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 Due Process Hearing Officer

Final Decision and Order
ODR No. 20499-1718KE
CLOSED HEARING

Child's Name:
M. I.

Date of Birth:
[redacted]

Dates of Hearing:
05/14/2018, 06/01/2018, 06/07/2018, 06/13/2018, 07/03/2018

Parent:
[redacted]

Counsel for Parent:
Mark W. Voigt, Esq.
Plymouth Meeting Executive Campus
600 West Germantown Pike, Suite 400
Plymouth Meeting, PA 19462

Local Education Agency:
West Chester Area School District
782 Springdale Drive
Exton, PA 19341

Counsel for the LEA:
David T. Painter, Esq.
Sweet, Stevens, Katz & Williams, LLP
331 East Butler Avenue
New Britain, PA 18901

Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
07/17/2018

Introduction

This special education due process hearing was requested by the Parents, on behalf of the Student, against the School District (the District).[1] The Parents allege that the District violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* by denying the Student a free, appropriate public education (FAPE). The Parents demand compensatory education and tuition reimbursement to remedy the alleged denial. The Parents also demand placement in a half-day private tutoring program or, alternatively, placement in a full day private tutoring program in the upcoming 2018-19 school year.

Regarding compensatory education, the Parents allege that the District's programming was not reasonably calculated to ensure that the Student received a FAPE from April 9, 2016 through the present.[2] The Parents demand 1080 hours of compensatory education to remedy that alleged denial. The Parents also allege that the Student was denied FAPE during the summers of 2016 and 2017, and demand an additional 180 hours of compensatory education to remedy that alleged denial.

Regarding placement, the Parents allege that a Life Skills program offered by the District is inappropriate for the Student. Beginning in March 2018, the Student attended a half-day reading tutoring program. The Parents demand reimbursement for that program and continued placement in that program at the District's expense. Alternatively, the Parents demand placement in a full-day program run by the same tutoring center at the District's expense for the 2018-19 school year.

In addition to the above, the Parents allege that an aide assigned to the Student was unqualified for the position. The Parents demand assignment of a qualified aide. There is also some disagreement about what IDEA eligibility criteria apply to the Student.

The Parents also allege that the same facts giving rise to their IDEA claims also substantiate violations of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq*. Although not pleaded in their complaint, the Parents demand reimbursement for expert testimony under Section 504. This issue is presented in the Parent's statement of issues, but I do not have authority to award that form of relief. I view the statement a reservation of the Parents' right to bring that claim in an appropriate forum.

Issues

The parties phrased and parsed the issues differently, but there is no substantive dispute about what issues are before me. The issues in this matter are:

1. What are the Student's disability categories?

2. Was the Student denied a FAPE from April 9, 2016 through the present?

3. Are the Parents entitled to tuition reimbursement for the private tutoring they obtained for the Student, staring in April 2018?

---

[1] Except for the cover page, identifying information is omitted to the greatest extent possible.

[2] Neither the Parent's complaint nor their statement of the issues specifically say during which school years the alleged denial of FAPE occurred. The complaint was filed on April 9, 2018. Therein, and throughout the hearing, the Parents demanded 1080 hours of compensatory education, representing three hours for every day that the Student attended school "for the past two calendar years." I will, therefore, consider whether the Student is owed compensatory education to remedy denials of FAPE from April 9, 2016, onward.

4. What placement is appropriate for the Student in the upcoming 2018-19 school year?

Findings of Fact

This section of this Decision is intended to be a chronology of events. That chronology is largely undisputed in this case. The evidence is discussed in depth in the discussion section below, with additional citation to the record.

I carefully reviewed and considered the record in its entirety. I make findings, however, only as necessary to resolve the issues before me. Consequently, not all evidence in the record is referenced herein. A considerable portion of the evidence in this case was found to be admissible during the hearing, but is ultimately irrelevant. For reasons discussed below, this includes much of the evidence concerning the Student's actual progress. Additionally, for reasons discussed below, certain evidence offered by the Parents is also not reliable and was not used for fact-finding.

I find as follows:

1. There is no dispute that the Student is properly diagnosed with an Intellectual Disability (ID), has a full scale IQ of less than 60, and impaired adaptive and functional skills.

2. The Student's IEP team drafted an IEP for the Student on April 28, 2016. That IEP placed the student in supplemental Learning Support and Speech Language Support. S-9.

3. The Parents approved the 2016 IEP via a NOREP the same day. S-10.

4. The IEP team reconvened and revised the 2016 IEP on May 23, 2016. The IEP was revised to address the Student's transition to middle school. The District recommended the Student receive social skills instruction. S-12.

5. The Parents objected to the offer of social skills instruction. P-1.

6. The District proposed a waiver that would excuse the Student from social skills instruction. *See* P-1.

7. The Parents rejected the waiver, objecting to its language as overly-broad. P-1.

8. The Student did not attend the District's ESY program in the summer of 2016. S-7.

9. The District removed social skills instruction from the Student's IEP on August 15, 2016. *See* S-14, S-15.

10. The Parents approved the 2016 IEP as revised. S-15.

11. The IEP team met again on February 22, 2017. The team reviewed data and determined that the Student was not progressing towards IEP goals as expected. The team concluded that additional assessments were needed, and the District proposed a reevaluation. *See* S-16, S-17.

