

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING

ODR File Number: 21027-18-19

Child's Name: N. S. **Date of Birth:** [redacted]

Parents:
[redacted]

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D.

Date of Decision: 12/31/2018

INTRODUCTION AND PROCEDURAL HISTORY

The student (Student)¹ is a late pre-teenaged student who is a resident of the Colonial School District (District) and is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) based on Other Health Impairment and Specific Learning Disability.² Student began attending a private school (Private School) in the fall of 2018.

In August 2018, Student's Parents filed a due process complaint against the District and the matter proceeded to a hearing.³ The Parents asserted that the District's program provided during the 2016-17 and 2017-18 school years, and its offer of a program for the 2018-19 school year, denied Student a free, appropriate public education (FAPE) under the IDEA and the implementing federal and state regulations. The District maintained that its special education program, as offered and implemented, was appropriate for Student; and, it noted that it had already agreed to Student's placement in the Private School for the 2018-19 school year at its expense.

For the reasons set forth below, the Parents' claims will be granted in part and denied in part.

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all versions. Hearing Officer Exhibit 1 (HO-1), a list of errata from the December 21, 2018 hearing transcript provided by the Parents, was previously sent to the parties and is hereby admitted.

ISSUES

1. Whether the District should be ordered to maintain Student's placement at the Private School for the 2018-19 school year;
2. Whether the District provided an appropriate educational program to Student during the 2016-17 and 2017-18 school years, as well as the summers of 2016, 2017, and 2018; and
3. If the District did fail to provide Student with an appropriate educational program during any part of the 2016-17 and 2017-18 school years and the summers of 2016, 2017, and 2018, should Student be awarded compensatory education?

FINDINGS OF FACT

1. Student is a late pre-teenaged student who is a resident of the District but attending the Private School for the 2018-19 school year, currently at the expense of the District. Student is eligible for special education under the IDEA as a child with an Other Health Impairment and Specific Learning Disability. An Emotional Disturbance based on Anxiety has also been suggested. (N.T. 55-57; S-61.)
2. Student has been tried on various medications for Attention Deficit Hyperactivity Disorder (ADHD), but none were consistently effective over the long term. (N.T. 71, 168-69; S-8; S-9; S-14; S-17; S-18; S-19; S-20; S-32; S-62.)
3. Student's intense symptoms related to ADHD, Anxiety, and other diagnoses impact Student's ability to make academic progress. (S-62 at 18.)

2015-16 SCHOOL YEAR (THIRD GRADE)

4. Student and the Parents moved into the District at the start of the 2015-16 school year as Student began third grade. Prior to the move, the former school district had sought and obtained consent to conduct an evaluation. (N.T. 59; S-3; S-4.)
5. In the fall of 2015, the District evaluated Student for special education after the Parents provided consent. The reason for the evaluation was a set of concerns by the prior school district regarding Student's reading, writing, and mathematics skills, in addition to difficulties with attention and maintaining focus on tasks (which a former teacher attributed as a cause of reading, writing, and mathematics skill deficits). An Evaluation Report (ER) issued in October 2015. (S-3; S-4)
6. Parent input into the October 2015 ER reflected a previous diagnosis of ADHD that was not successfully managed by medication. (S-4 at 1, 4.)

7. During the 2015-16 school year, Student was not able to complete homework on Student's own, and this was reported for the October 2015 ER. (N.T. 62-63; S-4 at 1.)
8. District teacher input into the October 2015 ER reflected inappropriate peer interactions, and exhibition of verbal or nonverbal noises and movement in the classroom during instruction. Other difficulties were noted with attending to instruction, following directions, frustration with redirection, and task completion without supervision. (S-4 at 1-2.)
9. The October 2015 ER reported on Student's academic levels as of the start of the school year. Student was reportedly at a below basic level in reading fluency and comprehension (performing at an early second grade level on benchmark assessments) and demonstrated weak writing and mathematics skills. (S-4 at 2-3.)
10. Cognitive assessment for the October 2015 ER (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) yielded a Full Scale IQ score in the average range (Standard Score 92) with relative weaknesses on the Verbal Comprehension and Processing Speed Indices (both low average range). The Full Scale IQ was deemed to be representative of Student's cognitive ability. (S-4 at 6-8.)
11. Assessment of Student's academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) for the October 2015 ER reflected scores below expectations in the areas of Total Reading, Reading Comprehension, and Reading Fluency; Mathematics Fluency and the Mathematics Composites; and some areas of Written Expression. (S-4 at 8-10.)
12. Student's teacher for the second grade year and one of the Parents completed Conners 3 rating scales for the October 2015 ER. Both endorsed very elevated range concerns with respect to inattention, hyperactivity/impulsivity, learning problems, and defiance/aggression; concern with executive functioning was reportedly at an elevated (teacher) to very elevated (Parents) range. Peer relation concerns were also reportedly elevated to the teacher. (S-4 at 5.)
13. On the Behavior Assessment System for Children – Third Edition (BASC-3) reported in the October 2015 ER, Student's then-current District teacher similarly revealed concerns with a number of areas consistent with that reflected in the Conners 3 by other raters. Specifically, on the content scales, the teacher's rating scales yielded scores in the clinically significant range with respect to hyperactivity, conduct problems, attention problems, and learning problems; and in the at-risk range for aggression. On the clinical scales, the teacher reported a clinically significant concern with atypicality and at-risk concerns with withdrawal and several of the adaptive behavior areas (study skills, leadership, and functional communication). (S-4 at 5-6.)
14. The October 2015 ER determined that Student was eligible for special education on the basis of Other Health Impairment (due to ADHD) and Specific Learning Disability (reading fluency, mathematics problem solving, and written expression). Recommendations for Student's educational program included specially designed

instruction for deficits in reading, written expression, and mathematics skills, as well as maintaining attention and focus. (S-4 at 12-13.)

