

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

22279-18-19

Dates of Hearing

September 3, 2019

September 17, 2019

September 19, 2019

November 6, 2019

Child's Name

C.K.

Date of Birth

[redacted]

Parents

[redacted]

Local Education Agency

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Hearing Officer

Linda M. Valentini, Psy.D, CHO
Certified Hearing Official

Date of Decision

December 10, 2019

Background

Student¹ is a mid-teen aged District resident who is identified as eligible for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its Pennsylvania implementing regulations, 22 Pa. Code § 14 *et seq.* (Chapter 14). Student has Down syndrome, an intellectual disability, autism and a speech/language impairment. Student is also regarded as an “individual with a disability” as defined by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*, and as a “protected handicapped student” under the Pennsylvania regulations implementing Section 504 in schools, 22 Pa. Code § 15 *et seq.* (Chapter 15).

Student has not been educated in the District, and was never enrolled in the District. Although the Parents requested an evaluation in April 2017, the District did not complete its evaluation until February 2018, and it proposed an IEP in May/June 2018. The Parents asked for this hearing, seeking compensatory education for a delay in the evaluation and what they believe was an inappropriate offered IEP. They also seek tuition reimbursement and transportation for Student’s unilateral placement at a private school in a neighboring state for the 2019-2020 school year. The District disputes Parents’ position and maintains that no recovery is due.

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. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of 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).

In reaching my decision I carefully considered the witnesses' sworn testimony, documents admitted into the record, and the parties' written closing legal arguments. Below I reference the evidence that I found to be directly relevant to deciding the issues before me; hence not all testimony nor all documents comprising the record are cited. Based on the record before me I find in favor of the Parents in part and the District in part.

Issues

1. Is Student entitled to compensatory education for the period of time after the District should have produced its evaluation but did not?
2. Was the IEP the District offered in June 2018 appropriate?
3. Depending upon whether the evaluation and/or the June 2018 IEP were appropriate/inappropriate, is Student entitled to additional compensatory education?
4. Was the IEP the District offered in June 2019 appropriate?
5. If the June 2019 was not appropriate, are the Parents entitled to tuition and transportation reimbursement for the 2019-2020 school year?
6. Should the District be required to reimburse the Parents for the private evaluations they obtained for Student in the areas of speech/language, autism, and occupational therapy?

Findings of Fact²

Background Information

1. Student is a child with Down syndrome, an intellectual disability, speech/language impairment, fine motor deficits, adaptive functioning deficits and recently diagnosed autism spectrum disorder. [NT 1131-1136; P-35]
2. Student received Early Intervention services and remained in Early Intervention for an extra year. [NT 40, 42-43]
3. When Student aged out of Early Intervention the Parents did not enroll Student in the District, but instead chose a Kindergarten placement at a private religious academy (Academy), as they believed that the District did not offer an appropriate IEP following a District evaluation in 2010³. [NT 41-44, 638]
4. Student's siblings were at Academy and Academy offered a special needs program and was willing to accommodate Student. [NT 44]
5. Student repeated Kindergarten at Academy. [Stipulation at NT 46]

² Transcript page references to witnesses are as follows: Mother NT 36–93, 138-213, 272-315, 707-725; Special Needs Coordinator for original private school NT 98- 37; Private Speech/Language Evaluator NT 216–272; District Psychologist NT 326-424; District Speech/Language Evaluator NT 425-472; District Special Education Teacher NT 472-586; District Special Education Director NT 589-694; Head of School for original private school NT 696-705; Educational Advocate NT 727-793; Teacher at current private school NT 797-940; Family Friend – Former Special Education Teacher NT 978-1113; Developmental Psychologist NT 1116-1322.

³ Student has never been enrolled in the District. [NT 644, 651, 681]

6. The extra year in Early Intervention and the retention in Kindergarten resulted in Student's being two years older than same-grade peers starting in the second Kindergarten year and continuing to the present. [NT 47]
7. Records from Academy do not contain reports of behavior problems of concern.⁴ [P-7]
8. Student was making slow academic progress at Academy. In January or February 2017 Academy staff told the Parents that the Academy was no longer appropriate for Student. The Parents agreed. [NT 48-49, 55; P-7]
9. In addition to making slow academic progress, the Academy noted that Student could not socialize appropriately there because for most of the day Student was in class with one other peer; the peer was of the opposite gender. The Parent noted Student was not happy. [NT 55]

Supports Available to the Parent⁵

10. The Parent has a long-time family friend who has known the family since the Parent was a child. The family friend is a retired special

⁴ Although the Parent testified to some behaviors of concern, the Academy teachers' reports do not support that Student engaged in behaviors that were frequent, intense, or disruptive. Student had Therapeutic Staff Support (TSS) starting in Kindergarten, funded through mental health, but as of June 2018 Student's TSS services had been cut down to 5 hours per week. Academy did not provide Student with a one-to-one aide. [NT 796; P-7]

⁵ Student's mother testified at the hearing. She was the parent who engaged in the activities described in the record but it is understood that she acted on behalf of herself and her husband.

education teacher who spent 16 years of her 32-year career working in the District. [NT 979-983, 1030-1031; P-44]

11. The family friend first became involved in supporting the Parent in 2017 when the Parent was approaching the District for an evaluation. [NT 64-65, 983]
12. Although the family friend testified that she was strictly acting as a family friend, the Parent described the family friend's role in the IEP process as one of "friend and educational consultant." [NT 186-187]
13. In early January 2018, when Student was still attending Academy and the District had not yet issued an evaluation report, the Parent sought the assistance of a well-known family advocacy agency and secured the services of a professional advocate. [NT 79, 727-728, 734]
14. The Parent told the professional advocate that she was looking for guidance and assistance with regard to transitioning Student from a private school to the public school. [NT 740]

District's Evaluation Timelines⁶

15. On April 3, 2017 the Parent hand-delivered a letter, dated March 28, 2017 and addressed to the Principal, to the District middle school (Middle School) in her area. She gave the letter to the school secretary and verbally requested an evaluation for special education services.⁷ [NT 55, 57, 73; P-12]
16. The secretary summoned the special education liaison (SEL 1) who spoke with the Parent and told her that since Middle School was about

⁶ The reader is referred to NT 57-71 for a comprehensive chronology in her own words of the Parent's contacts with the District regarding having Student evaluated.