12. The Parents provided consent for the reevaluation on March 6, 2017. S-18.

13. The District issued a reevaluation report on April 20, 2017 (the 2017 RR). S-22.

14. The IEP team convened on April 26, 2017 to review the 2017 RR and revise the Student's IEP. S-23.

15. The IEP team was unable to complete the IEP development process on April 26, and so it reconvened on May 15, 2017. S-24.

16. On May 19, 2017, the District proposed a continuation of the Student's program in Learning Support, and then a transfer to a Life Skills and Learning Support program at the start of the 2017-18 school year, and ESY services in the summer of 2017 (the revised 2017 IEP). S-23, S-26.

17. The Parents rejected the District's proposal. S-26.

18. The Student did not attend the District's ESY program in the summer of 2017. NT *passim*.

19. The Parents requested mediation and the District agreed. On July 13, 2017, the Parties entered into a mediation agreement. The mediation agreement called for the District to fund a series of independent educational evaluations (IEEs) for the Student, convene an IEP team meeting after the IEEs were complete, and continue to implement the 2016 IEP as revised in August 2016. P-7.

20. The Parents obtained an independent Psycho-Educational Evaluation (S-34), an independent Educational Evaluation (S-35), and an independent Assistive Technology Evaluation (S-36) at the District's expense.

21. The Assistive Technology Evaluation was finished last, on December 8, 2017. S-36.

22. The IEP team reconvened on January 25, 2018. S-37. The independent evaluators participated in the meeting.

23. The District continued to offer supplemental placement in Life Skills and Learning Support. After some negotiation, the District proposed the revised 2017 IEP via a NOREP on February 8, 2018. The Parents rejected the NOREP on February 16, 2018. S-39.

24. The Parents sent the Student to a half-day tutoring center starting on March 5, 2018. P-25. From that point forward, the Student missed half of the school day, every day.

25. The District offered a new, annual IEP on April 24, 2018, after the due process hearing was requested (the 2018 IEP). S-43.

Credibility

I am charged with the responsibility of judging the credibility of witnesses. I have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); S*ee also, generally, David G. v. Council Rock School District*, 2009 U.S. Dist. LEXIS 96338, 2009 WL 3064732 (E.D. Pa. 2009).

In this case, except as noted, all witnesses testified credibility to the extent that they recalled and related facts to the best of their ability and give their honest opinions.

The Parents testified credibly to the extent I am persuaded that they believed what they were saying. However, I give their testimony and their written descriptions of school observations little to no weight. The record unambiguously establishes that the Parents harbor a pejorative view of Life Skills placements,

and may have the same view of the children who receive life skills services. Their attacks, both contemporaneous and during the hearing, were so vitriolic that they do more than merely strain credulity. Their *ad hominem* attacks against District staff made it difficult to distinguish their criticism of the Student's program with their dislike of the District's people. Those attacks, coupled with their presentation of evidence that may have been intentionally misleading (discussed below) compel me to disregard most of their testimony and some of their documentary evidence.

Despite the foregoing, I must note that the Parents were completely sincere in their desire to obtain what they believe is best for their child. That desire is natural and unsurprising. The Parents' concern about the Student's actual progress is also legitimate. Evidence concerning the Student's actual progress is alarming out of context. Even so, my obligation is to assess the record under the applicable laws and jurisprudence. I am obligated to assess the appropriateness of the District's offers at the time they were made. Evidence of the Student's actual progress has only limited relevance under the unique facts of this case, as explained below.

Applicable 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 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 Parents are the party seeking relief and must bear the burden of persuasion.

Eligibility for Special Education (Categories)

Only children with disabilities are entitled to the IDEA's substantive rights and procedural protections. The IDEA defines a child with a disability as a student with any of 13 specified disabilities or categories of disabilities and who, by reason thereof, needs special education and related services. 34 C.F.R. § 300.8(a)(1).

In this case, there is no dispute that the Student is a child with a disability because the Student has disabilities recognized by the act and, by reason thereof, requires special education.

The definition of disability categories pertinent to this matter are:

Intellectual disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance. 34 C.F.R. § 300.8(c)(6).

Speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance. 34 C.F.R. § 300.8(c)(11).

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that -
(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
(ii) Adversely affects a child's educational performance. 34 C.F.R. § 300.8(c)(9), (9)(i), (9)(ii).

All children with disabilities have the same special education rights regardless of their disability category(ies), with the exception of ID. Children with ID receive enhanced protections. *See, e.g.* 22 Pa. Code §14.124(c),

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'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 each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist*. RE-1, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id* at 3015.

Historically the Third Circuit has interpreted Rowley to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative 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).

Under the historical meaningful benefit standard, 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). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. *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). 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.'" T*ucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimis*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's

circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics — as is clearly evident in this case.

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 an appropriately ambitious education in light of the Student's circumstances.

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, endorses 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 endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and 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 or 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.

Tuition Reimbursement

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the *"Burlington-Carter"* test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007).

The steps are taken in sequence, and the analysis ends if any step is not satisfied.