15. An Individualized Education Program (IEP)⁴ developed in November 2015 identified needs for mathematics (counting, telling time, and subtraction), written expression, reading fluency and comprehension, and remaining on task. (P-1.)
16. Annual goals in the November 2015 IEP targeted reading comprehension (from second- to third-grade level texts); decoding (from a second grade to third grade instructional level); oral reading fluency (to a proficient end of second grade level); subtraction of two-digit number; counting/sequencing of numbers; written expression (word writing fluency and conventions); and maintaining attention to task. A number of program modifications and items of specially designed instruction were also provided. (P-1.)
17. Student's Parents approved the Notice of Recommended Educational Placement (NOREP) for the November 2015 IEP, which proposed a supplemental level of learning support, with Student not participating in regular education classes for reading, written expression, and mathematics instruction. (P-1; P-2.)
18. The IEP was revised in May 2016 to reflect that Student had met the decoding goal and increased the expectations to a mid-third grade level. (S-6.)
19. The November 2015 IEP noted that Student was new to special education and, therefore, was not at that time determined to be eligible for extended school year (ESY) services; the May 2016 revision did not change that determination. The District did not offer Student extended school year (ESY) services for the summer of 2016. (P-1 at 23; S-6.)

2016-17 SCHOOL YEAR (FOURTH GRADE)

20. Student experienced anxiety about going to school during fourth grade, resulting in a number of absences, with a marked increase in December 2016. Student also experienced anxiety due to concerns about relationships with peers and staff. (N.T. 70, 74, 78, 81; P-12; S-12.)
21. Student's fourth grade teachers were aware of Student's anxiety about attending school, and they communicated with the Parents about the number of absences. (N.T. 252; S-12; S-15; S-16; S-18; S-21; S-22; S-23; S-27; S-35.)
22. Student continued to experience difficulty with homework during fourth grade, expressing frustration and requiring support of the Parents to try to complete it. The Parents conveyed these difficulties to the District. (N.T. 72; S-9; S-12; S-35 at 1.)

⁴ The document itself and the District's other IEPs are all entitled "Individualized Education Plan," but the terminology in federal and state law is referenced here. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.34 and 300.320; 22 Pa. Code § 14.101.

23. Student exhibited difficulty with attention and remaining focused in fourth grade. (N.T. 252, 254-55, 303-04.)
24. A new IEP was developed for Student in November 2016.⁵ Identified needs were for subtraction of two-digit numbers with grouping and of larger numbers; multiplication facts; written expression (editing, organizing, and focus); and reading comprehension. It was also noted that Student exhibited behaviors that impeded Student's learning or that of others. (S-10.)
25. Annual goals in the November 2016 IEP targeted reading comprehension (from beginning of second grade level to beginning of third-grade level texts); oral reading fluency (from a baseline of fifty five words correct per minute at a third grade level to ninety eight words correct per minute at the third grade level); oral reading accuracy (from a baseline of beginning of second grade instructional level to a beginning of third grade instructional level); addition and subtraction of two-digit numbers with regrouping (from no baseline to 75% accuracy); solving single-step word problems (from no baseline to 80% accuracy); written expression (conventions – capitalization (from a baseline of 55% to a goal of 80% accuracy) and paragraph writing (from a baseline of four points to a goal of six points on an eight-point rubric)); and maintaining attention to task (from a baseline of under five minutes with one prompt to a minimum of fifteen minutes with one prompt). (S-10.)
26. A number of program modifications and items of specially designed instruction were also provided, including multisensory phonics instruction; use of checklists and graphic organizers for writing tasks; frequency reminders; preferential seating; fidget items; and a motivational behavior plan. There was no formal Positive Behavior Support Plan (PBSP). (S-10.)
27. Student's Parents approved the NOREP for the November 2016 IEP, which proposed a supplemental level of learning support, with Student not participating in regular education classes for reading and mathematics instruction. (S-10; S-11.)
28. The November 2016 IEP noted that Student was new to special education and, therefore, was not at that time determined to be eligible for extended school year (ESY) services. (S-10 at 26.)
29. During fourth grade, Student was in co-taught classes for science and writing, but was provided writing support in small groups as needed. Student had mathematics class in the learning support classroom with a special education teacher and instructional aide. Student also had a ninety minute period of small group and shared reading instruction in the learning support classroom with a special education teacher. (N.T. 239-40, 294-98, 325-26.)

⁵ The November 2016 IEP includes a reference to an administration of the Wilson Assessment of Decoding and Encoding (WADE) to a child with a different name. (S-10 at 8.) It is unclear whether the WADE was administered to Student in the fall of 2016.

