

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: I. M.

Date of Birth: [redacted]

CLOSED HEARING

ODR File No. 16189-14-15 KE

Parties to the Hearing:

Representative:

Parents
Parent[s]

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Date Record Closed:

January 4, 2016

Dates of Hearing:

6/22/2015, 8/19/2015, 9/17/2015,
9/30/2015, 11/12/2015, 11/18/2015,
12/8/2015, 12/23/2015

Date of Decision:

January 8, 2016

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is an early elementary school-aged student in the School District of Philadelphia (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student attended a District program in the fall of 2013 through the end of October 2014, after which Student was provided a home-based program arranged by the Parent without involvement by the District. Student's Parent filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes, during the time period in question, May 1, 2014 through the present.

The case proceeded to a due process hearing convening over multiple sessions, at which the parties presented evidence in support of their respective positions.⁴ The Parent sought to establish that the District failed to provide Student with FAPE throughout the time it implemented its educational program for Student, and requested compensatory education; she also sought reimbursement for the expense incurred in providing Student with the home-based program. These remedies were requested to be provided in the form of a special needs trust. The District maintained that its special education program, as offered and implemented, was

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.

² 20 U.S.C. §§ 1400-1482.

³ 29 U.S.C. § 794.

⁴ References to the record will be made as follows: Notes of Testimony (N.T.), Parent Exhibits (P), School District Exhibits (S), and Hearing Officer Exhibits (HO). References to duplicative exhibits may be to one or the other or both. All exhibits were admitted at the final hearing session, with the exception of P-65 which was taken under advisement. The District's objection to that exhibit (N.T. 184-85, 1527) is hereby sustained, for two reasons: first, that it was not disclosed on a timely basis and, even more significantly, that there was no testimony about the document (a short article that purports to discuss autism programs including the specific program Student attended in the District), and any probative value is outweighed by its hearsay nature and apparently limited if any connection to this specific proceeding.

appropriate for Student; and that no remedy was due.

For the reasons set forth below, I find in favor of the Parent.

ISSUES

1. Whether the District proposed and implemented an appropriate program to meet Student's needs;
2. If the District did not offer and implement an appropriate program for Student, are the Student and Parent entitled to compensatory education (for the period of May 1, 2014 through October 31, 2014) and reimbursement for the cost of Student's home-based program (from November 1, 2014 through the present);
3. If the Student and Parent are entitled to compensatory education and/or reimbursement, should the remedy be provided in the form of a special needs trust?

FINDINGS OF FACT

1. Student is an early elementary school-aged student who is a resident of the District. Student is a child with a disability under the IDEA and Section 504 and is eligible for special education pursuant to the IDEA under the classifications of Autism Spectrum Disorder (ASD), and also meets the criteria for an Intellectual Disability (ID). (N.T. 44-45, 48)

General Background

2. Student's developmental levels are far below age expectations across all domains. (N.T. 1073, 1079-81, 1087-89, 1377-78; S-24)
3. Student is nonverbal but can and does make vocalizations. Student has begun to communicate using the Picture Exchange Communication System (PECS) to request objects, but remains significantly impaired in the area of communication. Student is not able to use an iPad or similar device. (N.T. 48, 51, 60, 667, 1073, 1079, 1472)
4. Student exhibits problematic behavior including physical aggression, loud vocalizations, and elopement. (N.T. 48-49)
5. Student requires constant supervision, and has no awareness of safety or danger. (N.T. 49, 1184)

6. Student was evaluated by a developmental pediatrician in July 2010, who concurred with a previous diagnosis of ASD and recommended Applied Behavior Analysis (ABA) for Student. (N.T. 52; P-18)
7. Student entered the District in the fall of 2013 in an Autistic Support classroom for the kindergarten year. (P-20 pp. 1, 4)