Discussion

The Student's IDEA Eligibility Categories

The District identified the Student as a child with an Intellectual Disability (ID) and a Speech/Language Impairment through the April 2017 RR. The Parents agree that those designations are proper, but claim that the Student should also be identified as a child with Other Health Impairment (OHI) resulting from ADHD, Selective Mutism, Executive Functioning Impairment, and Specific Learning Disability (SLD) in written expression.

The IDEA's eligibility criteria are exactly that: they are the categories of disabilities under which children may qualify for special education. Once a child is found eligible for special education, programming must be based on the child's unique needs and not the child's diagnosis. A child with a Speech/Language Impairment has identical rights to a child with SLD. ID is the only exception to this general rule. Children with ID have enhanced rights and protections. Consequently, with the exception of ID, any mis-categorization is a procedural violation unless the mis-categorization resulted in a substantive program deficiency. Allowing categorization to drive programming is a violation in and of itself.

This is not intended to undermine the value of correctly categorizing children with disabilities for IDEA purposes. Some categories carry enhanced social and emotional significance for some families, and school districts should be sensitive to that. This sensitivity, however, does not alter any school district's legal obligations.

In this case, the Parents make no assertion about how the Student's program would be different if the District categorized the Student in accordance with their wishes. Since no substantive violation flowing from the alleged mis-categorization is pleaded, any violation is purely procedural. More importantly, a preponderance of the evidence establishes that the Student's correct primary disability is ID and that the Student's correct secondary disability is Speech/Language Impairment. The evidence does not establish that the Student is in need of specially designed instruction specific to ADHD, and therefore the District's decision to not include OHI as a disability category was proper. Evidence does not establish SLD. Evidence of Selective Mutism also is not preponderant.

Specifically regarding SLD, the evidence in this case does not establish a statistically significant discrepancy between the Student's abilities and achievement. Of equal importance, by definition a student is not a child with SLD if learning problems are primarily the result of an intellectual disability. The Student's classification as a child with an intellectual disability is exceedingly well-supported by the record and is not disputed by the Parents. The record supports a finding that the Student's learning problems are primarily a function of the Student's ID and, therefore, by definition, the Student cannot be classified as a student with SLD.[3]

Specifically regarding Selective Mutism, mutism is not recognized as a qualifying disability under the IDEA in and of itself. The Parents make no argument about what category of disabilities Selective Mutism may fall under, if not Speech/Language Impairment.

For these reasons, the Parents' claims that the District failed to properly categorize the Student's disabilities are denied.

April 9, 2016 through the end of the 2015-16 School Year

For the period from April 9, 2016 through the end of the 2015-16 school year, the Student received programming pursuant to a 2015 IEP (S-6). The record is all but silent regarding the appropriateness of the 2015 IEP. The Parents' complaint includes no claims concerning the 2015 IEP – only a demand for compensatory education during the last two months (roughly) during which the document was implemented.

The Parents did not prove by preponderant evidence that the District denied a FAPE to the Student for the period from April 9, 2016 through the end of the 2015-16 school year.

Summer 2016

[3] That distinction says nothing about what type of services the Student requires.

The District offered an ESY program during the summer of 2016. The Parents rejected that offer, choosing instead to work with the Student at home. S-7.

At the hearing, Parents testified that the ESY offer was only a continuation of ineffective service. Regardless of whether that objection was raised at the time, the Parents are correct that the ESY offer was a continuation of IEP goals though the same or similar programs delivered during the 2015-16 school year. Above, I find that the Parents did not present preponderant evidence that the Student was denied a FAPE from April 9, 2016 through the end of the 2015-16 school year. Consequently, the Parents also failed to present preponderant evidence that the District's 2016 ESY offer was substantively inappropriate. Further, even if there were flaws in the District's programming during the 2015-16 school year, the Parents have failed to put on evidence concerning the appropriateness of the 2016 ESY offer specifically, and so they have not met their burden in this regard.

The 2016 IEP

The process of creating the Student's IEP for the 2016-17 school year started during the prior school year in April 2016. S-9.

On April 28, 2016, the District drafted an IEP for the Student. That IEP included placement in Learning Support for Reading and Math, and placement in general education for all other subjects. The IEP also included social skills instruction. The IEP did not call for a 1:1 aide for the Student. Through negotiations between the Parents and District, the IEP was revised on May 23, 2016 and August 15, 2016. The final revision prior to the start of the 2016-17 school year did not include a 1:1 aide, or social skills instruction as a related service, or a social skills goal. S-14. Despite this, at the time, it appears that the Parents and District were disputing the need for social skills instruction.

The Parents objected to the provision of social skills instruction and demanded a 1:1 aide. The Parents raised those objections at the time the 2016 IEP was offered. The Parents raised no other objections to the IEP at that time, or in their due process complaint. A child's rights are not contingent upon parental vigilance, and so parents are not precluded from raising objections to an IEP at a due process hearing even if those objections were not made when the IEP was first offered. At the same time, I am constrained to only adjudicate those issues that are before me. The only issues raised by the Parents concerning the appropriateness of the 2016 IEP are the lack of an aide and social skills instruction.