⁷ The Parent drew up a timeline of events. [P-8 (admitted over objection)]

to be closed down she should go to her area's elementary school (Elementary School). In this conversation the Parent described Student's disabilities and behavioral issues and explained that she was looking for a special education placement. The Parent was not given a permission to evaluate form to sign.⁸ [NT 58-59, 66-67]

17. On April 6, 2017 the Parent went to Elementary School as directed and hand-delivered a request letter dated April 5, 2017 addressed to the Principal. The secretary receiving the letter summoned the school's special education liaison (SEL 2). The Parent met with SEL 2 and a school psychologist, described Student, and verbally requested an evaluation for special education services. [NT 59; P13]
18. During the April 6, 2017 conversation the school psychologist told the Parent that they were very busy since it was nearing the end of the school year and she was not sure when they would get to evaluating Student but that she would speak with her supervisor. The District's school year ended on June 20, 2017. Again the Parent was not given a permission to evaluate form to sign.⁹ [NT 69; P-16]
19. Not having heard back from SEL 2, the Parent called her, and SEL 2 told the Parent that the District did not currently have a District ID

⁸ If the Parent had been given a permission to evaluate form ten days after this April 3, 2017 contact with the District and signed it that day, Day One of the mandated time period for producing the District's evaluation would have been April 13, 2017 and Day 60 would have been June 12, 2017.

⁹If the Parent had been given a permission to evaluate form ten days after this April 6, 2017 contact with the District and signed it that day, Day One of the mandated time period for producing the District's evaluation would have been April 16, 2017 and Day 60 would have been June 15, 2017.

number for Student and that the SEL would call the Parent back. [NT 59-60]

20. Again not having heard back from SEL 2, the Parent called her and was told that she needed to go back to Middle School because Student was middle school age and even if Middle School was closing that school needed to do the evaluation. [NT 60, 70]
21. The Parent called Middle School and left a message for SEL 1 or the school psychologist. Hearing nothing back the Parent called Elementary School again, hoping the psychologist could help her. On May 9, 2017 the Parent spoke with the school psychologist who referred her to SEL 2; however, that same day the school psychologist called the Parent back, and said Middle School was willing to do the evaluation. [NT 60-61]
22. The school psychologist sent the Parent the permission to evaluate form and a consent to obtain Academy records. The Parent signed both and sent them back on May 11, 2017. The Parent received the permission form approximately six weeks after her first visit to Middle School where she had initially hand-delivered the request letter.¹⁰ [NT 61-62; P-14, P-15]

¹⁰ With May 11, 2017 being Day One of the mandated time period the clock would stop on June 19th (Day 40) and resume on the day after school started up again. Assuming the school year for students started on the Wednesday after Labor Day, the Thursday after Labor Day, September 7, 2017 would be Day 41 and September 26, 2017 would be Day 60.

23. On August 15, 2017 the school psychologist emailed the Parent to tell her that the District was “still working on [Student’s] placement” and that she would be in contact.¹¹ [NT 74-75; P-17]
24. Meanwhile, because the District’s evaluation and a proposed placement did not seem to be forthcoming, the Parents persuaded Academy to keep Student for the 2017-2018 school year although neither they nor Academy staff believed the Academy remained appropriate for Student. Academy was not happy about taking Student back. [NT 74-76, 108-109]

District’s February 2, 2018 Evaluation

25. The District did not issue an evaluation report until February 2, 2018. [NT 78-79; P-63]
26. For its February 2018 evaluation the District used data taken from a March 2017 evaluation conducted by a private agency. The data from the private agency included intelligence testing with the DAS-II, achievement testing with the WIAT-III, and a behavior assessment with the BASC-2. [NT 1137-1138; P-19]
27. Rather than providing a full speech/language evaluation, the District simply conducted an informal and incomplete functional communication checklist assessment. [NT 228-231, 1138-1140, 1143-1146; P-63]

¹¹ To be clear, there had not yet been an evaluation, much less an IEP, or evaluation/IEP team meetings with Parent, all of which should have preceded working on a placement. The lack of these first necessary steps was even more impactful given that Student had never attended school in the District.

28. The District did not conduct any criterion-referenced academic testing to determine Student's current functional levels of reading, math and writing skills. [NT 1139-1140; P-63]
29. Despite the length of time the District took to complete its evaluation, in addition to failing to gather updated cognitive, achievement, and behavioral data, the District's evaluation did not include an assessment for possible autism¹², a direct assessment of adaptive functioning, or an occupational therapy assessment. [NT 989-990, 1139, 1141; P-63]

District's June 2018 IEP

30. Because of scheduling issues on the part of both the District and the Parent, an IEP meeting was not held until May 31, 2018. The District proposed a draft IEP dated May 31, 2018. The Parent, her professional advocate and the family friend attended this meeting. The meeting lasted about an hour and then was discontinued because necessary District participants – speech/language therapist, occupational therapist and psychologist –were not present to explain the reports and the program. [NT 80-84, 495-496, 499-502, 553-558, 613-614, 743, 764-765, 988-989; S-15, S-19, P-20, P-22]
31. On June 12, 2018 the District convened another IEP meeting with the Parent, her professional advocate, and the family friend. Necessary

¹² The District did not conduct an evaluation to explore a possible autism classification. It is unclear whether the District had any reason before seeing Student to suspect that disability based on available information in the documents in its possession, specifically a PDD-NOS diagnosis. However, the Parents' expert witness, who has trained many educators and psychologists, testified that the signs were clear and obvious (not even on the border) and that a psychologist should have been able to pick up the signs upon observation of Student. [NT 1134-1135, 1142]

District personnel were present. The District proposed an IEP dated June 12, 2018. [NT 561-562, 989; P-23]

32. The IEP offered at the June 12, 2018 meeting was a draft, subject to ongoing revision based on Parent's concerns the Parent might have. The meeting ended with the District providing Parent with the version of the draft IEP as it stood "at that moment in time." [NT 566-567, 574, 655-658; P-23]
33. The Parent expressed concerns about class size, the absence of occupational therapy services, and her belief that the speech/language services offered were inadequate. However, the main reason she chose not to enroll Student in the District for the 2018-2019 school year was because she "didn't think it was safe," as Student would not have a one-to-one aide to monitor Student and prevent Student from running away. [NT 139, 986-987]
34. The Parent had never discussed safety concerns that she had with regard to [Student] entering the School District with her professional advocate, nor did the Parent make the professional advocate aware of any concerns regarding Student's eloping from the Academy setting. [NT 744, 785-786, 796]
35. No one from the Academy staff reported any concerns about elopement or other at-risk behaviors of Student to the District psychologist. [NT 421-422]
36. The District's special education director recognized that the Parent's concern about Student being given a 1:1 aide was a safety issue rather than an instructional issue. The special education director had concerns about Student's having a 1:1 aide, but that issue remained unresolved at the IEP meeting. [NT 673-674]