30. The special education teacher who provided Student with reading instruction also used Orton-Gillingham-based strategies⁶ to work with Student on reading fluency and decoding/encoding skills. A paraprofessional also provided support to students in that block. (N.T. 298-300, 304, 318-20, 321-23, 330, 331-32.)
31. Student did not perform well during whole class instruction in fourth grade with approximately twenty-three other students. Student performed much better in small groups or one-on-one. (N.T. 285-86, 304, 310, 329; S-36 at 6.)
32. Student had difficulty with fourth grade mathematics concepts and performed inconsistently. Student's attendance impacted Student's performance in that subject, needing to cover missed ground when returning to school. (N.T. 241-42, 254-55.)
33. Student's attendance impacted Student's performance with reading, and Student needed to cover missed instruction upon returning to school. Student's major difficulties were with fluency and comprehension. (N.T. 301-03, 323-24.)
34. Student was provided accommodation in mathematics class such as only being required to complete a few problems rather than ten. (N.T. 254.)
35. Beginning in late fall 2016, Student participated in a weekly lunch bunch social skills group, and in another small social skills group with the school counselor. Those groups were comprised of regular and special education students. Student also met with the school counselor individually as needed when Student became upset or needed to talk about something, sometimes at the request of a teacher or the Parents. (N.T. 349-54, 358, 364.)
36. By the middle of the 2016-17 school year, Student was exhibiting difficulty with peer relationships and social skills throughout fourth grade, particularly in unstructured settings. At times, Student was unable to properly interpret words and actions of others and perceived them differently than did other students. At other times, Student engaged in inappropriate behavior toward other students such as aggression, lying, and stealing their belongings. District staff were also concerned about Student behaving in a sexually-suggestive manner at school. (N.T. 242-43, 247-49, 252, 258-59, 269, 274, 305-06, 350-52; S-15; S-19; S-21; S-25; S-28.)
37. Approximately halfway through the 2016-17 school year, Student began an additional period of reading support in the learning support classroom. The IEP was not revised and no new NOREP was issued to reflect that change. (N.T. 275, 280-81.)
38. In March 2017, the District behavioral health advisor convened a meeting with the Parents to discuss available community-based behavioral health services and the possibility of the Parents signing a release form to permit the District to communicate with community-based treatment providers. The behavioral health advisor also provided information on community-based services. On the same day and as a part of the same meeting, the District school counselor requested permission to evaluate Student due to

⁶ The teacher is certified in that specific Orton-Gillingham-based program. (N.T. 318-19.)

concerns with attendance and problematic behaviors. Around that time, other District representatives suggested a behavior plan beyond the school-wide positive behavior plan where all students could earn points for demonstrating appropriate behavior. (N.T. 257-62, 287-89, 307, 337-41, 354, 356-58, 559; S-23; S-24; S-26; S-29.)

39. The Parents expressed concerns to the behavioral health specialist about the extent of the information that might be shared with the District from community-based providers. They understood that, in order for Student to be reevaluated in the spring of 2017, they also needed to provide consent to release of information by private providers. (N.T. 83-84, 86, 170, 340-44.)
40. The Parents did not consent to a reevaluation in the spring of 2017. They did communicate to the school counselor that they were pursuing a private evaluation. (N.T. 362, 367-69; S-24.)
41. The behavior plan that was developed in fourth grade consisted of a chart that set forth expectations for Student regarding remaining focused and on task, keeping hands and feet to self, and telling the truth. Student earned points for appropriate behavior. The chart was not maintained day to day or for any period of time. (N.T. 288-92.)
42. The District convened another meeting with the Parents in April 2017. Among other things, a truancy elimination plan was discussed. (N.T. 263.)
43. The Parents obtained a psychiatric evaluation of Student in April 2017, but did not share the report of that evaluation with the District. They did provide the District with the diagnoses that had been made (ADHD, Anxiety, Depression, and Disruptive Mood Dysregulation Disorder). (N.T. 84-85, 138, 150; S-32.)
44. Progress monitoring over the 2016-17 school year reflected inconsistency overall across most of the IEP goals. Student's remained at or below the baseline for the reading comprehension throughout the year but was reportedly reading end of second grade level texts at the end of the school year. Probes on Student's reading fluency goal at a third grade level reflected a marked increase in the middle of the school year with a decline toward the baseline by the end of the school year. Scores on the writing conventions were quite variable and reportedly impacted by Student's attention and whether Student edited the piece. Student maintained baseline level performance on the mathematics computation and problem solving goals. Data on the goal for maintaining on task was also variable, with the end of school year probes at approximately the same level as the baseline (under five minutes). By contrast, Student performed at or near goal level on the reading accuracy goal and demonstrated improvement on the written expression (paragraph writing) goal. (S-36.)
45. Student ended the 2016-17 school year with forty seven absences. Student's report grades were primarily in the partially proficient range with a few skills in the proficient or not proficient range. (S-40.)

2017-18 SCHOOL YEAR (FIFTH GRADE)

46. Student began the fifth grade school year exhibiting problematic behavior during transportation and Student was suspended from the bus for several days. (S-54 at 1-2, 4.)
47. Student had a behavior chart in fifth grade similar to the one from the prior school year. That chart tracked whether and how many prompts Student needed in following directions, using respectful language, and keeping hands to self for each class. Student earned points to be used toward a reward daily and/or weekly. (N.T. 359-60; S-44.)
48. Student continued to exhibit difficulty with focus and maintaining attention to task during fifth grade. Student also engaged in physically aggressive behavior toward peers in unstructured settings. (N.T. 371-72; S-54 at 3-4, 7.)
49. Again in fifth grade, Student participated in a weekly lunch bunch social skills group, and in another small social skills group with the school counselor and regular and special education students. Student also met with the school counselor individually as needed when Student became upset or needed to talk about something, sometimes at the request of a teacher or the Parents. (N.T. 349-54, 358, 364; S-55; S-61 at 10.)
50. In early November 2017, in the learning support classroom, Student wrote that Student wanted to kill self. The school counselor and learning support teachers discussed the writing with Student and reported the incident to the Parents. Student indicated that Student did not have a plan to follow through with the statement but wrote it because Student was bored. (N.T. 361-62; S-49; S-50.)
51. In mid-November 2017, the District requested consent for a reevaluation from the Parents, since none had been conducted in the spring and behavioral concerns remained, including the suicidal ideation earlier that month, and a continuation of difficulty with focus and attention as well as sexually-suggestive comments. (N.T. 362-63, 382-83, 532-35; S-48; S-51.)
52. The Parents provided written consent to the reevaluation on or about November 14, 2017, and the form was received by the District on November 27, 2017. The proposed reevaluation was to include assessment of academic achievement, curriculum-based assessments, a behavioral assessment, and social/emotional/behavioral rating scales, in addition to a school-based neuropsychological assessment. (S-48.)
53. An IEP was developed following a meeting of the team in November 2017. That IEP reflected that Student exhibited difficulties with maintaining focus and attention and sitting still, requiring frequent redirection. Identified needs were for following directions and remaining focus to task; solving mathematics word problems and acquiring division skills; written expression (editing, organizing, and focus); and reading comprehension. It was also noted that Student exhibited behaviors that impeded Student's learning or that of others. (S-52.)
54. Annual goals in the November 2017 IEP addressed reading comprehension (from end of second grade level to end of third-grade level texts); oral reading fluency (from a baseline