Education-related Evaluations

8. The District conducted an assistive technology/augmentative communication evaluation at the Parent's request in November 2013. The speech/language therapist who conducted this evaluation recommended a multi-modality approach to communication, manipulation of the environment, opportunities to make choices throughout the day, and encouragement of functional communication. Exploration of picture exchange was also suggested although it was noted that Student did not discriminate between pictures. (P-19)
9. Student was evaluated by the District in November 2013. The Reevaluation Report (RR) summarized Student's delays across domains and current program. No tests could be administered, but rating scales supported the diagnosis of autism and reflected extremely low adaptive behavior functioning; the RR also included a recent speech/language assessment, the augmentative/alternative communication evaluation, and occupational and physical therapy evaluations. Student was determined to be eligible for special education on the bases of ASD and a Speech/Language Impairment. (P-20)
10. At the time of an April 2014 agreement between the parties, the Parent agreed that Student would be re-evaluated, and that the IEP team would reconvene to consider the reports of the Parent's private evaluator. The District sent the Parent a form to provide written consent to the re-evaluation. (N.T. 1369; P-63 pp. 1-2; S-3, S-5 p. 3)
11. The Parent obtained an independent evaluation in April 2014 by a private Board Certified Behavior Analyst (BCBA) that included a Functional Behavior Assessment (FBA), the VB-MAPP (Verbal Behavior Milestones and Assessment Placement Protocol), and the ABLLS-R (Assessment of Basic Language and Learning Skills – Revised). The FBA targeted Student's eloping and pica behaviors, and the function of both was determined to be gaining sensory input, with a milder function of accessing tangibles; elopement also served a function of escape/avoidance. (N.T. 52; P-21)
12. The BCBA recommended a minimum of twenty hours of intensive one-on-one instruction using ABA at school, with an additional ten hours per week in the natural environment also using ABA, and ten hours of services at home for pre-teaching and practice of skills. She emphasized the need for a BCBA to be involved in the implementation of the program. The BCBA made a number of specific suggestions for Student's educational program, including functional communication with the same system used across environments; consistent data collection presented in graph format; programming to develop play skills, increase socialization, and learn self-care skills; and a behavior plan based on ABA. (P-21)

13. The District conducted an FBA in June 2014 that targeted Student's elopement from the classroom and physical aggression. The hypothesis was that Student would elope when frustrated or when an opportunity to do so (such as inattention by the one-on-one aide) occurred. The FBA recommended positive reinforcement and a Behavioral Support Plan. (S-8)
14. The District conducted a Psychoeducational Reevaluation (PRR) and issued a Reevaluation Report (RR) on October 30, 2014. The Parent was unaware the reevaluation was being conducted, but did complete questionnaires and rating scales that were sent from the District that were included in the PRR and RR. She also spoke with the school psychologist as part of that reevaluation. (N.T. 80-82, 137-39, 155, 1373-76; S-16, S-17, S-18, S-23)
15. For the PRR, the District school psychologist obtained parent input and information from Student's one-on-one aide, and reviewed Student's records. She conducted four observations of Student but did not observe Student interacting with peers. (N.T. 1382; S-24)
16. Cognitive and academic achievement assessments for the PRR were attempted but discontinued when Student exhibited a lack of understanding of what was expected. Input from the Parent and one-on-one aide on Student's adaptive behavior functioning reflected extremely low skills; and autism rating scales supported continuation of the diagnosis. Previous evaluations were also summarized. Student was determined to be eligible for special education on the bases of ID and ASD. (S-24)
17. The RR incorporated the PRR, also concluded that Student met the criteria for IDEA eligibility on the bases of ID and ASD. Recommendations were for following class routines, receptive language, and self-help skills, as well as occupational and speech/language therapy. (N.T. 1379; S-23)
18. Student's teacher completed a functional communication skills checklist in November 2014. That document reflected that Student had very limited expressive language skills but was learning to request help or the bathroom, to accept or reject items, and to wave to others. Student similarly had very limited receptive language skills, but was learning to vocalize and orient to the speaker when Student's name was called and to respond to important safety directions. (S-33)
19. The District issued another RR on November 25, 2014. The Parent did not give consent to this evaluation and was not asked to provide input for that report. This RR is the same as the October 2014 RR, with the addition of a brief summary of the functional communication skills checklist and a new recommendation for programming and instruction in interpersonal communication. (N.T. 82-83; S-34)