37. The District agreed that it would conduct an FBA once Student was enrolled and placed in the District. [NT 747]
38. It was the understanding of the professional advocate that the IEP under discussion at the June 12, 2018 meeting was subject to revision by the Parent and the District prior to the start of school, and as revised would be in place for an interim period after Student first entered the District. The IEP would govern the first thirty days of Student's placement, at which time the team would reconvene to again revise and discuss the program based on any concerns that arose during that initial thirty day period. The special education director and the special education teacher who drafted the IEP corroborated the professional advocate's understanding. [NT 546-547, 566-567, 640, 749-750]¹³
39. The emailed copy of the June 12, 2018 IEP was attached to an email, the subject line of which was "[Student First Initial, Last Name] Draft." The IEP document itself was titled in the same way. [NT 567; S-22]
40. After the June 12, 2018 IEP meeting, the professional advocate and the Parent briefly spoke, and the professional advocate then expected to speak at length with the family friend and the Parent to review the IEP so the professional advocate, as was her practice, could send feedback about concerns and requested changes to the District. [NT 655, 747, 754-756, 1051-1052]

¹³ The family friend testified to the contrary, saying that the June 2018 IEP "was stamped finalized ... excuse me, proposed *which indicated it was finalized.*" [NT 990-991] I do not find the family friend's understanding on this point credible in light of the testimony of the professional advocate and the two cited District staff persons.

41. Sharing the professional advocate's expectation, the District anticipated, based on its years of previous collaboration with this particular professional advocate, that the Parent and the professional advocate would go over the IEP thoroughly and that it would then be returned to the District with written notations that the parties would discuss over the summer and come to some agreement. [NT 582, 655-658, 680]
42. The professional advocate did not hear back from the Parent until several weeks after the June 12, 2018 IEP meeting. This communication was through an email in which the Parent said she was "kind of tied up" and busy and wouldn't be able to get right back to the professional advocate. The Parent never got back in touch with the professional advocate. [NT 750-751, 754-756]
43. Consequently, the District did not hear back from the professional advocate as expected, nor did it hear back from the Parent. It is not infrequent for the District to present a FAPE offer to a not-yet-enrolled Student after which parents choose to send the student to a private school. The District will present the FAPE offer, and if the District hears back then the student is enrolled. If the District doesn't hear back it typically indicates that the parents have made a different choice. In the instant matter, given that the Parent was working with a professional advocate with whom the District was very familiar, the special education director had an honest assumption that the Parent had chosen a different option and therefore she did not pursue the Parent. [NT 657-658]
44. The Parent ceased all communication with her professional advocate and with the District regarding the contents of or suggested changes to the June 12, 2018 draft IEP. [NT 199-200, 206, 658-659, 755]

Enrollment in the Private School

45. After inexplicably abandoning the June 2018 IEP process, including terminating her relationship with her professional advocate, the Parent began looking for a private school for Student, and in the meantime began teaching Student at home for the 2018-2019 school year. [NT 92-93, 141]
46. In November 2018 with the assistance of counsel, the Parent located an approved private school (private school) in a neighboring state that she thought could be appropriate for Student. In December 2018 Student started attending¹⁴ the private school tuition-free a few days at a time through the 2018-2019 school year, for a total of 69 days.¹⁵ [NT 149, 207, 717; P-28]
47. On May 3, 2019, after nearly one year of having no communication from the Parent, the special education director became aware of a letter from the Parents dated March 26, 2019 notifying the District that for the 2019-2020 school year they intended to enroll Student in a certain private placement at public expense¹⁶. The letter stated, “[b]ecause the School District has not offered [Student] a free and appropriate public education, we intend on placing [Student] at private school at public expense.” [NT 659-660; S-2, S-23, S-24, P-31]

¹⁴ Statement of Parents’ counsel. [NT 26]

¹⁵ The Parents are not seeking reimbursement for tuition, if any, paid during that year or for transportation. The Parents are seeking reimbursement for tuition and transportation for the summer 2019 ESY program and the 2019-2020 school year. [NT 154-155]

¹⁶ The record is unclear about when the letter physically arrived at the District; this is immaterial.

48. Although the Parent was unable to state with clarity when Student was enrolled at the private school she had chosen, it is clear that Student was attending the private placement as of December 2018. Attendance records support enrollment in the private school. Accordingly, the March 26, 2019 letter does not represent a legitimate 10-day notice of intent to enroll. [NT 152-155; 178-180; 207-208; P-28]
49. Six weeks after receiving the Parents' letter, on May 6, 2019¹⁷ the District replied that it would not fund the placement but offered to hold an IEP meeting. [NT 151-152, 599; P-30]
50. The Parent contacted the District multiple times to arrange the meeting, but the District did not respond by sending the Parent an invitation to participate in an IEP meeting or in an informal meeting. [NT 155-156, 600, 605]
51. Having been unable to secure the offered meeting, in May 2019 the Parents unilaterally enrolled Student at private school for ESY 2019 and the 2019-2020 school year. [NT 152-153, 155, 157]
52. On May 29, 2019, two months after their letter of March 29, 2019, the Parents initiated this matter; they later amended their complaint on June 19, 2019. [S-1]

¹⁷ The letter says May 2016; this is an error. [NT 598]

District's June 18, 2019 IEP^{18, 19}

53. Although the District did not respond to the Parent's calls and an email to set up the offered IEP team meeting, the District's counsel sent the Parents' counsel an IEP and a Notice of Recommended Educational Placement (NOREP) on June 18, 2019²⁰. [NT 158, 599-600; P-33]
54. Student's grade is misidentified on the June 2019 IEP. [NT 630-631]
55. The IEP did not identify where Student was going to go to school. At the top of each page the school assignment was noted to be Middle School, the same school building that the Parent had, over two years earlier, been informed was to be closing. Elsewhere the IEP indicated that Student would be placed at an elementary school which was not Elementary School to which the Parent had been directed in March

¹⁸ This IEP was admitted over Parent counsel's objection and is being considered herein. I ruled that the District's last program/placement offer was relevant to the issue of tuition reimbursement. [NT 12-16]

¹⁹ This June 2019 IEP contains much of the language that was contained in the June 2018 IEP. The testimony of the special education teacher and the special education director in regard to the June 2018 IEP is largely relevant to the June 2019 IEP.