of thirty seven words correct per minute at a third grade level to ninety eight words correct per minute at the third grade level); oral reading accuracy (from a baseline end of second grade instructional level to an end of third grade instructional level); division of two- to four-digit numbers (from a baseline of 33% accuracy to a goal of 80% accuracy); solving single-step word problems (from 40% accuracy to 80% accuracy); written expression (conventions – capitalization (from a baseline of 26% to a goal of 80% accuracy) and composing essays (three to five paragraphs) (from a baseline of 70% accuracy to a goal of 80% accuracy); and maintaining attention to task (from a baseline of two minutes with two prompts to a minimum of five minutes with one prompt). (S-52.)

55. A number of program modifications and items of specially designed instruction were also provided in the November 2017 IEP, including multisensory phonics instruction; use of checklists and graphic organizers for writing tasks; frequent reminders and cues; support for organization; small group instruction for reading, mathematics, and social skills; preferential seating; fidget items; and a motivational behavior plan. There was no formal PBSP. (S-52.)
56. The November 2017 IEP proposed a supplemental level of learning support in the neighborhood elementary school, with Student not participating in regular education classes for reading and mathematics instruction. The IEP went on to note that the team agreed on placement in an approved private school. However, no NOREP issued at that time. (N.T. 561; S-52.)
57. The November 2017 IEP noted that Student was not eligible for ESY services. (S-52 at 26.)
58. At the November 2017 IEP meeting, the team discussed several private schools as possible placements for Student and determined that it was appropriate to investigate such placements. The District believed that a reevaluation was necessary first. (N.T. 101, 153, 534, 556-57.)
59. By November of 2017, Student was reportedly at an end of second grade instructional reading level; in December 2017, Student was working on beginning of third grade level materials. (S-36; S-52 at 9; S-61 at 5-6.)

DISTRICT REEVALUATION

60. In early December 2017, the District sought the Parents' permission to conduct a psychiatric evaluation as well as to consent to a release of the privately obtained spring 2017 evaluation. The Parents consented to the psychiatric evaluation. (N.T. 532-35; S-53; S-56.)
61. The District conducted its reevaluation of Student and issued a report in January 2018. (N.T. 458-59; S-61.)

62. Parent input into the January 2018 RR reflected that Student continued to exhibit anxiety about going to school though to a less significant degree than the prior school year. Homework also remained difficult for Student to complete. (S-61 at 3.)
63. No cognitive assessment was conducted for the January 2018 RR, but the report noted the scores from the 2015 administration of the WISC-V which were overall in the average range. On an administration of the Wide Range Assessment of Memory and Learning – Second Edition, Student earned average-range scores on all subtests with the exception of design memory (low average range). (S-61.)
64. Academic achievement (WIAT-III) assessment for the January 2018 RR revealed a number of below average range scores: all subtests of the Mathematics Composite, and on the Sentence Composition and Oral Reading Fluency subtests. (S-61 at 22-23.)
65. Student completed BASC-3 Self-Report rating scales for the January 2018 RR, endorsing clinically significant concerns with some or all aspects of School Problems, Internalizing Problems, Inattention/Hyperactivity, and Emotional Symptoms. (S-61 at 21-22.)
66. In assessment of attention and executive functioning for the January 2018 RR, the District school psychologist administered the NEPSY-II and obtained rating scales (Behavior Rating Inventory of Executive Functioning – Second Edition (BRIEF-2) and Conners 3). All raters indicated clinically significant concerns across the areas measured by the BRIEF-2 with the exception of self-monitoring, which the Parents did not note as concerning. All raters similarly noted very elevated concerns for all of the areas assessed by the Conners 3. (S-61.)
67. The District school psychologist observed Student in several settings as part of a behavioral assessment for the January 2018 RR. The identified behaviors were inattention and impulsive/off-task behaviors. Those behaviors were noted to occur more frequently in large group and unstructured settings, with the hypothesized functions to gain peer or adult attention. (N.T. 459; S-61 at 24-27.)
68. The January 2018 RR reported on Student's below basic range scores on benchmark assessments of reading, mathematics, and writing in the fall of 2017. (S-61 at 4-5.)
69. The District school psychologist concluded that Student was not able to accurately interpret facial expressions and emotions of others other than those that were positive, and thus had difficulty with perception and social cues. (N.T. 464-65, 485.)
70. A number of recommendations were made to the IEP team in the January 2018 RR, including a change of placement, a PBSP, and counseling. The RR further recommended increased support for Student, and the District understood that Student should a small class size with a small student-to-teacher ratio was important. (N.T. 569; S-61 at 31-33.)
71. The Parents contacted the District on several occasions in January, February, and March 2018 to discuss a new program and placement for Student as recommended in the RR. An IEP meeting was ultimately scheduled for early May 2018. (P-16 at 8-9, 11-12.)