IEP Development

20. In September and early October of 2013, the Parent contacted the District with respect to concerns over Student's then-current educational programming and its failure to meet Student's needs. Among other things, the Parent expressed concerns about and requests

for classroom structure and routines; occupational, physical, and speech/language therapy (including a means of communication); interaction with typically-developing peers; and ABA-based interventions. (P-2, P-3)

21. An Individualized Education Program (IEP) was developed for Student in November 2013. In the special considerations section, the document indicated that Student's behaviors did not impede Student's learning or that of others. This IEP proposed Supplemental Autistic Support in a District elementary school. (S-2)
 - a. The present levels of academic achievement and functional performance section summarized the results of recent evaluations, focusing on Student's communication and adaptive behavior skills. Needs were noted for pre-academic skills, social interaction and communication, and functional daily living skills. (S-2)
 - b. Goals addressed walking in the hallway; functional communication (greeting, requesting, seeking attention, and refusing); pre-toileting skills; cleanup after meals; matching pictures and objects; corresponding numbers to objects, letter identification, sorting items, and functional play with peers. Program modifications and specially designed instruction were provided for each goal. (S-2)
 - c. Occupational and speech/language therapy, in addition to a one-on-one assistant, were provided as related services; Student was also to be provided with curb to curb transportation with a harness. (S-2)
 - d. Student was eligible for Extended School Year (ESY) Services, which would address sorting, functional play, functional communication, and walking in the hallway. (S-2)
22. The Parent approved a November 2013 Notice of Recommended Educational Placement (NOREP) for Student but with the caveat that she wanted Student to receive services with one-on-one support at school; she did not believe the IEP was appropriate. (P-4)
23. A meeting of Student's IEP team convened sometime in early June 2014. At that meeting, the team discussed goals to address Student's need to develop early learning, or precursor, skills, with input from the Parent and her educational consultant. Following that meeting the District sent a proposed IEP to the Parent for Supplemental Autistic Support in a District elementary school. (N.T. 877, 1114-15, 1122, 1128, 1134-35, 1457; P-5, P-66 pp. 2-3; S-7)
 - a. Present levels of academic achievement and functional performance described Student's skill levels in the District's STAR (Autistic Support) Program; fine motor skills (including sensory needs and hand-over-hand assistance using writing instruments); limited functional communication ability; lack of functional social interaction; and need to learn functional daily living skills. More specifically in goal areas, present levels in the area of Behavior indicated behaviors of concern as elopement, pica, meeting sensory needs appropriately,

and engagement in non-preferred tasks, with a decrease in elopement and aggressive behavior and an ability to follow routines without frustration; in the area of Communication indicated that Student was a pre-symbolic communicator who did not recognize objectives and pictures but would use eye gaze, reaching, and some vocalizations, with some understanding of exchanging a picture icon for a preferred item, use of a voice output device, and the ability to follow some directions with prompting; and in the area of Life Skills indicated limited toileting, feeding, domestic cleaning, and play skills with prompting; in the area of Functional Academics, Student was at a pre-academic level. The special considerations section noted that Student exhibited behaviors that interfered with Student's learning. (P-5)