²⁰ The date on the IEP is June 12, 2018. This is incorrect. However, the IEP contains numerous references to services to be delivered from June 2018 to June 2019, suggesting that the writer of this IEP was using the June 2018 IEP as a template and was careless in preparing the IEP that was to be the District's offer after the Parents requested tuition and transportation to private school. Given this error and the errors enumerated below, "careless" hardly captures the attitude conveyed by the writer of the IEP. The identity of the writer of the June 2019 IEP is unclear. [NT 601-604]

2017.²¹ The IEP team verbally advised the Parent that Student would be placed at a high school. [NT 528, 568, 1097; P-33]

56. The District was proposing that Student receive Supplemental Life Skills Support programming, with 30 percent of the day spent in general education classrooms. [P-33]
57. The District was offering related services in the form of a 1:1 adult assistant to support Student's instructional needs for 1500 minutes a week, whereas Student's school week would consist of 2115 minutes (423 minutes a day x 5 days a week). However, according to the IEP, the 1:1 support was to be provided as follows: outside of the building, arrival, dismissal, transition between classrooms, Math, Social Studies, English/Literacy, Science, special classes, lunch, and recess.²² [NT 675-677; P-33]
58. The District was offering related services in the form of group (2 or more students) speech/language therapy for 30 minutes per week. [P-33]
59. The District was offering transportation in the form of curb-to-curb pick-up and drop-off. [P-33]
60. The present levels of academic achievement and levels of performance in the June 2019 IEP are identical to those written into the May 2018 and the June 2018 draft IEPs and those levels were outdated at the

²¹ See footnote above. This internal inconsistency is another example of the carelessness with which this IEP was prepared.

²² See the previous two footnotes characterizing the preparation of this IEP as careless. I cannot identify any part of Student's day, other than assemblies, not covered by this list. It is unclear whether the calculation of minutes was incorrect or if the list of places/times Student would have a 1:1 aide was incorrect.

time the May 2018 and June 2018 IEPs were drafted²³. [NT 539, 621-622; P-22, P-23, P-33]

61. Under Parental concerns, the IEP merely states, “[Student’s] family expressed the following concerns at the IEP meeting” [P-33]
62. Under the Transition section of the IEP, the answer “Yes” to the question of whether there was evidence that the measurable post-secondary goals were based on age-appropriate transition assessment is highly likely to be untrue. [P-33]
63. The Goals and Objectives in the IEP are over two years outdated, as they are based upon the March 2017 evaluation from a private agency and the May 2018 and June 2018 draft IEPs. [NT 506-507; P-19, P-22, P-23, P-33]
64. The IEP does have short term objectives and modifications/SDI attached to each goal, but the goals’ baselines imbedded in the Present Levels are outdated, and there are no new baselines, making the objectives meaningless, although the writer of the May 2018/June 2018 draft IEPs, upon which the June 2019 IEP was based, tried to factor in an estimated rate of improvement from the outdated evaluation data.²⁴ [NT 542-544, 590, 626, 1161-1179; P-33]

²³ The special education teacher who drafted the 2018 IEPs testified that she relied on outdated information because she did not have access to Student, but when questioned as to whether she could have asked the Parent for access stated, “Maybe, yeah ... ” and “So I mean I guess. I don't know. I guess I could have tried to request getting access to the student but I ...” whereupon the witness was interrupted. [NT 540]

²⁴ As was the case when the May/June 2018 draft IEPs were drafted, there is no evidence that the District reached out to the Parent asking for access to Student to update present levels or that the District issued a permission to reevaluate form.

65. A measurable annual goal for math has short-term objectives related to creative writing rather than math.²⁵ [P-33]
66. The IEP does not contain any form of plan for assisting Student to transition from having solely been educated in Academy, at home and/or the private school setting to attending a District high school. [NT 1154-1158; P-33]
67. The Parents did not approve the IEP, and maintained Student's enrollment at private school for 2019 ESY and the 2019-2020 school year.
68. On July 22, 2019 the District sent the Parents a permission to reevaluate form. The Parent gave her signed consent to the reevaluation on August 13, 2019, and on August 29, 2019 sent the Parent Input form referencing private evaluations completed and in progress. [NT 607-610; S-31, P-34, P-59]
69. The Parent asked the special education director by email to tell her when the District was available to meet. The special education director did not respond to this email and is not sure if she forwarded it to anyone else in the District. [NT 610-611, 617-620; P-59]

²⁵ See the previous four footnotes addressing the carelessness with which this IEP was drafted.

Private Placement²⁶

70. The private school is an Approved Private School in the state where it is located.²⁷ [NT 798]
71. The private school population of about 250 students is largely comprised of children with an intellectual disability and/or on the autistic spectrum. [NT 799]
72. The private school's student to teacher ratio is two students to one teacher, but if needed the ratio could be one to one.²⁸ [NT 801]
73. Student's current class has pupils ranging in age from fourteen to sixteen or seventeen. [NT 838]
74. Although the private school is not a religious school per se, and religious instruction is not provided during the school day²⁹, approximately 85 to 90 percent of the students there share the same

²⁶ The representative from the private school who was called to provide information about the private school's program for Student holds a Master's degree in special education and taught Student for a portion of the 2018-2019 school year and during the summer 2019 ESY program. He has direct knowledge of the 2018-2019 school year but not the 2019-2020 school year. Given that he testified in mid-September he would have had more knowledge of Student than this year's teachers. [NT 798, 814-815]

²⁷According to MAPS for iPhone, it is between 66 and 72 miles from the Parents' address to the private school's address. Driving time ranges from 1 hour 32 minutes to 1 hour 56 minutes depending on the route chosen. [Application visited on December 10, 2019]

²⁸ The classrooms also have aides. Last year there were eight pupils in Student's class with six adults who were teachers and/or aides. This year there are nine pupils in Student's class with five adults. [NT 801-802, 815, 838-839]

²⁹Religious instruction may be provided to some pupils in the after-school program. [NT 900]

religious background as Student and Student's family. [NT 813-814, 836-837; P-57]