72. Progress monitoring reported over the course of the 2017-18 school year continued to reflect inconsistency overall across most of the IEP goals. In reading comprehension, by the end of the school year Student was reportedly reading end of third grade level texts. Probes on Student's reading fluency goal at a third grade level reflected two scores nearing mastery of the goal by the end of the school year. On the reading accuracy goal, Student maintained a 95% or better score with few exceptions. Scores on the written expression goals were quite variable with occasional probes above the target. Student mastered the division goal and performed inconsistently on the problem solving goal. Data on the goal for maintaining attention on task was also variable, but Student increased the amount of time to four minutes with two or prompts on a March 2018 probe. (S-68.)
73. Student had some private counseling during the fifth grade school year. No information about that therapy was shared with the District. (N.T. 148, 172.)

MAY 2018 EVALUATION REPORTS AND IEP

74. The District arranged for a psychiatric evaluation of Student in the spring of 2018 following consent by the Parents in early December. The psychiatrist issued a report after April 26, 2018. (N.T. 402-03; S-56; S-62.)
75. The psychiatric evaluation resulted in a report provided in May 2018. That evaluation provided diagnoses of ADHD, Tourette's Syndrome, Anxiety Disorder Not Otherwise Specified, and Obsessive Compulsive Disorder. Recommendations included "robust" mental health treatment (S-61 at 18); and for school: social skills, counseling, accommodations and supports, and a school environment with a low student to teacher ratio with a behavior plan. (S-62.)
76. The District school psychologist also reviewed the January 2018 RR with the IEP team at the May 2018 meeting, but not in a separate multidisciplinary team meeting. (N.T. 468-69, 472.)
77. At the May 2018 team meeting, the psychiatrist described her evaluation of Student and made a recommendation for a private school placement for Student that provided small class sizes and a low student-to-teacher ratio. (N.T. 107-08, 156, 363-64, 404, 430-31, 494-96, 541.)
78. An IEP was developed in May 2018. That IEP identified needs for following directions and remaining focus to task; solving mathematics problems especially word problems and improving math fact fluency; written expression including organization and conventions; and reading comprehension, fluency, and accuracy. It was also noted that Student exhibited behaviors that impeded Student's learning or that of others. (S-62A.)
79. Annual goals in the May 2018 IEP addressed reading comprehension (from end of third grade level to end of fourth-grade level texts); oral reading fluency (from a baseline of forty five words correct per minute at an end of third grade level to ninety eight words correct per minute at the fourth grade level); oral reading accuracy (from a baseline end

of third grade instructional level to an end of fourth grade instructional level); solving single-step word problems (from 61% accuracy to 80% accuracy); solving addition, subtraction, and multiplication problems with 70% accuracy); written expression (conventions – capitalization (from a baseline of 57% to a goal of 80% accuracy) and composing essays (three to five paragraphs) (from a baseline of 46% accuracy to a goal of 80% accuracy); and maintaining attention to task (from a baseline of two minutes with two prompts to a minimum of five minutes with one prompt). (S-62A.)

80. A number of program modifications and items of specially designed instruction were also provided in the May 2018 IEP, including multisensory phonics instruction; use of conferences and graphic organizers for writing tasks; frequent reminders and cues; support for organization; small group instruction for social skills; preferential seating; test and assignment accommodations; fidget and sensory items; limitations on unstructured activities; and positive reinforcement and a PBSP. Counseling was included as a related service. There was no formal PBSP. (S-62A.)
81. The May 2018 IEP proposed a supplemental level of learning support in the neighborhood elementary school, with Student not participating in regular education classes for reading and mathematics instruction. The IEP went on to note that Student would be in a different setting for the 2018-19 school year. (S-62A.)
82. The May 2018 IEP noted that Student was not eligible for ESY services. (S-62A at 31-32.)
83. The team agreed at the May 2018 meeting that Student should be placed in a private school and that they would move forward with obtaining such a placement for the summer of 2018 (to help with transition) and the start of 2018-19 school year. (N.T. 227, 525-26, 541-42, 573.)
84. The District did not issue a NOREP in May 2018. (N.T. 111.)

PRIVATE SCHOOL REFERRAL AND ACCEPTANCE

85. After the May 2018 team meeting, a District supervisor of special education contacted the Private School about making a referral for Student and sent the records it requested. The formal referral was made on June 13, 2018. Thereafter, the District waited for communication from the Private School. (N.T. 497-98, 578; S-63A; S-72.)
86. The District representatives believed that it was understood by the Parents that its referral of Student to the Private School reflected its commitment to fund Student's placement there. (N.T. 504.)
87. Also after the May 2018 IEP meeting, the Parents sought and obtained information about the Private School. Student visited the Private School during the summer of 2018. (N.T. 116-17, 158.)