- b. Annual goals addressed giving back unwanted items (baseline of 0); attending to tasks without elopement (baseline of 0); acquiring 20 single word requests (manding) (via signs, picture icons, or voice output devices, with baseline of 0); demonstrating pre-toileting skills with prompts (no baseline); cleaning Student's eating area (no baseline); looking at an array of objects (baseline of 0); and joint attention (baseline of 0). Program modifications and specially designed instruction were provided for each goal. (P-5)
 - c. Occupational and Speech/Language Therapy, in addition to a one-on-one assistant, were provided as related services. There was no behavior plan although one was referenced in the present level section of the IEP. (P-5)
 - d. Student was eligible for Extended School Year (ESY) Services, which would address looking at an array of objects, giving back unwanted items, joint attention, and acquiring single word requests. ESY services were proposed at 690 minutes per week for a five-week period (excluding the Fourth of July holiday). (P-5)
24. After the June 2014 IEP meeting, the Parent wrote a letter to the District outlining her concerns with Student's program. She did not believe that the District adequately addressed any of those specific concerns. Specifically, the Parent requested documentation of the ABA services in the IEP; BCBA consultation by her educational consultant; increased speech/language and occupational therapy; a clear sign for toilet training known by all who worked with Student; and revisions to the IEP goals including an ESY program addressing all of those goals and services. (N.T. 65, 69-75; P-6; S-10)
25. The Parent sent a second letter on July 7, 2014, reiterating the matters set forth in the June 2014 letter regarding the most recent IEP and noting no response. Due to her belief that the District had not offered FAPE to Student, she also asked that the District fund Student's placement in a home program. (P-7)
26. The District responded by letter of July 14, 2014, explaining that it could not conduct an IEP meeting over the summer, but offered to convene one as soon as school began in the fall to address the Parent's concerns. The District also declined the request for tuition

reimbursement to provide the home program at public expense. (N.T. 68, 218, 256-57; P-8, P-9, P-10; S-13)

27. The District sent an IEP dated August 25, 2014 to the Parent prior to the start of school as its “offer of FAPE” for the 2014-15 school year (P-11 p. 1). The IEP team did not convene again after the June meeting before that document was mailed to the Parent. (N.T. 257; P-11; S-14)
28. The August 2014 IEP revised the goals and short term objectives, with significant changes to the communication and toileting goals. The communication/manding goal added use of ABA interventions and increased expectations to 50 single word requests; and the toileting goal added task analysis and increased expectations to independent toileting. Baselines were removed from several goals that had them in the prior version. Monthly consultation of the occupational and speech/language therapists with the classroom teacher was also added. This IEP proposed Supplemental Autistic Support in a District elementary school. (P-11; S-14)
29. The Parent approved the August 2014 NOREP by noting that she wanted Student to continue to receive services, but did not believe the IEP was appropriate or sufficient; and, she stated that she still intended to pursue private programming at public expense. (P-11 pp. 40-42, P-12; S-15)
30. The Parent sent another letter to the District on October 31, 2014, expressing the same concerns with Student’s program as in her June letter. She also advised the District that she had arranged for a home-based ABA program for which she would seek reimbursement. (P-13; S-27)
31. An IEP meeting convened on November 19, 2014 that included a discussion of the most recent RR. (N.T. 134, 137-39, 916-17, 1128, 1380-81; P-66 p. 4; S-32)
32. Another meeting convened on November 25, 2014. At that meeting, there were discussions of use of a special chair and the PECS program. The District Speech/Language Pathologist participated in the meeting by speakerphone, and the assigned Director of Special Education also participated briefly by telephone to essentially end the meeting. (N.T. 220, 221-22, 917, 1128, 1136-1141, 1261, 1519-20; P-66 p. 5)
33. The District prepared a revised IEP after the November 25, 2014 meeting. This IEP updated Student’s disability classification and present levels, including recent evaluation information. Needs continued to be pre-academic skills, development of functional interaction with peers, and functional daily living skills; the annual goals were essentially unchanged from August. The program proposed was Supplemental Multiple Disabilities Support in a District elementary school. (S-38)
34. Another IEP meeting convened in January 2015. The team talked further about multiple disabilities support. The Parent’s educational consultant requested that a District BCBA supervise Student’s program; when the District asked for the opportunity for its BCBA to observe student, the consultant suggested that he or she observe Student’s home-based

program. (N.T. 147-48, 150, 207-08, 230-31, 922, 1128, 1147-48, 1150-51, 1262-64; P-66 p. 6; S-41)

