningful and appropriate benefit.

⁷ Although the evaluation reports, dated a year or more before the final IEP was approved, reflected some difficulties in reading comprehension deriving from Student's attention and short-term memory deficits, the record is preponderant that Student was able to access the curriculum in the area of reading comprehension. Thus I find no denial of FAPE on this account.

By the end of first grade, Student had demonstrated additional needs for occupational therapy to address issues of gross and fine motor functioning that affected Student's posture, coordination and handwriting. In September 2015, the District responded to this information by adding an occupational therapy goal addressing the legibility of Student's handwriting, and increasing Student's occupational therapy related services to include direct services in the classroom.

In response to Parents' complaints that their suggestions were not being considered seriously at IEP team meetings, the District amended the proposed IEP several times. It required monthly meetings with Parents. It changed the characterization of behaviors that had disrupted Student's education in the kindergarten year to encompass parents' concerns that Student was being blamed for behavior that was a manifestation of autism. It added numerous pages of parental statements about Student and their relationship with the District. It considered newly provided private evaluations and incorporated elements from those evaluations to which the IEP team could agree.

In late November 2016, Parents' counsel forwarded to District counsel a copy of a private evaluation that Parents had obtained in August 2016. This evaluation contained standardized scores that seemed to contradict some of the District's understandings about Student's cognitive ability and academic achievement. It recommended additional IDEA classification with Autism, Speech or Language Impairment and Specific Learning Disability. It recommended numerous new interventions. In response, the District offered to change Student's classifications and special education services to address the needs that the private evaluator reported.

In sum, the District proposed an initial and several revised IEPs that addressed all educational needs of which the District was aware. It added proposed services within a reasonable

time of learning of new evaluation data indicating new needs. It also revised the IEP to address Parents' concerns about their own equal participation as members of the IEP team. Therefore, I conclude that the District at all relevant times offered to provide Student with services that were reasonably calculated to provide opportunities for reasonable and meaningful educational benefit in view of Student's unique circumstances, in all areas of educational need known to the District.

Parents argue that this is not the case because the District never provided them with a "final" IEP. They argue that a parent should not be held responsible for consenting to any IEP document marked "DRAFT" as all District proposals were marked. I conclude that this argument must fail because Parents withheld consent to the initiation of special education services from May 2014, when the District identified Student as eligible under the IDEA, until October 2015, when Parents signed a NOREP for provision of special education services without agreeing to the pending proposed IEP. In addition, Parents disagreed with all proposed IEPs that the District offered. The record is preponderant that Parents understood or should have understood that special education services could not be commenced without their formal written consent.⁸ Therefore, the marking of the proposed IEPs as "DRAFT", pursuant to District policy and practice did not somehow confuse Parents about the fact that they were delaying the initiation of services by refusing to sign an initial consent, as required by law. 34 C.F.R. §300.300(b). The state implementing regulation, 22 Pa. Code §14. 131(a)(6)(requiring implementation within ten days of "completion") is not to the contrary.

⁸ At one point, in anticipation of an imminent team agreement on an IEP, the Director suggested that Parents "hold" the latest offered NOREP to start services. This may have accounted for a brief part of the overall delay, but it cannot reasonably be argued that Parents took this as a contradiction of the several written notices that their written consent would be required, notices that they received both before and after the Director's suggestion. The weight of the evidence is that Parents chose to delay the provision of services and withheld consent, due to their profound inability to agree to the services being proposed.

Parents argue that the proposed IEPs were not “reasonably calculated” because they were admittedly long and unwieldy, citing statements by District administrators that the drafts needed editing. I am not persuaded, although Parents are correct about the ultimate design of the documents themselves. The IDEA requires an offer that is reasonably “calculated”, not one that is well or reasonably “designed”.

Parents argue that the District’s final proposed IEP, issued shortly before Parents withdrew Student from the District, is not appropriate because it provided for addressing Student’s difficulties with academic needs, such as reading comprehension and mathematics operations, through the District’s regular education tiered intervention system. I fail to see a legal objection to this configuration of services; there is no evidence that it would have failed to address Student’s academic needs. Moreover, the January 2017 proposed IEP offered goals for reading, mathematics and writing. There is no evidence that the District was attempting an end-run around the requirements of the IDEA.