88. Student was accepted at the Private School in July 2018. The Parents completed the necessary paperwork to enroll Student and paid a deposit so that Student would not lose the open slot for the 2018-19 school year. (N.T. 119-20, 159-60, 164, 225, 228-29; P-18.)
89. The Parents advised the District of the Private School's acceptance of Student on July 10, 2018. (N.T. 501; P-16 at 18-19.)
90. The Parents incurred a convenience fee charge for using a credit card to make the deposit for the Private School. They also obtained insurance of funds they paid to Private School in the event Student did not enroll. Those sums were not reimbursed by the District. (N.T. 213, 225-26; P-18.)
91. The Private School sent a formal letter of acceptance of Student to the District on August 8, 2018, but prior to that, the Private School did not communicate directly to the District to advise that Student had been accepted. (N.T. 498-99, 501, 507, 546, 576-78; S-64.)
92. The District staff did not directly contact the Parents between the May 2018 meeting and the August 8, 2018 acceptance letter about Student attending the Private School. (N.T. 504-06.)
93. The District issued a NOREP for the Private School on August 9, 2018. (S-65.)
94. The Parents approved the NOREP for the Private School on August 17, 2018. (N.T. 163, 576; S-66.)
95. The District was provided its first invoice from the Private School in September 2018. (N.T. 582.)

2018-19 SCHOOL YEAR (FIFTH GRADE): PRIVATE SCHOOL

96. The Private School serves students with learning differences from kindergarten to twelfth grade. The Private School employs multisensory instruction that is differentiated and individualized based on student needs. (N.T. 192-93, 195; P-20.)
97. The Private School is a small school that has thirty-four sixth graders including Student. The students are taught by certified teachers. Supports provided to students include consistency in class expectations and routines, checks of assignment notebooks and planners, a laptop for each student, and positive reinforcement. (N.T. 194, 193, 202-04.)
98. Each student has a learning profile developed by the Private School that identifies areas of strength and need and provides recommendations for meeting those needs. (N.T. 196.)
99. Student's learning profile noted needs with maintaining focus on tasks and for routine and consistency. A number of classroom and subject-specific accommodations for Student were included. (P-19 at 3-5.)

100. Students at the Private School have academic courses (mathematics, reading, writing, social studies, and science), as well as classes in study skills, computer skills, and special classes. Each grade in the middle school (sixth through eighth grades) has a learning specialist who is a certified teacher and who provides instruction in the classroom alongside the regular teacher as needed. (N.T. 193-97; P-19 at 6-7.)
101. At the end of the first quarter of the 2018-19 school year, Student had all A to B- grades. Student did have a few disciplinary incidents at the Private School but, as of early December 2018, had acclimated to the setting and formed positive relationships with teachers and peers. (N.T. 206-08; P-19.)
102. Student has not exhibited anxiety about attending the Private School. (N.T. 70, 116, 124, 172-73, 588-90.)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. At the outset of the discussion, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents who requested this administrative hearing. Nevertheless, application of this principle determines which party prevails only in those rare cases where the evidence is evenly balanced or in “equipoise.” *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence, as is the case here.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

This hearing officer found all of the witnesses who testified to be credible, and their testimony was essentially quite consistent where it overlapped.⁷ No witness' testimony was accorded significantly more or less weight than any other.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' comprehensive closing arguments made on the record.

GENERAL IDEA PRINCIPLES

The IDEA and state and federal regulations obligate local educational agencies (LEAs) to provide a "free appropriate public education" (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

⁷ The Parents' objection to the District's untimely five-day disclosure notice was overruled based on the reasons given for the brief delay in identifying its witnesses. (N.T. 7-24.) It should be noted that, had the District been precluded from presenting witnesses, it is not clear that the Parents could have met their burden of proof.

Recently, the U.S. Supreme Court reconsidered the application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA[.] * * * A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child’s circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. * * * As we observed in *Rowley*, the IDEA “requires participating States to educate a wide spectrum of handicapped children,” and “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”

Endrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(italics in original)(citing *Rowley* at 206-09)(other citations omitted). The Court explained that, “an educational program must be appropriately ambitious in light of [the child’s] circumstances... [and] every child should have the chance to meet challenging objectives.” *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not “fully integrated into the regular classroom.” *Id.* The Court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not

inconsistent with the above interpretations of *Rowley* by the Third Circuit. *K.D. v. Downingtown Area School District*, 904 F.3d 248, 254 (3d Cir. 2018).

As *Andrew*, *Rowley*, and the IDEA make clear, the IEP must be responsive to the child's identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, the LEA is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Critically, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); see also *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same).

ESY

Pennsylvania sets forth a number of criteria that IEP teams must consider to determine whether a student is eligible for ESY:

- (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
- (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
- (iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
- (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.
- (v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.
- (vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

22 Pa. Code § 14.132(a)(2). If the student is eligible, the team must also determine the services to be provided. 22 Pa. Code § 14.132(a)(1). In determining whether a proposed ESY program is appropriate, the general principles applicable to special education must be applied, since ESY services must be provided in accordance with the child's IEP. 34 C.F.R. § 106(b).

PROCEDURAL FAPE

The IEP is developed by a team, and a child's educational placement must be determined by the IEP team based upon the child's IEP, as well as other relevant factors. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.116. Parents play "a significant role in the IEP process." *Schaffer, supra*, at 53. Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). However, a procedural violation is actionable under the IDEA only if there is a consequent loss of educational opportunity for the student, a parent is seriously denied the right to participate, or a deprivation of educational benefit results. *D.S., supra*, 602 F.3d at 565; 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).

THE PARENTS' CLAIMS

Because two of the three issues relate solely to remedies, the first issue that will be addressed is whether the District's program denied FAPE to Student during any part of the 2016-17 and 2017-18 school years. However, it is prudent to first address two important procedural aspects of Student's program before turning to its substance.

First, the District position that it was not necessary to issue a NOREP when Student's IEP was revised or at the time of its annual review (N.T. 553-54, 563-64) because Student's

“placement” was not changing is puzzling. The NOREP is the form Prior Written Notice used within this Commonwealth that LEAs are required to provide any time it proposes or refuses to make a change to the Student’s identification, evaluation, or placement, or special education program. 20 U.S.C. § 1415(b)(3). This notice serves to advise parents of specific actions the LEA is or is not taking, and provides them with an opportunity to approve or disapprove the proposal. Notice is an important procedural safeguard in the IDEA that cannot be overlooked.