75. All teaching staff at private school are certified special education teachers. [NT 801]
76. The private school has related services staff in the areas of speech/language, occupational therapy, school social work and behavior specialist, and the private school also works with a developmental psychologist. [NT 802]
77. In the previous year, Student received group speech/language services in 30 minute periods twice a week and occupational therapy services in a 30 minute period once a week. [NT 816, 862]
78. The private school's regular school year runs from September through June for 180 days; school is closed for a variety of religious holidays but is open for some secular holidays to balance out the time off for religious holidays. The instructional day at private school runs from 9:30 a.m. to 2:30 p.m. [NT 852-853, 890-891]
79. The curriculum in which Student participates at the private school is aligned with the private school's State Common Core Standards. [NT 804, 816]
80. The private school uses an Orton-Gillingham research-based approach to teaching reading, the Recipe for Reading program. [NT 803-805; P-52]
81. Functional reading skills taught include such things as reading instructions, being able to read a note, being able to write a note from a phone call or take a message, looking up information in a dictionary or a directory, being able to fill out a form, write a check, and reading signs and reading directions for assembling items. [NT 808-809]

82. The private school's math curriculum was developed in-house based on state standards. It provides instruction in functional math, for example comparing prices in a store, being able to pay for something, giving change, being able to round things off to the nearest bill, and using measurements in cooking. [NT 804, 807-808, 894-895; P-52]
83. The private school's writing curriculum, the Four Square Writing Method, is research based. [NT 806; P-52]
84. The private school provides direct social skills for the workplace instruction using a defined social skills curriculum. Student's general social skills are not a concern although functional social skills are taught throughout the day. [NT 802-803, 816, 895-899; P-50]
85. Student has slowly begun to develop relationships with peers at private school. [NT 821-822]
86. There is no individualized behavior management plan in place at private school to address Student's behavioral needs; rather Student's behavioral needs are addressed through a class-wide behavior plan that relies on self-grading. [NT 820-821, 874-875, 885]
87. As did the other pupils, Student had informal individual academic motivating plans last year to address areas such as focus, attitude and class participation. [NT 875-877]
88. Elopement has not been an issue for Student at private school. [NT 823]
89. Students at the private school participate in prevocational and vocational programs; the vocational program involves job sampling. Student is in the middle of the prevocational course. [NT 809-812]
90. The private school has a life skills room, set up like an apartment, where younger students (or older students who need such) learn basic

life skills. In the upper grades students work on higher level home economics skills such as budgeting and handling a bank account.³⁰ [NT 812-813, 842]

91. The private school's ESY program runs for four hours a day for six weeks. It focuses on maintaining the main skills of English, language arts, and mathematics, and students also review social skills and general social studies concepts. [NT 825]
92. The private school representative testified that all students at the private school are required to have IEPs, per the state requirements. [NT 921]
93. The document representing Student's IEP consisted of some pages from a longer, undated document that contained "instructional goals," with no indication of present levels, any specially designed instruction, or gauges for measuring Student's progress toward those goals. The private school representative noted that this document "contained all the requirements that a typical IEP would have."³¹ [NT 904-921, 932; P-55]
94. Student made progress at private school during the 2018-2019 school year. [NT 817]
95. Student enjoys sports and music, and in the academic area enjoys reading and spelling. [NT 822]

³⁰ The private school witness was unable to describe the life skills instruction currently specific to Student. [NT 840-844. 882]

³¹ At the conclusion of the third hearing session (September 17, 2019), I ordered the production of the complete IEP that was in effect as of that specific hearing date but no document of that kind was produced. [NT 904-905, 911, 930, 934]

96. The Parents' expert witness conducted foundational activities on behalf of the family. She reviewed Student's records, interviewed the Parent and Student, observed Student, commissioned and supervised some educational testing of Student, visited the private school program, and had several meetings with private school staff. [NT 1126-1130]
97. Based on her foundational work, the Parents' expert witness opined that the private school provides Student with close adult supervision, small group and systematic multisensory instruction, small classes, data-based behavioral interventions, instruction that is centered around achieving functional goals, speech and language therapy, occupational therapy, social skills instruction, and a transition program. [NT 1186-1188, 1196–1197, 1198, 1200–1207, 1211, 1215]

Private Evaluations

98. At the June 12, 2018 IEP meeting, the Parent's professional advocate advised the team that she was recommending to the Parent that she submit formal requests for independent evaluations in the areas of speech/language and occupational therapy. The special education director present at the IEP meeting advised the Parent that those requests would need to be submitted in writing to the District; the professional advocate was aware of the District's response to the Parent.³² [NT 746-747]
99. At the June 12, 2018 meeting the District did not offer the Parent a permission to evaluate form in the area of occupational therapy, but

³² The Parent reported that she had no recollection of the professional advocate's advising her regarding potential requests for independent evaluations in the areas of speech/language and occupational therapy. I find the professional advocate's testimony credible on this point of fact. [NT 192]

rather said that it would provide a screening once Student entered the District placement. [NT 563, 653]

100. At the June 12, 2018 meeting, after the psychologist discussed her report, there was a discussion about Student's needing a full speech/language evaluation. There is no record of the District's offering the Parent a permission to evaluate in the area of speech/language. [NT 650-651]
101. Each of the private evaluations was conducted after June 12, 2018 when the Parent had withdrawn from the IEP process, and after the May 29, 2019 initiation of the due process complaint: Psychological Evaluation to clarify an Autism Diagnosis (June 30, 2019 and July 11, 2019), Speech/Language Evaluation (June 28, 2019) and Occupational Therapy Evaluation (July 5, 2019). [P-35, P-36, P-37]

Legal Basis

Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in " equipoise ", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers 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); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); .see also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). I generally found the witnesses to be credible, testifying to the best of their knowledge and recollection about events pertinent to the matter. In one instance on a fact of importance I found that the family friend's testimony was less credible than that provided by District staff and the professional advocate. The expert witness's testimony was particularly helpful, and I found that her willingness to share her expertise in the areas of 1:1 assistance and effective transition from a private school to a public school setting to be generous and of potential great help to the parties.

District's Obligations toward Student

The IDEA and state and federal regulations obligate local educational agencies (LEAs) to locate, identify, and evaluate children with disabilities

who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125. Those laws also obligate LEAs to provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In Pennsylvania, the school district of residence is generally responsible for educating students residing within its boundaries, including children with disabilities. 24 P.S. §§ 13-1302, 13-1372; 22 Pa. Code § 11.11.

A school district's obligation to provide FAPE is triggered by the student's residency, not enrollment. In a case where an eligible child is not currently enrolled in the school district of residence, but the parents ask that school district to develop a special education program for him or her, it is incumbent upon the district to comply. *James v. Upper Arlington City School District*, 228 F.3d 764 (6th Cir. 2000)(holding that a school district's obligation toward a child with a disability arises from his or her residence within the district and not on enrollment); *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011)(concluding that a parent's request for an evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop an IEP).

FAPE

Student is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE “consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction.” *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). The IDEA contemplates educational programs tailored to “how

the child's disability affects the child's involvement and progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa). In *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court 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."