To be clear, the Parents ultimately claim that the Student failed to make meaningful progress under the 2016 IEP, but my task is to determine the appropriateness of the IEP at the time it was offered. The Student's actual progress under the 2016 IEP is relevant to the appropriateness of the District's actions after the 2016 IEP was implemented. Actual progress is not relevant to the question of the 2016 IEP's appropriateness at the time it was offered.

Regarding social skills instruction, the District never implemented this portion of the 2016 IEP. The Parents objected to social skills instruction, and the District offered a waiver that excused the Student from social skills instruction. The Parents took issue with the waiver, and refused to sign it. Ultimately, by August 2016, the District agreed to remove social skills instruction and issued a NOREP removing that component of the Student's program before the 2016-17 school year started. The Parents approved the NOREP on August 16, 2016. S-15.

The actual contents of the IEP notwithstanding, record establishes that the Student may have benefited from social skills instruction, and so it was not a violation for the District to offer social skills instruction. The record does not establish that social skills instruction was a necessary component of FAPE for the

Student at that time. Consequently, the District's ultimate acquiescence to the Parents' demands is also not a denial of FAPE. It is not clear to me that this issue has ever been ripe. It has centrally been moot since at least August 2016.

Regarding the 1:1 aide, the record barely touches upon the Parents' request at the time the 2016 IEP was offered. Assuming *arguendo* that the Parents requested an aide and that the District denied the request, I find no preponderant evidence in the record concerning the Student's need for a 1:1 aide at the time the 2016 IEP was offered.

Given the foregoing, I find that the 2016 IEP, as revised in May and August 2016 (S-14), was appropriate at the time it was offered.

The 2016-17 School Year - Start Through February 27, 2017

The FAPE question during the 2016-17 school year is best taken in two parts. From the start of the 2016-17 school year through February 27, 2017, and then from February 27, 2017 through the remainder of the school year.

At the start of the school year, the Student received special education in accordance with the IEP that the Parents approved on August 16, 2016. By the end of the second marking period, the District's progress monitoring revealed that the Student was not making progress towards a math goal, and had regressed in reading comprehension and writing goals. S-16. The Student had also made a small amount of progress towards an OT goal, and progress towards both a Speech goal and a reading fluency goal. S-16. The Student's performance on any given progress monitoring probe was highly variable in all domains, as performance was significantly helped or hindered by the Student's interest, the content of the material, and the supports that the Student received. S-16.

The Student's progress prompted the District to reevaluate the Student's educational needs – which is completely consistent with the District's obligations. The District proposed a reevaluation on February 27, 2017. Since I have found that the IEP in place at the time was appropriate at the time it was offered, the Student's actual progress evidences a denial of FAPE only if the District failed to act after it knew that the Student was not progressing as expected.

There are no hard and fast rules about how much time may pass before a school takes action after collecting progress data. That ambiguity is compounded in this case because there is also a dearth of evidence concerning what quantum of progress should be expected of a child with the Student's unique constellation of disabilities.

Despite the lack of evidence about how much progress the Student should have been making, it was clear from the outset that, in some domains, the Student was not progressing as anticipated by the IEP. In other domains, progress was too variable to draw conclusions (progress for any child is rarely perfectly linear). In some domains, it appeared that the Student was progressing as the IEP anticipated. Given the totality of the circumstances I find that the District did not wait too long to propose a reevaluation.

I find that the Parents did not prove that the Student was denied a FAPE from the start of the 2016-17 school year through February 27, 2017. During this time, the Student received programming pursuant to an IEP that was appropriate at the time it was offered. When data indicated that the Student was not making the amount of progress anticipated in the IEP, the District proposed a reevaluation. Under the facts of this case, the timing of the District's offered revelation was appropriate.

The 2016-17 School Year - February 27, 2017 Through the End 2016-17

The District started the revelation process with a review of existing data, and an IEP team meeting in February 2017. S-17. Next, on February 27, 2017, the District proposed a more formal reevaluation with additional testing. The Parent provided consent for the reevaluation on March 6, 2017. S-18. The District issued a reevaluation report on April 20, 2017 (the 2017 RR). S-22.

The Parents do not challenge the substantive findings of the 2017 RR. Rather, the Parents' only challenge to the 2017 RR raised in the complaint or the Parents' statement of issues is that the evaluator failed to identify the Student as a child with a specific learning disability. I reject that challenge for reasons stated above.

After the 2017 RR, the District reconvened the Student's IEP team. The team convened first on April 26, 2017. S-21.The team was unable to complete the IEP development process on April 26, and so it reconvened on May 15, 2017. S-24. Ultimately, on May 19, 2017, the District proposed a continuation of the Student's program in Learning Support, and then a transfer to a Life Skills and Learning Support program at the start of the 2017-18 school year. S-23, S-26. This change would require a transfer to a different school building. *See id*, NT *passim.*

Believing that a Life Skills placement was not appropriate for the Student, the Parents rejected the District's offer on May 26, 2017 (the 2017 IEP). S-26. The Parents requested mediation upon rejecting the District's offer. S-26.