35. The Parent visited a District multiple disabilities support classroom after it was proposed for Student. She did not believe that placement was appropriate for Student because it did not offer ABA. (N.T. 78-79, 207-08, 858-60, 926)
36. Following the January 2015 IEP meeting, the District sent a revised IEP to the Parent. This IEP provided some updated present level information. The annual goal for acquiring 20 single word requests/manding was changed to use of a picture symbol to make requests. Otherwise, the IEP was left unchanged, proposing Supplemental Autistic Support in a District elementary school as before. (P-14; S-43)⁵
37. Baselines for the goals were discussed at each IEP meeting. (N.T. 93)
38. The Parent asked the private BCBA to go to Student's school and work with District staff. The District offered to fund the private BCBA at school for one or two hours each day to provide ABA services, but the Parent did not agree to this proposal. The District also offered to have one of its BCBA's observe Student at school and conduct an FBA if Student were to return. (N.T. 76-77, 87, 226-27, 235-38, 244, 1012-13)
39. Several of the IEP meetings were unproductive. District representatives believed that the Parent's educational consultant was difficult to work with, while the Parent and her representatives believed that the District predetermined the length and content of IEP meetings. (N.T. 139, 162-63, 221, 230-32, 250-51, 252-53, 256, 461-62, 784-86, 866, 877-78, 917-18, 931-35, 940-41, 951-52, 1131, 1133-34, 1166, 1502, 1521-22)

Programming in the District

40. Student entered the District in the fall of 2013, and as of January 2014 was in a kindergarten through second grade Autistic Support program in a particular elementary school. (N.T. 48, 281-82)
41. Student's father took Student to school every day, and Student was often late arriving. There were also occasions when Student's one-on-one aide was not yet available when Student arrived, so Student had to wait for the aide to be available before going to the classroom. (N.T. 410, 414, 463, 812, 868-69, 1514)
42. Student used a voice output device at school that was programmed to play a recorded message at the push of a button. Student was able to push the button to play a phrase such as "Good morning" that an adult recorded for that device. The recording could be changed based on the current activity. (N.T. 59-60, 307, 327-29, 1489)

⁵ There is an IEP in the record that is dated May 6, 2015. (S-46) It is virtually identical to the January 2015 IEP, but there is no indication in the record how that document came to be.

43. Student required a one-on-one aide at school to support Student and provide supervision. When no one-on-one aide was available, Student was not able to attend school. (N.T. 57, 130-31, 160, 302)
44. At school, Student would elope and engage in physical aggression towards others despite having a one-on-one aide. (N.T. 57-58, 109, 111, 302)
45. The teachers used a communication book with the Parents every day; sometimes Student's one-on-one aide also wrote in the book. The teacher also spoke with one of the Parents when Student was transported to or from school. (N.T. 308-10, 400-01, 434, 905; S-55)

STAR Program

46. The District implemented the STAR Program (Strategies for Teaching Based on Autism Research) for autistic support. The STAR Program provides some ABA-based interventions, including Discrete Trial Training (DTT) and Pivotal Response Training (PRT), which are embedded into that program. The Program also includes functional routines. The District's two BCBA's provide consultation for the STAR Program. (N.T. 115-18, 198, 200, 327, 846-47, 882, 1001-02, 1003, 1018-23, 1024, 1097, 1116-17, 1118-19, 1505; P-24)
47. The STAR Program is a cooperative program that involves a local university. The program is supervised by trained mentors and includes training for teachers who use the program. (N.T. 201, 334, 841-42, 884-85, 1020-22, 1041-42, 1096-98)
48. STAR Program lessons are scripted. Lessons involve three trials of a specific skill; if the student demonstrates the skill over two consecutive days, he or she moves on to the next lesson. (N.T. 349-50)

2013-14 School Year

49. Student's Autistic Support class in the District elementary school had nine students. In addition to the teacher, there was a classroom assistant. Some students, including Student, had a one-on-one aide. (N.T. 283, 394-95)
50. Student was one of a few nonverbal students in the class. Student did make some vocalizations but did not communicate orally. (N.T. 284, 295-96)
51. Student did not interact with other children in the class but did at times engage in parallel play. (N.T. 299, 314-15)
52. Student sought sensory items and engaged in pica. (N.T. 299, 302)
53. Student generally required some level of prompting to perform tasks in the classroom, typically needing hand-over-hand physical assistance. (N.T. 300-01, 305-06)