Evaluations

Under the Pennsylvania evaluation timeline, an evaluation "shall be completed and a copy of the evaluation report presented to the parents no later than 60-calendar days after the agency receives written parental consent for evaluation, except that the calendar days from the day after the last day of the spring school term up to and including the day before the first day of the subsequent fall school term will not be counted." 22 Pa. Code § 14.123(b). In *P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727(3rd Cir. 2010), under a fact pattern similar to the instant matter, the Third Circuit upheld a Pennsylvania Appeals Panel's reversal of part of a hearing officer's award of compensatory education for an evaluation that was "unfortunately" delayed (Third Circuit) and/or "egregiously" delayed (Hearing Officer) because there was no evidence that the parents would have removed the child from private school and enrolled the child in the school district for the last two months of a school year had the requested evaluation been issued on time. However, *P.P.* is distinguishable from the instant matter in that in this case both the Parent and Student's private school (Academy) believed that the private school was no longer appropriate, and there was evidence that when the Parent requested the evaluation she did intend to enroll Student in the District upon an appropriate offer of FAPE.

Compensatory Education

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d. Cir. 1999). Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method (“hour for hour”), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*. An alternate method, (“same position”), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014); *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010). The “same position” method has been endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) although the court also cites to *M.C.*

The “same position” method, has significant practical problems in that unless the parents produce a credible expert to testify about what is needed to bring the child up to the same position he or she would occupy but for the denial of FAPE the hearing officer is left with having to craft a remedy based on educated estimation. Although on several occasions this hearing officer has been able to do so with relative confidence, the instant matter does not present such an opportunity. Therefore the default “hour for hour” approach will be used.

Tuition Reimbursement

Parents who believe that a district's proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement, but they place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE, otherwise acted appropriately, or that the parents' selected placement is inappropriate. "Parents who believe that a public school is not providing a FAPE may unilaterally remove their disabled child from that school, place him or her in another school, and seek tuition reimbursement for the cost of the alternate placement." *Mary T. v. Sch. Dist. of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009) (citing 20 U.S.C. §1412(a)(10)(c); *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 374 (1985)). "A court may grant tuition reimbursement if the School District failed to provide the required FAPE and the parents sought an appropriate private placement." *Id.* A court may reduce or even deny the reimbursement if:

- 1) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense;
- 2) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of [their intent to enroll their child in private school at public expense] or
- 3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents. 34 CFR 300.148(d).

In *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985) the United States Supreme Court established the right to consideration of tuition reimbursement for students placed unilaterally by their parents. *Florence County Sch. Dist. Four V. Carter*, 114 S. Ct. 361 (1993) later outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are:

- 1) Whether the district's proposed program was appropriate;
- 2) If not, whether the parents' unilateral placement was appropriate, and;
- 3) If so, whether the equities reduce or remove the requested reimbursement.

This three-part test is referenced as the "Burlington-Carter" test for tuition reimbursement claims under the IDEA. The second and third tests need be applied only if the first is resolved against the school district.

Section 504/Chapter 15 – Denial of FAPE

Section 504 and Chapter 15 also require that children with disabilities be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §15.1). The provisions of IDEA/Chapter 14 and related case law, in regard to providing FAPE, are more voluminous than those under Section 504 and Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial of FAPE. (See generally *P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)). Therefore, the foregoing analysis under the IDEA is adopted here for purposes of considering the claim under Section 504/Chapter 15.

Discussion

Delayed Evaluation Denied Student FAPE: Compensatory Education Is Due:

There is no dispute between the parties about Student's eligibility for special education, about Student's entitlement to FAPE, and/or about the District's responsibility to offer Student FAPE.

During the 2016-2017 school year the Parent and the private school where Student had attended during Student's entire educational career to date concluded that the private school was no longer appropriate for Student. The Parent therefore requested that the District conduct a multidisciplinary evaluation and provide Student a placement.

Although the Parent diligently pursued the District, the District took approximately six weeks to issue a Permission to Evaluate form and then took nearly one year to complete its evaluation. The delay in producing an evaluation was a significant procedural violation. A procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits.") *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010) The District's procedural violation clearly represented a loss of educational opportunity for Student and denied Student educational benefit, as Student remained in a placement deemed inappropriate by both the Parent and the placement's administrative staff.

Because this procedural error of significantly delaying the production of an evaluation and the subsequent delay of offering Student an IEP denied Student educational benefit, Student is entitled to compensatory

education.³³ I conclude that Student was denied FAPE for the summer of 2017 (ESY program) and for the entire 2017-2018 academic year. I calculate that this compensatory education shall be in the amount of 72 hours for ESY for summer 2017 (4 hours per day x 3 days per week x 6 weeks)³⁴ and 900 hours for the 2017-2018 school year (5 hours per day of special education programming for 180 days)³⁵ for a total of 972 hours.

The compensatory education hours awarded to Student are to be used exclusively for educational, developmental and therapeutic services, products or devices that address Student's identified needs. The value of these hours shall be based upon the usual and customary rate charged by the providers of educational, developmental and therapeutic services in the county where the District is located and geographically adjacent Pennsylvania counties. The compensatory services may be used after school,

³³ The District asserts in its closing argument that *P.P. v. West Chester Area School District*, 585 F.3d 727, 738–40 (3d Cir. 2009), weighs against the Parents' request for compensatory education because *P.P.* held that the child was not entitled to compensatory education for the time in which he was unilaterally enrolled at a private school. As *P.P.* is one of my previous cases I am very familiar with the court's findings. I will adopt the reasoning in the Parents' closing argument that *P.P.* is distinguishable. "There, the evidence showed that (1) even if the district offered a timely, appropriate evaluation and IEP, the parents would have kept the child in private school and (2) the child received appropriate services in private school. In the instant matter the record shows that Parents would have placed Student in the District rather than [Academy] in 2017 if the District had offered an appropriate placement and also shows that Student did not receive appropriate services at [Academy] during the relevant time."

³⁴ The Parents' expert witness opined that Student needed 200 hours of ESY. [NT 1181-1183] After consideration, I find that estimate excessive for a summer program for Student.

³⁵ Student would very likely participate in general education, at a minimum, for specials (e.g. art, music) and lunch such that special education services, in my calculation would be provided for 5 hours per day.

on weekends and in the summers until Student's 21st birthday. The services are meant to supplement, and not be used in place of, services that may be in Student's future IEPs should Student enroll in the District. The Parents will choose how to use the compensatory education hours.