The Student continued to receive programming pursuant to the 2016 IEP. The District takes the position that it was unable to change the Student's program because the Parents rejected the 2017 IEP. That argument has merit, but it is also true that the 2017 IEP continued the 2016 IEP through the remainder of the 2016-17 school year. At that point in time, the District had reason to know that the Student was not making progress as expected. A change was needed, but it would have been cruel to rip the Student out of the 2016-17 school and program at the very end of the school year. Avoiding that cruelty, the time it would have taken to craft an end-of-the-year transition, and the Parent's rejection of the 2017 IEP all make the 2017 IEP appropriate as it relates to the period of time from May 19, 2017 through the end of the 2016-17 school year.

In sum, on February 27, 2017, the District proposed a reevaluation. After obtaining consent, the District issued a report on April 20, 2017. By May 15, 2017, the Student's IEP team convened twice. The District offered an IEP on May 19, 2017 that continued the Student's program for the remainder of the 2016-17 school year. Under the unique facts of this case, the portions of the 2017 IEP to be implemented during the 2016-17 school year were appropriate at the time they were offered. As a technical matter, those portions of the 2017 IEP were never implemented because the Parents withheld consent, although nothing would have changed during the 2016-17 school year if the Parents provided consent.

Summer 2017

The record establishes that the District offered ESY services to the Student, and that the Student did not attend. More specifically, the District offered services in the areas of Reading, Writing, Math, Speech, OT, and PT. S-23. ESY goals were drafted for each domain. ESY services were to take place between June 26, 2017 and August 3, 2017, four days per week, 5.5 hours per day.

Unlike the summer of 2016, the Parents did not express a desire to work with the Student at home during the summer of 2017. Rather, they viewed the offer as a continuation of inappropriate programs, and the offer did not specify where services would be delivered. NT 178-179. The Parents are correct that the IEP

did not specify the physical location in which ESY services would be delivered, but that does not make the offer substantively inappropriate.

There is some merit to the Parents' claim that the services offered in the summer of 2017 were inappropriate. At that point, the District was proposing to change the Student's program in the 2017-18 school year, but the ESY offer continued the programming provided in the 2016-17 school year. Even so, this argument ultimately fails. As discussed below, the District never proposed terminating the Student's Learning Support program. Rather, the District proposed adding Life Skills. Below, I explain why that decision was appropriate. I find that continuing the 2016-17 school year program into the summer of 2017 was appropriate under the circumstances and unique facts of this case.

Another critical event occurred in the summer of 2017. The District agreed to the Parents' mediation request. This resulted in a mediation agreement on July 13, 2017. P-7. Under the mediation agreement, the District agreed to fund several independent educational evaluations (IEEs) for the Student. The Parties also agreed that the 2016 IEP "will remain in effect until the issuance of the IEEs are completed and reviewed by the IEP team." The agreement called for an IEP team meeting 30 calendar days after receipt of the last IEE. P-7.

The 2017-18 School Year - Start Through January 25, 2018

The Student started the 2017-18 school year under the terms of the mediation agreement. Both parties had agreed to implement the 2016 IEP until several IEEs were complete and the IEP team reconvened. P-7. The mediation agreement does not explicitly include a FAPE waiver. Generally a school's acquiescence to parental demands is not a defense in a denial of FAPE claim. In this case, the District did not simply comply with the Parents' demand to keep the 2016 IEP in place. Rather, the District put forth a new IEP, sought consent to implement the new IEP, and then participated in mediation when the new IEP sparked a dispute. Further, I cannot punish the District for complying with the mediation agreement. Under the IDEA, mediation agreements are binding and enforceable. 20 U.S.C. § 1415(e)(2)(F). The mediation agreement in this case is also binding and enforceable by its own terms. P-7.

It is unfortunate that the Parents let the perfect stand as the enemy of the good. Through their actions, the Parents placed the District in a position where it had no choice but to implement an old IEP that neither party was happy with. I find that the District discharged its FAPE obligation by complying with the mediation agreement, as is required by the IDEA.

The 2017-18 School Year - January 25, 2018 through March 5, 2018

The Parents obtained three IEEs under the terms of the mediation agreement: a Psycho-Educational Evaluation (S-34), an Independent Educational Evaluation (S-35), and an Assistive Technology Evaluation (S-36). The Assistive Technology Evaluation was finished last, on December 8, 2017. Under the terms of the mediation agreement, the District was obligated to hold an IEP team meeting on or before January 7, 2018. There is some ambiguity in the record about when the IEP team meeting occurred, but there was also some delay as the team worked to find dates that allowed the independent evaluators to participate. The team did eventually meet, and the 2017 IEP was revised on January 25, 2018. S-37. The District continued to offer supplemental placement in Life Skills and Learning Support, and this offer continued to be unacceptable to the Parents. After some negotiation, the District proposed the revised 2017 IEP via a NOREP on February 8, 2018. The Parents rejected the NOREP on February 16, 2018. S-

39.[4] When the Parents rejected the NOREP, the District became obligated to continue to implement the 2016 IEP – now nearly two years old.

On March 5, 2018, the Parents began sending the Student to a half-day reading program at a tutoring center. This unilateral placement made it impossible for the District to implement the 2017 IEP as amended on January 25, 2018. This narrows the FAPE question: is the Student entitled to compensatory education to remedy the District's failure to propose an appropriate IEP from January 25, 2018 (the end of the mediation agreement) through March 5, 2018 (the Parents' unilateral placement)?