Second, the amount of time that elapsed between the Parent’s consent to a psychiatric evaluation and the resulting report was significantly more than sixty calendar days as required by the Pennsylvania regulations at 22 Pa. Code § 14.124(b). It is evident that the psychiatrist retained by the District was not herself under its control with respect to timelines, and it is also perhaps not surprising that the evaluation and report took more than sixty days to complete. Nevertheless, the IDEA and the state and federal regulations provide time limitations and expectations in part so that programming decisions can be timely made. As will be discussed more fully below, Student’s educational program was adversely impacted in part by this delay that was not merely a procedural violation.

The Parents contend that Student’s program was not calculated to enable Student to make meaningful progress, and that Student did not do so. The Parents, understandably, are concerned that Student did not make the gains expected of peers during the time period in question, and that Student now must make more than one school year’s growth in areas of deficit in order to catch up. (*See, e.g.*, N.T. 167-68.) However, an LEA “is not required to maximize a handicapped child’s potential ‘commensurate with the opportunity provided to other children.’” *El Paso Independent School District v. Robert W.*, 898 F. Supp. 442, 449 (W.D. Tex. 1995)(quoting *Rowley, supra*, 458 U.S. at 186). The District could not be expected to eliminate Student’s

disabilities or to guarantee that Student would attain any particular level of proficiency in Student's areas of weakness, including reading, mathematics, and written expression. *Leighty v. Laurel School District*, 457 F.Supp.2d 546, 557 (W.D. Pa. 2006). Still, "[r]ather than presuming grade-level advancement, the [IDEA] requires revisions to education programs 'as appropriate to address any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate.'" *K.D.*, *supra*, 904 F.3d at 255 (quoting 20 U.S.C. § 1414(d)(4)(A)(ii), (ii)(I)).

During the 2016-17 school year, Student's progress on IEP goals was variable, with growth on some goals and not on others. Student's ability to maintain attention to task remained at baseline levels. However, there were new concerns by December of 2016 when Student began to exhibit significant anxiety over going to school and the District and Parents communicated about that. Student's attendance declined and behaviors became increasingly more concerning. Additional supports and interventions were provided, including additional pull-out reading support, social skills groups, and meetings with the school counselor. In mid-March 2017, as Student's behaviors continued, the District sought to reevaluate Student.

The Parents misunderstood that the District's reevaluation was contingent upon a release of information, a circumstance that cannot be attributed to one or the other party. Whether or not they would have provided consent, however, certainly by the middle of March of 2017 there was reason for the District to look into revisions of Student's program while the proposed evaluation was to be conducted. This was a student who had significant attention difficulties and impulsivity impeding academic progress since before entry into the District; and, Student was engaging in increasingly alarming behaviors that were not age-appropriate. There was no formal

PBSP in place or developed, and the response to create a behavior chart of expectations that was not maintained or even monitored for efficacy was, simply put, not appropriate.

The fall of the 2017-18 school year began as the previous year had ended, with the same lack of attention and focus and problematic behavior, and with a continuation of the informal behavior chart and IEP goals. Progress on IEP goals over the course of the school year remained inconsistent with one notable exception: Student's ability to maintain attention to task had decreased to two minutes with prompts from the prior school year's constant level of between four and five minutes. Also quite significantly, the team made a definite determination in November 2017 that Student needed a different placement.

The decision to conduct a reevaluation in the fall of 2017 was eminently reasonable and yielded information that was invaluable to the process of exploring alternative placements. It was also not unreasonable to conduct the psychiatric evaluation in order to fully understand Student's needs including the type of placement that would be appropriate. Nevertheless, even if there were any doubt previously, the team agreed as of November 2017 that a change to Student's placement was necessary. The team also agreed by that time that Student required a small group setting with a low student-to-teacher ratio, an approach that had been very effective in assisting Student with maintaining focus and attention in fourth grade. Yet, inexplicably, no meaningful change was made to Student's program during the long process that occurred to identify a placement that ultimately culminated in acceptance at the Private School in July 2018. The delay between November 2017 and July 2018 without any meaningful revision to Student's program in light of Student's unique needs and circumstances amounted to a denial of FAPE.

In advance of the below discussion of remedies, it should be noted that Student's progress or lack of progress toward IEP goals over the relevant school years cannot be summed

up easily, particularly since it is clear that Student's diagnoses have significant impact on Student's ability to attend to tasks and to learn. Although the District could not possibly have been expected to provide the type of intensive mental health services Student now clearly needs, its failure to respond appropriately to Student's behavioral manifestations at school between March 2017 and the end of the 2017-18 school year amounted to a substantive denial of FAPE.

The Parents also contend that Student should have qualified for ESY Services during the summers of 2016, 2017, and 2018. With the exception of 2018 discussed below, the Parents have not established by a preponderance of the evidence that Student should have been eligible for ESY based on the factors outlined above. Student's pattern of performance throughout the time period in question has been remarkably constant in its overall lack of consistency that does not appear to be at all related to long interruptions in programming; nor is there evidence that a crucial skill or severe disability would have supported a determination that ESY services were necessary. Accordingly, this claim must fail.