The Period from June 12, 2018 to June 18, 2019: No Compensatory Education Is Due:

The Parent had been assisted by two capable individuals as of the June 12, 2018 IEP meeting. The District had considerable experience with one of these, the Parent's professional advocate, having collaborated with her in the interests of a number of children. After the IEP team met on June 12, 2018 the District had an expectation and the professional advocate had an expectation: The District expected that the professional advocate would sit down with the Parent and the other assisting person to go over the draft IEP very carefully, discuss all concerns and requests, and then return an annotated IEP for further discussion and negotiation with the District. The professional advocate expected that she and the Parent and the other assisting person would meet, discuss, dissect and annotate the draft IEP which would then be returned to the District for further discussion and negotiation.

Neither the District's nor the professional advocate's expectations were met. The Parent withdrew from both the professional advocate and from the District, thus abruptly abandoning the IEP process. I find that the District bears no fault for not pursuing the Parent, particularly since it knew and trusted the professional advocate with whom the Parent was working. I find the director of special education's reasoning credible: based on experience with unenrolled students, it is not uncommon for parents to ask for an evaluation and an IEP and then decide to opt for private school for their children. The Parent did not get back to the District and the Parent did not enroll Student in the District.

Given that it was the unequivocal understanding of the District and the Parent's professional advocate that the June 12, 2018 IEP was a working draft subject to further refinement and negotiation I decline to dissect and analyze the appropriateness of that IEP as of the time the Parent withdrew from the process.³⁶ Had the Parent, with the assistance of her very experienced professional advocate, seen the IEP development through to its proper refinement and conclusion, the resultant product would be subject to my rigorous examination. Student is not entitled to compensatory education in any amount for summer 2018 ESY or for the 2018-2019 school year.

Insufficiency of Ten-Day Notice:

The law regarding the sufficiency of a parent's 10-day notice to a District, when seeking tuition, is clear. The cost of reimbursement [for tuition] ... may be reduced or denied ... if 10 business days ... prior to the removal of the child from the public school, the parents did not give written notice to the public agency of their intent to enroll their child in private school at public expense; or upon a judicial finding of unreasonableness with respect to actions taken by the parents. 20 U.S.C. §1412(a)(10)(C); see also 34 C.F.R. §300.148. A proper ten-day notice gives a school district an opportunity to respond and offer its own program. See *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. at 247 ("[C]ourts retain discretion to reduce the amount of a reimbursement award if the equities so warrant—for instance, if the parents failed to give the school district adequate notice of their intent to

³⁶ The June 2018 draft IEP did not represent a final proposed program ripe for consideration. As did my hearing officer colleague in *Z.Z. v. Pittsburgh Public School District*, I find that because the District has not proposed a final program for Student, it is "not necessary to further address the substantive appropriateness of the draft IEP." See ODR File No. 16353-1415KE, (*affirmed by* No. 311 C.D. 2016, 2016 WL 6994971 (Pa. Commw. Ct.) (nonprecedential).

enroll the child in private school"). With regard to the June 2018 draft IEP, the Parents' request for tuition reimbursement is subject to challenge on several grounds:

- 1) The Parent did not indicate her intent to enroll Student in a private placement at the June 12, 2018 IEP meeting or during any period thereafter until the March 26, 2019 letter;
- 2) The March 26, 2019 letter was written after Parent had already started Student in the private school as of December 2018 rather than ten days prior to enrollment in the private school³⁷;
- 3) The Parent acted unreasonably by abruptly withdrawing from the IEP process following the June 12, 2018 IEP meeting.

Tuition Reimbursement based on the June 18, 2019 IEP:

The Parents' request for tuition reimbursement will now be considered in the light of the June 2019 IEP.

The District developed the June 2019 IEP without holding an IEP meeting and without input from parents. *See Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 994 (2017) (underscoring that IEPs "must be drafted in compliance with a detailed set of procedures" which "emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances").

The June 2019 IEP proposed placing Student in a supplemental Life Skills Support program, with 70% of the day being in special education settings and 30% of the day being in general education settings. Student was to receive a 1:1 aide for safety and instructional purposes. Student was

³⁷ To the extent that Parent argues that actual enrollment was not accomplished in order for Student to start attending the private school in December 2018, this argument is rejected.

to receive speech/language services. Student was to receive curb-to-curb transportation. Staff working with Student were to receive consultation.

The IEP the District offered Student in June 2019 was flawed in many respects. There were several deficiencies that I attribute to carelessness: Student's grade is misidentified; the location of implementation of the IEP was internally inconsistent as well as inconsistent with what the Parent had been told previously; although the Transition section indicates that the measurable post-secondary goals were based on an age-appropriate transition assessment there is no evidence that such a transition assessment was conducted; the minutes Student was to receive the related service of a 1:1 adult did not correspond to the listed times and locations where the service was to be provided; the objectives under a measurable annual goal for one subject (math) related instead to another completely different subject (creative writing).

Other defects in the IEP were substantive:

- The IEP does not contain updated Parental Concerns.
- The Present Levels of academic achievement and functional performance in the June 2019 IEP are identical to those written into the May 2018 and the June 2018 draft IEPs and those levels were outdated even at the time the May 2018 and June 2018 IEPs were drafted.
- The Goals and Objectives in the IEP are over two years outdated, being based upon the March 2017 evaluation from a private agency and the May 2018 and June 2018 draft IEPs.
- The IEP does have short term objectives and modifications/SDI attached to each goal, but the goals' baselines imbedded in the Present Levels are outdated, and there are no new baselines, making the objectives meaningless.

Some of these defects could have been cured if the District had immediately offered to reevaluate Student upon receipt of the Parents' March 26, 2019 letter.³⁸ I have absolutely no doubt that had the District quickly conducted a thorough multidisciplinary evaluation it could have offered a legally defensible IEP. Make no mistake, I also believe, contrary to the opinions of some of the Parents' witnesses, that the District could have safely and appropriately integrated Student into a District high school's special education and general education settings, including successfully accommodating Student's familial/cultural experiences, particularly if the location of the high school was in Student's home community.³⁹

Unfortunately the District offered neither a comprehensive evaluation nor an appropriate IEP for Student's summer ESY programming or for the 2019-2020 school year. Having found against the District on the first prong of the *Burlington-Carter* analysis, I must now examine whether the Parents have met their burden of proof regarding the appropriateness of their unilateral placement.