The Parents challenge the revised 2017 IEP on several fronts. First, they allege that the District failed to incorporate the recommendations of the IEEs. Second, the Parents allege that the IEP's goals are not appropriate. Third, the Parents allege predetermination. Fourth, the Parents allege that the IEP falls to offer researched-based instruction that is necessary for the Student to make progress. Fifth, the Parents allege that Life Skills is not an appropriate placement for the Student. I will address these objections in order.

Regarding the IEEs, the District was obligated to consider the evaluations; it was not obligated to accept them outright. 34 U.S.C. § 300.502(c)(1). A preponderance of evidence establishes that the District carefully considered all three IEEs, going so far as to invite the evaluators to the IEP team meeting. NT *passim*. More importantly, for the most part, the IEEs were entirely consistent with information that the District had already learned through its own evaluations. For example, the Psycho-Educational and Independent Educational evaluations were consistent with the District's prior evaluations and reports in terms of the Student's intellectual abilities and academic achievement. S-34, S-35. Both of those evaluations match the District's conclusions about proper eligibility under ID and Speech/Language Impairment. The Psycho-Educational evaluation notes that the Student also reaches eligibility under OHI due to a prior ADHD diagnosis, but also says that the Student's executive functioning difficulties flow from ID, not ADHD.[5] S-34. Moreover, the evaluator's recommendations flowing from ADHD were offered by the District through the revised 2017 IEP. C/f S-34, S-37.

Both the Psycho-Educational and Independent Educational evaluations recommend continued placement in Learning Support. S-34, S-35. The IEP in question continues placement in Learning Support. S-37. Both evaluations recommend against placement in Life Skills. S-34, S-34. The IEP in question adds Life Skills to Learning Support. I find that it was appropriate for the District to consider but reject the recommendation against Life Skills. Both evaluators drew conclusions about the appropriateness of Life Skills based on information provided by the Parents without actually visiting the Life Skills classroom. Discussed above, the Parents are not reliable narrators when it comes to Life Skills. Further, both evaluations contemplate either a Learning Support *or* a Life Skills placement. Neither addresses the appropriateness of Learning Support supplemented with Life Skills, which is what the District actually proposed.

Regarding the goals, a preponderance of evidence establishes that the goals were appropriate. It is fair to describe the goals in the revised 2017 IEP as a lowering of expectations for the Student. It is also correct that the revisions brought the Student's goals in line with reality, based both on progress monitoring and the most current evaluations of the Student's intellectual abilities (both the District's and the IEEs). Both parties agree that the Student's full scale IQ is below 60 and that the Student's adaptive abilities are significantly impaired. Studies concerning the academic performance of children with below-average IQs

[4] The District issued two identical NOREPs on February 8, 2018. The Parents rejected both, one on February 16, 2018 and the other on March 5, 2018. S-39, S-40.
[5] This is further evidence that SLD is not an appropriate classification for the Student.

indicate that academic progress is possible, but can be painfully slow. S-49. Within this context, it is the Parents' burden to establish that the goals were not appropriately ambitious for the Student.

As noted above, there is simply no preponderant evidence in the record to establish what a reasonable, expected rate of academic progress should be for the Student. The IEEs make programmatic recommendations, but say nothing about what skills and abilities the Student is expected to acquire over an IEP term, assuming the delivery of appropriate services.[6] Without preponderant evidence concerning the Student's anticipated rate of growth, and with more than a preponderance of evidence that the prior IEPs set the bar too high, I must conclude that the Parents have not met their burden to establish that the goals of the revised 2017 IEP were not appropriately ambitious for the Student.

Regarding predetermination, preponderant evidence establishes that the District gave the Parents a meaningful opportunity to participate in the IEP development process. Through multiple meetings, the District took input from the Parents and their evaluators. That input is reflected in the revised 2017 IEP. The District's ultimate disagreement with the Parents was just that: a disagreement. That disagreement is not proof that the District ignored the Parents. Rather, after giving the Parents an opportunity to participate and considering their input, the District reached a conclusion that the Parents opposed. This does not establish predetermination. Similarly, the Parents point out that the District did not give their assistive technology evaluator an opportunity to demonstrate each of the supports recommended for the Student during the IEP team meeting. That is true, but I find that the District appropriately considered the Assistive Technology evaluation.

Regarding research-based instruction, the IDEA requires that special education must be "based on peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d). The Parents have twisted that language to argue that the Student's special education itself must be a peer-reviewed, research-based program. The Parents' legal argument fails two ways. First, the IDEA does not include an absolute requirement for peer-reviewed, researched based programs. Rather, such programs are required only to the extent practicable. The "What Works Clearinghouse" is the U.S. Department of Education's review and assessment of peer-reviewed, research-based educational programs. Both parties referenced "What Works," which operates a public website that enables visitors to search for programs and learn about their effectiveness. Despite that resource, the Parents point to no program (including the program at the private tutoring center) that has been proven effective for educating children at the Student's cognitive level. In that sense, the Parents did not address whether it was practicable to provide a peer-reviewed, research-based program. Ignoring the practicability issue, there is preponderant evidence throughout the entirety of the record that the District's programs were based on peer-reviewed research. *See, e.g.* NT 917-918. The Student received an eclectic curriculum in all academic subjects, meaning that the teachers pulled from several resources as opposed to a packaged program. Using those materials, the teachers relied upon their training to deliver instruction in using evidence-based methods. I find that the District complied with the IDEA's requirements at 20 U.S.C. § 1414(d).