Parents argue that the proposed IEPs were fatally deficient because they did not call for ESY services for the summers of 2015 and 2016. I find no evidence that there was a need for such services. There was no data indicating a failure to recoup any educational gains lost over the summer months, and there was no evidence contradicting the team’s written determination that none of the other factors in Chapter 14 applied. Parents’ private evaluator’s recommendation to the contrary was not supported by any data on Student’s performance in school, nor did the evaluator rely upon criteria consistent with the IDEA’s mandate to provide a FAPE.

DISTRICT EDUCATORS IMPLEMENTED THE IEP APPROPRIATELY

Parents have failed to introduce preponderant evidence that the proposed IEP services were not provided once Parents signed the NOREP for initial special education services in October 2015. The evidence shows that team members and teachers provided monthly meeting with Parents to discuss Student's education. They provided occupational therapy. The record contains progress monitoring data on all of Student's goals. The evidence showed that teachers provided modifications, accommodations and specially designed instruction. All these interventions were provided despite the inability of Parents and District educators to reach agreement on an IEP. Parents failed to show any substantial deviation from the services proposed but not agreed upon by them during the relevant period.

Parents argued that the District denied Student a FAPE because it failed to intervene appropriately in numerous instances in which peers bullied Student. While the evidence shows that Student's peers may have teased, manipulated, laughed at and even physically pushed, pulled or struck Student, Parents have failed to show that any such events rose to the level of a denial of a FAPE. The record is preponderant that District administrators investigated all or most of the allegations that came to their attention, and that administrators concluded that some of the allegations were misinterpretations of the actual events. Student's principal credibly testified that she investigated such allegations diligently and intervened to curb any inappropriate behavior by peers toward Student. There is no evidence that such alleged incidents denied Student a FAPE, because Student continued to make progress throughout the relevant period.

STUDENT MADE APPROPRIATE PROGRESS DURING THE RELEVANT PERIOD

The record is more than preponderant that Student made appropriate and meaningful progress during the relevant period of time. Student functioned at grade level in all subjects. Student's marks were passing throughout the period, and indeed were often "A"s and "B"s.⁹ Teachers testified credibly that Student was making progress throughout the period. Parent introduced no preponderant evidence to the contrary.

Student also made progress on most IEP goals, according to progress monitoring data. Teachers credibly corroborated the data, in that they reported Student's overall satisfactory behavior in class in the areas of attentiveness, focus and impulsiveness. They reported that Student continued to struggle with these issues but was able to access the curriculum and succeed academically. Therefore, on the whole, Student made progress on Student's IEP goals and in the regular education curriculum. Parents emphasized areas in which Student was not achieving at grade level, and areas in which Student may have regressed. I have considered these facts, and conclude that the weight of the evidence shows meaningful and appropriate progress during the relevant period.

Parents argue that Student was denied a FAPE because the District failed to respond to a request under the Family Educational Rights and Privacy Act (FERPA) for about a year. They assert that the delay caused them to delay consenting to initial special education services. They imply that it denied them fair opportunity to participate in the IEP team planning process. Thus, they assert that a FAPE was denied. 34 C.F.R. §300.513(a). I conclude that the preponderance of the evidence is to the contrary.

⁹ Although local assessments were accommodated, there is not preponderant evidence that the Student's grades were substantially supported so as to distort the grades as a measure of appropriate progress. Andrew F. 137 S. Ct. above at 999.

The evidence is clear that Parents chose to withhold consent to initiation of special education services because they had questions due to lack of understanding; wanted detailed information about implementation ahead of time, which they requested through numerous avenues, and which was given at least to a significant extent; and disagreed profoundly with the District's refusal to classify Student with Autism, which seemed to them to invalidate the proposed IEPs. The District's failure to comply promptly with the FERPA request was a small part of this dissatisfaction on this record.