Appropriateness of Private Placement:

In their closing brief, the Parents report that private school has been recognized "as a placement that affords appropriate, individualized services to children with disabilities. See *D.S. v. Howell Twp. Bd. of Educ.*, 2019 N.J. Agen. LEXIS 437, *28 (NJ OAL 2017) (ordering stay put at [private school]

³⁸ The letter seems not to have been brought to the attention of appropriate District staff until May 3, 2019.

³⁹ The District high school where I would expect Student to be placed is located in a neighborhood that has a large population of families culturally similar to Student's family. [NT 934] I expressed my opinion on this subject on the record and having reviewed the complete file I can find no credible basis on which to revise my opinion. [NT 1091]

for a child with intellectual disability); *C.B. v. Lakewood Bd. of Educ.*, 2001 N.J. Agen. LEXIS 554, *25 (NJ OAL 2001) (“The Board does not dispute [private school] provided E.B. with an appropriate program for his needs.”).” These cases however are not determinative of the question of the private school’s appropriateness for Student.

A private placement is appropriate if it confers meaningful benefit, that is, if it provides significant learning and confers meaningful benefit. The placement need not meet the criteria of a FAPE and it also need not be perfect, only appropriate. See *Lauren W. v. DeFlaminis*, 480 F.3d 259, 76 (3d Cir. 2007); *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1070–71 (D.N.J. 2011)

The private school placement is appropriate because it is reasonably calculated to confer meaningful benefit. The private school offers Student specially designed instruction, using research-based curricula, to address academic, functional, adaptive and social skills needs, the related services of speech and language therapy and occupational therapy, and prevocational and vocational training.

Equitable Considerations:

I find no equitable grounds for reducing or removing the District’s responsibility to reimburse the Parents for tuition and transportation costs. Nevertheless, I have deep concerns about the length of time Student spends commuting to and from school. The lengthy commute consumes a considerable amount of resources, both in terms of Student’s time away from family and leisure activities and in terms of the financial resources of the District. Taking an average travel time of 1 hour and 15 minutes each way (according to the Parent) or 1 hour and 40 minutes each way (according to MAPS) Student spends from 2 hours and 30 minutes to 3 hours and 20 minutes per day traveling to and from school. Taking 68 miles as the

average, a daily round-trip is 136 miles, and 180 days results in 24,480 miles. Given the most recent government mileage reimbursement rate of 0.58 cents per mile as of 1-1-2019, transportation reimbursement costs could reach the amount of \$14,198 per year. On the singular basis of expenditure of resources for transportation, I am loath to establish the private school as Student's placement for the 2019-2020 school year. However, I accept the Parents' research on this issue which, while not binding on me, is persuasive.⁴⁰

Private Evaluations:

Each of the private evaluations for which the Parents seek reimbursement was conducted after they had initiated Due Process through the filing of their complaint. Although there are indications that the results of these evaluations are being used to inform program planning for Student at private school, it is clear that they were at least in part intended to support the Parents' position in litigation. Reimbursement for these evaluations will be denied.

Dicta:

As noted above, I find that the excessive travel time and cost of travel reimbursement to support Student's attendance at the private school for the

⁴⁰ *S.A. v. N.Y.C. Dep't of Educ.*, 2014 U.S. Dist. LEXIS 42649, at *50 (E.D.N.Y. Mar. 30, 2014) (upholding a Hearing Officer finding that a private placement was appropriate despite a 90-minute commute because "there was no evidence that the trip adversely affected the student's performance or behavior"); *A.V. v. Capital Area Inter. Unit*, No. 15833-1415, at 8–10 (ODR July 31, 2015) (finding a placement appropriate despite a lengthy commute because the record did not establish that the commute harmed the child); *C.J. v. Penn Manor Sch. Dist.*, No. 17382-1516, at 11, 22, 26 (ODR July 11, 2016) (finding a placement appropriate that was 66 miles from student's home and ordering the District to reimburse parents for transportation expenses).

2019-2020 school year troubling. I believe that it would greatly benefit Student and both parties if two main avenues were explored starting immediately, proceeding from the premise that the Parent was seeking a placement in the District when she first approached her neighborhood school in March 2017. First, given the Parent's having signed a permission to reevaluate form on August 13, 2019, the District should begin a thorough, thoughtful, comprehensive multidisciplinary evaluation of Student and utilize the results to form the basis of an IEP drafted collaboratively and in scrupulous detail with the Parent and a complete IEP team. The IEP should be designed to be implemented in Student's neighborhood high school and should include a 1:1 aide for as long as the IEP team deems this assistance necessary. [See persuasive rationale for a 1:1 aide in a public high school at NT 1150-1151] The IEP must also include a plan for a successful transition to the public high school. [See detailed explanation of such a plan at NT 1154-1158] Second, given that one of the reasons the Parent was unsuccessful in locating a Philadelphia area private placement in fall 2018 involved a scarcity of openings that time of year, the Parent should also immediately resume her search for a placement for Student in the regions of Philadelphia and its suburbs. I strongly urge the parties to work together to locate, for the coming academic year, an appropriate educational setting, whether public or private, for this child who has another five years of school attendance ahead.

Order

It is hereby ordered that:

1. Student is entitled to compensatory education for the period of time after the District should have produced its evaluation but did not, as the District's delay in evaluating Student and proposing an IEP constituted a procedural violation that resulted in a denial of

educational benefit for Student. Student was denied FAPE for the summer of 2017 (ESY program) and for the entire 2017-2018 academic year. Accordingly, the compensatory education shall be in the amount of 72 hours for ESY for summer 2017 (4 hours per day x 3 days per week x 6 weeks) and 900 hours for the 2017-2018 school year (5 hours per day of special education programming for 180 days) for a total of 972 hours.

2. The Parent's dropping out of the process of crafting an IEP after the June 12, 2018 IEP meeting, giving the District no notice or reason for her discontinuing the process, absolves the District of further responsibility for compensatory education.
3. The IEP offered to Student on June 18, 2019 was inappropriate.
4. The Parents' unilateral placement at the private school for summer 2019 ESY and academic year 2019-2020 meets the standard of appropriateness for private placements.
5. The Parents are entitled to reimbursement of tuition and transportation costs for Student's attendance at the private school for the summer 2019 ESY program and the 2019-2020 school year.
6. There are no equitable considerations that would reduce or remove the District's responsibility for tuition and transportation reimbursement.
7. The District is not required to reimburse the Parents for the private evaluations they obtained subsequent to initiating Due Process.

Any claims not specifically addressed by this decision and order are denied and dismissed.

December 10, 2019

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D. CHO
Special Education Hearing Officer
NAHO Certified Hearing Official