Finally, regarding the proposed Life Skills placement, I find that preponderant evidence supports the District's placement offer. Although it is stated several times in this decision, I note again that the District did not propose a full-time Life Skills placement. The Parents' testimony, taken as a whole, suggests a comparison between Learning Support and Life Skills. That is a false dichotomy. The Student very clearly has needs in both domains, and so the District offered both. The purpose of Learning Support is to provide the specially designed instruction that the Student needs to make academic progress. While the Parents do not agree that the Student received appropriate Learning Support services, there is no dispute

[6] Even the private tutoring center's reports and progress documents simply state and monitor the Student's progress through the tutoring center's program without saying what rate of progress is expected for the Student.

that the Student requires the type of academic intervention that is best provided in a Learning Support environment. The record as a whole (but especially the District's evaluation and the IEEs) supports a finding that the Student also requires Life Skills services. The IEEs caution against a full-time, life skills program – particularly as described by the Parents. But the evaluations and the record as a whole leave no doubt that the Student must be taught the type of functional and independent living skills that are best delivered though a Life Skills program.

In their opening and closing statement, the Parents paraphrased President George W. Bush when insisting that the program proposed by the District represents the "soft bigotry of low expectations." The record is to the contrary. The District offered a program reasonably calculated to enhance the Student's academic skills while, at the same time, providing instruction to improve the Student's functional and adaptive skills. Even while lowering expectations in purely academic domains, the District takes the position that the Student can be successful in all domains relative to the Student's cognitive abilities. I agree. The 2017 IEP, as revised on January 25, 2018, was appropriate at the time it was issued.

The 2017-18 School Year - March 5, 2018, through End 2017-18

The Parents sent the Student to a half-day tutoring center starting on March 5, 2018. P-25. From that point forward, the Student missed half of the school day, every day. While the record includes a detailed description of the program that the Student received in the tutoring center, it is fair to describe the tutoring services as reading interventions that targeted decoding, fluency, and comprehension.

Regardless of the merits of the tutoring center, the Student was simply unavailable for instruction in school for half of each school day from March 5, 2018 onward. Above, I find that the District offered an appropriate IEP during this period of time. The IEP contemplated the Student's attendance in school for the entirety of the school day. The District cannot be faulted for any failure to implement the IEP while the Student was not made available for instruction. I find no denial of FAPE during this period of time.

The District offered a new, annual IEP on April 24, 2018, after the due process hearing was requested (the 2018 IEP). S-43. Pendency and a lack of parental consent blocked the District's implementation of that IEP. The 2018 IEP is similar in many ways to the revised 2017 IEP, but provides more detail about the functional skills the Student is expected to acquire. The 2018 IEP is appropriate for the same reasons that the revised 2017 IEP is appropriate.

Tuition Reimbursement / 2018-19 Placement

The District argues that the private tutoring center is not a school, and questions the applicability of the *Burlington-Carter* test in this case. There is some support that the *Burlington-Carter* test applies to demands for tutoring reimbursement. *See Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 277 (3d Cir. 2014). I hold that *Burlington-Carter* is the proper test here, since the Parents removed the Student from school (at least partially) to obtain educational services at their own expense after concluding that the District was not providing a FAPE.

Above, I find that the District offered an appropriate IEP immediately prior to the Parent's unilateral placement. Consequently, the Parents do not pass the first prong of the *Burlington-Carter* test. I therefore deny the Parent's demand for reimbursement.

The logic is similar regarding the Parents' request for a prospective private placement in the tutoring center (either half-day or full-day). Since the District has offered an appropriate IEP, the Parents are not entitled to a private placement at the District's expense.

The Aide

The Parents allege that District assigned an inappropriate person to be the Student's aide during the 2016-17 school year. I disagree. At a basic level, the District did not assign the aide in question to the Student. Rather, the aide was a classroom aide that helped the Student and other children. Beyond that, the Parents' evidence comes in three forms: 1) examples of the aide's social media use, 2) documentation of the aide's credentials, and 3) observations of the aide in school. Two out of the three forms are irrelevant, and the third is not preponderant.

The examples of the aide's social media activities are irrelevant. Those documents were not sufficiently authenticated. Even if they were authenticated, the dates of various images are unknown. The content of various images is also unknown, and the Parents' juxtaposition of images from the aide's social media profile with images that the Parents found outside of the aide's profile walks up to the line of violating rules requiring candor toward the tribunal.[7] Similarly, written statements made by the aide (if that is what they are) on social media concerning out-of-school events between 2011 and 2014 shed no light on services provided in 2016. Again, ignoring authentication, if I were to accept the Parents' evidence as proof of what the aide was doing outside of school in 2014, the only conclusion I could draw is that the aide's decision to leave the images and statements in question available to the public shows poor judgement. That poor judgement in a personal, out-of-school domain sheds no light on what services the aide provided to the Student. Moreover, and to be clear, I do not accept the Parents' evidence of the aide's social media activities due to the lack of authentication and, with the hindsight of a complete record, would have excluded them as irrelevant.[8]

The examples of the aide's credentials are also not relevant. The Parents submitted an undated resumé from the aide, and certificates of attendance in certification programs concerning the foundations of special education and care for children with food allergies. It appears that the resumé was part of the aide's job application, and the certificates were obtained in early October 2017. I am unaware of any laws establishing specific educational credentials for paraprofessional aides, and none have been cited to me.[9] The aide's lack of prior special education experience is not a violation of any law or regulation; I judge the aide's work based on the record before me. This makes the aide's credentials irrelevant.