The evidence is preponderant that the District and its IEP team members facilitated extensive Parental participation in Student's education. The District convened several IEP meetings and monthly staff meetings with Parents. District educators provided daily communication logs to Parents pursuant to the proposed IEPs. They responded to numerous extensive requests for documents and information. Teachers and others responded to numerous email messages and telephone calls. In the midst of this home-school communication and planning, the failure to respond to a FERPA request was not a predominant deprivation of communication rights.

Parents argue that their right to communicate with Student's teachers and service providers was substantively compromised when Student's principal directed that all Parent communications be directed to him, before being sent to teachers and staff. I conclude that this administrative decision did not deny either Student or Parents a FAPE. The record is preponderant that it was short-lived and did not block communication.

REQUEST FOR TUITION REIMBURSEMENT

Although a parent is always free to decide upon the program and placement that he or she believes will best meet the student's needs, public funding for that choice is available only under limited circumstances. The United States Supreme Court has established a three part test to determine whether or not a school district is obligated to fund such a private placement¹⁰. Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985). First, was the district's program legally adequate? Second, is the parents' proposed placement appropriate? Third, would it be equitable and fair to require the district to pay? The second and third tests need be determined only if the first is resolved against the school district. See also, Florence County School District v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993); Lauren W. v. DeFlaminis, 480 F.3d 259 (3rd Cir. 2007).

In this matter, I conclude that the District's proposed program was legally adequate, as discussed above. Therefore, Parents' claim for tuition reimbursement and costs must fail. As discussed above, that all iterations of the proposed program were marked as drafts does not detract from the fact that they were in fact offered, and that Parents were well aware of what was being offered. Thus, I decline to reach the second and third tests for tuition reimbursement, for the reason discussed above.

PRIVATE EVALUATOR FEES

I find no equitable or other basis to order the District to reimburse Parents for the fees of the private evaluator's evaluation and report of August 2016. Although the District did alter its

¹⁰ The weight of judicial authority in this Circuit holds that tuition reimbursement is available under section 504, and that the Burlington-Carter tests are equally applicable to section 504 claims for tuition reimbursement. See, 34 C.F.R. §103.33(c)(4); Lauren G. v. West Chester Area Sch. Dist., 906 F.Supp.2d 375, 390-391(E.D. Pa. 2012). Therefore, I so conclude.

proposed IEP to reflect many of the evaluator's recommendations, I find that this was not a reflection of meaningful contribution to the IEP under the circumstances of this matter. The report was delivered after Parents had evinced an intention to consider unilateral private school placement. The IEP was amended in response to Parental communication that Parents were contemplating such a move with a demand for tuition reimbursement. The amendment was done rapidly and without the benefit of a re-evaluation to consider the expert report more thoroughly – as is the usual way of proceeding. Thus, the evidence shows that the amending of the IEP was as much a response to the Parents' impending unilateral placement as to the expert's August report. Therefore, I conclude that Parents have failed to prove by a preponderance that the August report was a substantial cause of the amended IEP.

Equitably, in these circumstances, I also find that ordering reimbursement would be unfair and inappropriate. Parents did not follow the usual procedure of requesting an Independent Educational Evaluation. They just contracted privately for the evaluation. Thus, they deprived the District of any input into the evaluation through a unilateral act of self-help. Given the District's compliance with its FAPE obligations and the circumstances of this evaluation, therefore, I decline to order reimbursement on equitable grounds.

SECTION 504 VIOLATION

I conclude that the District provided a FAPE to Student during the relevant period of time. The record preponderantly shows that the District provided appropriate services and accommodations to meet Student's individual needs as adequately as the needs of non-handicapped children in the District are met. 34 C.F.R. §104.33(b)(1). The proposed IEPs were calculated to allow Student to advance meaningfully from grade to grade within the general

education curriculum, and to participate with peers socially and collaboratively as called for in that curriculum. There is no preponderant evidence of segregation or unequal educational benefit. Thus, I find no violation of section 504.

CONCLUSION

I conclude that the District provided Student with a FAPE during the relevant period of time. Therefore, I will dismiss Parents' claims and deny the requested equitable relief.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Parents' requests for relief are hereby **DENIED** and **DISMISSED**. It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

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

DATED: September 7, 2017