REMEDIES

PRIVATE SCHOOL FUNDING

The first remedy sought by the Parents is unusual in that it primarily seeks an order for the District to do what it has already agreed to do. This case was originally couched in terms of a claim for tuition reimbursement, since it was filed before the District issued the NOREP for the Private School. Parents who believe that a public school is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement for tuition. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). The Complaint demanded tuition reimbursement and related expenses, an available remedy for parents to receive the costs associated with their child's placement in a private school where it is

determined that the program offered by the public school did not provide FAPE and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T.*, *supra*, 575 F.3d at 242. Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009); *Carter, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

Through the approved NOREP signed on August 17, 2018, the Private School is the last agreed-upon, or operative, placement.⁸ *M.R. v. Ridley School District*, 744 F.3d 112, 118 (3d Cir. 2004). It also is not disputed that the Private School is appropriate for Student at this time. The District has already reimbursed the Parents for a majority of the costs they incurred and have agreed to bear the financial responsibility of the Private School, including transportation, for the current school year. It has, however, declined to reimburse the Parents for the extra costs of the convenience fee and tuition refund insurance.

It is unclear why the Private School's communications with the District in the summer of 2018 were limited, particularly Student's July 2018 acceptance. What is evident, however, is that the District failed to follow up with the Private School after the June 13, 2018 referral, despite the recognition that Student should attend its summer program to facilitate the transition. The Parents cannot be faulted for taking the steps that the Private School demanded to ensure the slot for the fall of 2018, particularly since the IEP team had determined such a placement was necessary many months earlier in November of 2017 and the District was notified in early July

⁸ Though it does not appear to be necessary, to the extent that the Parents remain uncertain, the attached Order shall so reflect.

2018 that Student was accepted. While the District representatives believed they had conveyed to them the District's commitment to a private school placement including its funding, such was not made clear nor explicitly put in writing. Moreover, one cannot assume that the Parents were or should have been familiar with the process of applying to a private school, with or without agreement of and participation by the District. This hearing officer concludes that it would be wholly inequitable to require them to bear the expense of the additional fees they incurred in holding Student's slot. The Parents will accordingly be awarded reimbursement for the costs they incurred in the summer of 2018 in applying to the Private School that have not yet been reimbursed.

COMPENSATORY EDUCATION

As a remedy for the FAPE denial, found above, the Parents seek compensatory education, which is an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and the LEA fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). This type of award may compensate the child for the period of time of the deprivation of appropriate educational services while excluding the time reasonably required for a school district to correct the deficiency. *Id.* The Third Circuit has more recently also endorsed an alternate approach, sometimes described as a "make whole" remedy, where the award of compensatory education is designed "to restore the child to the educational path he or she would have traveled" absent the denial of FAPE. *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015); *see also Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005) (adopting a qualitative approach to compensatory education as proper relief for denial of FAPE); *J.K. v. Annville-*

Cleona School District, 39 F.Supp.3d 584 (M.D. Pa. 2014) (accepting the *Reid* Court’s more equitable, discretionary, and individually tailored calculation of this remedy). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

There was no evidence presented in this case that would guide or support a “make whole” compensatory education award. The standard method of providing an award equal to the amount of the deprivation, though somewhat challenging to determine, shall therefore be utilized.

As discussed above, Student was denied FAPE with respect to the District’s response to Student’s continuing behavioral difficulties, including lack of attention and focus, beginning in mid-March 2017 and continuing through the end of the 2017-18 school year. The Parents suggest that three hours per day would be an appropriate award in part due to ongoing academic deficits with the gap between Student’s performance and expectations of peers continuing to grow. As has been gleaned from the recent psychiatric report, Student’s disabilities have a major impact on Student’s ability to make academic progress; and, Student did exhibit some growth in areas of reading, writing, and mathematics. Nonetheless, Student’s inability to maintain focus and attention was not limited to any particular time of the school day. Equitably, then, this hearing officer estimates that two hours per day of compensatory education is the appropriate award for that time period. In addition, since Student was expected to attend the Private School summer program, but the District did not take steps to ensure that some plan of transition into the fall of 2018 was in place, an additional sixty hours for the summer of 2018 (estimating a thirty day summer program of two hours per day) shall be awarded.

The award of compensatory education is subject to the following conditions and limitations. Student’s Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial or

enriching educational service, product or device that furthers Student's educational and related services needs. Should Student return to the District, the compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21). The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District denied Student FAPE for a portion of the time period in question and will order compensatory education. The Parents shall also be reimbursed for the additional costs they incurred in securing Student's slot at the Private School.

ORDER

AND NOW, this 31st day of December, 2018, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. For the 2016-17 and 2017-18 school years, the District denied Student appropriate programming beginning on March 16, 2017 through the end of the 2017-18 school year as set forth in detail above.
2. Student is entitled to compensatory education in the amount of two hours per day for each day that the District was in session from March 16, 2017 through the end of the 2016-17 school year, and two hours per day for each day the District was in session for the entire 2017-18 school year. This award of compensatory education is also subject to the following conditions.
 - a. Student's Parents may decide how the compensatory education is provided. The compensatory education may take the form of any appropriate developmental, remedial, or enriching educational service, product, or device that furthers Student's educational and related services needs. Should Student return to the District, the compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress.
 - b. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21).
 - c. The compensatory services shall be provided by appropriately qualified professionals selected by the Parents. The cost to the District of providing the awarded hours of compensatory services may be limited to the average market rate for private providers of those services in the county where the District is located.
3. The District shall reimburse the Parents the full cost of the expenses they incurred in securing Student's slot at the Private School as set forth in P-18 at 4 that have not previously been reimbursed.

4. As of the date of this decision, the last agreed-upon placement is the Private School as reflected by the August 17, 2018 NOREP at S-66. The District is not ordered to take any further action in this regard.
5. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 21027-1819AS