---

[7] *See* 204 Pa. Code 3.3. According to the Parents, the social media images show the aide smoking marijuana. The picture in question shows a man holding what appears to be a long cigarette or a narrow cigar between his lips while holding a light cigarette lighter. The picture is undated. The Parents also searched the same social media platform – outside of the aide's profile – for pictures of marijuana cigarettes, found a similar image that purportedly is marijuana, and placed that image in the middle of the same exhibit. The exhibit itself contains no explanation about how the image was obtained or that it came from outside of the aide's social profile. As presented, the viewer is left with the impression that the second image is part of the aide's social media profile, and that the aide is explaining that he is smoking marijuana. These images are presented with statements, purportedly from the aide (although that was not authenticated) cherry-picked and presented out of chronological order. This combination of undated photos, photos from outside of the aide's profile, and outdated text is misleading. Giving the Parents the benefit out the doubt, I make no conclusions about whether the exhibit was intentionally misleading.

[8] I am aware that teachers have lost their jobs for less. *See Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943 (E.D. Pa. Dec. 3, 2008). Such cases come in an employment/licensing context, not in an IDEA context, but nothing herein should be taken as a signal that it is safe for school employees to act carelessly on social media.

[9] Pennsylvania law requires criminal and child abuse background checks for school employees and volunteers. The Parents did not challenge the aide in this domain, and un-rebutted testimony establishes that the aide passed those checks.

Regarding the aide's actual work with the Student, accounts are varied. The Parents' evidence establishes that, at least for one math lesson, the aide did not understand the work that the Student was supposed to do. Teachers gave more positive accounts. Regardless, it was not the aide's job to teach the Student. The aide was assigned to the classroom, not to the Student. Even if the aide were assigned directly to the Student, either as a 1:1 paraprofessional or a personal care assistant, the aide's duties and responsibilities necessarily could not have included teaching. Rather, the aide's task, necessarily, was to assist the teacher. No evidence was presented concerning the aide's work in assisting the teacher.[10]

I hold that the parents have not met their burden to establish that it was inappropriate for the District to assign the aide to the Student's classroom. I make this holding despite the fact that it is not clear that claims about the assignment of *classroom* aides are cognizable under the IDEA. Further, I find no evidence supporting a claim that the Student suffered any educational harm as a result of the aide's work with the Student.

Conclusions

The Parents did not prove by preponderant evidence that the District denied a FAPE to the Student for the period from April 9, 2016 through the end of the 2015-16 school year, or that the District's 2016 ESY offer was inappropriate. The 2016 IEP was appropriate at the time it was offered. The Parents did not prove that the Student was denied a FAPE from the start of the 2016-17 school year through February 27, 2017. The District's proposal to reevaluate the Student on February 27, 2017 was appropriate and timely. The IEP team reconvened after the reevaluation was complete. The resulting 2017 IEP was appropriate, but never implemented because the Parents withheld consent. The Parents did not prove by preponderant evidence that the 2017 ESY offer was appropriate. The parties entered into a mediation agreement in the summer of 2017. Under that agreement, the District continued to implement the 2016 IEP. The District's compliance with a binding, enforceable mediation agreement cannot be a denial of FAPE. The mediation agreement expired on January 25, 2018. At that point, several IEEs were completed. The IEP team then revised the 2017 IEP. The revised 2017 IEP was appropriate at the time it was offered, but it too was never implemented as a result of the Parents' actions. Those actions include their unilateral placement of the Student into a half-day private tutoring center, staring on March 5, 2018. From that point forward, the District could not implement the revised 2017 IEP both because of legal prohibitions and because the Student was not available for instruction. Despite these difficulties and a pending due process hearing, the District offered an appropriate IEP on April 24, 2018.

The Parents are not entitled to tuition reimbursement, and the record does not support the Parents' claims about the Student's aide.

As the Parents' Section 504 claims are derivative of their IDEA claims (except for expert testimony fees, addressed above), those claims are denied.

An appropriate order follows.

---

[10] Had the aide been assigned to the Student, that assignment should have happened through the IEP process. In that case, the IEP would have specified the aide's role. The Parents believed that the aide was assigned to the *Student* and sent emails reflecting that belief. P-3. The Parents also provided consent for the aide to assist the Student. The District agreed in emails that it assigned the aide to the Student's classroom as a proactive measure, but was clear that the aide was assigned to the classroom, not the Student, and the aide and also helped other children. P-3.

ORDER

Now, July 17, 2018, it is hereby **ORDERED** that the Parents' claims are **DENIED** and **DISMISSED.**

The IEP offered by the District on April 24, 2018 is appropriate.

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

/s/ Brian Jason Ford
HEARING OFFICER