54. The students had scheduled blocks for activities and classes throughout the day. Student had individual DTT and PRT sessions; special classes (art, physical education, computer); pre-academic mathematics skills; social skills; a language for learning block that taught functional communication skills; and centers where the children rotated through social activities. (N.T. 310-19; 350-51, 415-16; P-16)
55. Based on the skills Student demonstrated, Student entered the classroom at the very beginning of the STAR Program. Student demonstrated very few new skills targeted by the STAR Program by the end of April 2014. (N.T. 321, 342-46, 348, 355, 402-03; P-24)
56. Student's teacher found Student to be difficult to reinforce because Student could not or would not respond to many reinforcers. No one conducted a preference assessment to determine appropriate reinforcers for Student, but the teacher tried to identify activities and items in which Student was interested. (NT. 327-29, 332-33)
57. When Student entered the District, Student did not participate in the activities on Student's schedule. By the end of the school year, Student at times participated in some activities, such as the morning greeting routine that involved the teacher reading a story. (N.T. 307-08, 328, 399, 406-07)
58. Student had occupational therapy services to monitor and develop sensory integration strategies within the classroom. The occupational therapist recommended, and Student used, a weighted vest, an activity chair, joint compression, a vibrating pillow, and brushing. The activity chair had a safety strap or seat belt that could use used. (N.T. 58-59, 1409, 1410-1413, 1415-17, 1420, 1424-25, 1434; S-29 pp. 1-18)
59. Student had speech/language therapy services within the classroom that included introduction of the voice output device for a greeting. By the end of the school year, Student would at times push the button on the device spontaneously. Student had little exposure to PECS or any similar picture exchange system because Student could not discriminate between pictures; Student also did not discriminate between objects. Student was provided speech/language therapy either individually or with one other student but there was no data to support Student's progress toward those goals. (N.T. 1449, 1451-55, 1461-62, 1468, 1477-78, 1484-85, 1488; P-22 pp. 1-9; S-11)
60. By the end of the 2013-14 school year, the teacher believed that Student was able to perform many tasks that Student did not perform on entry into the District: hanging up Student's coat independently, grasping items in Student's hand, and using utensils; Student also eloped less frequently than at Student's entry into the District. There was no data taken on those skills. (N.T. 399, 402-09, 416-18, 439-40)
61. The District reported on Student's progress on the then-current IEP in the spring of 2014. Most tasks required physical hand-over-hand assistance, and one goal was described as too far above Student's developmental level. Student reportedly made some progress toward goals for walking in the hallway, matching common objects, and engaging in play with peers. (P-23 pp. 2-6; S-9)

62. Student was not provided ESY services by the District during the summer of 2014. ESY was discussed at the June 2014 IEP meeting, and Student was determined to be eligible, but the specific program and placement were still undetermined. The Parent expressed concerns in mid-July 2014 because the ESY services had not yet been specified. (N.T. 67-68, 97-98, 1163-64; P-9)

2014-15 School Year

63. Student began first grade at the start of the 2014-15 school year and attended through late October 2014. Student was one of six or seven children in the class with one teacher and a classroom assistant in addition to Student's one-on-one aide, who was the same as in the prior school year. Other adults were in the classroom at times. (N.T. 453-54, 778-79, 868, 880-81)
64. The District implemented the August 2014 IEP at the start of the school year. (N.T. 901-02; P-11; S-14)
65. Student was one of four nonverbal students in the classroom. Student communicated wants and needs by reaching toward the item or communication partner. The District tried to work with Student to make a request to use the restroom. Student did not independently use any picture exchange or other signs to signify the restroom. (N.T. 780, 788-89, 855-57)
66. The STAR curriculum was used again for Student in first grade. Based on the few skills Student demonstrated, Student was still working at the first levels of the STAR Program, and was not demonstrating all skills exhibited by Student the previous spring. (N.T. 798, 811, 821-22, 843-48, 894-95, 903-04; P-25; S-14, S-30, S-31)⁶
67. Speech/language therapy services continued in the fall of 2014. Student had communication cards available during first grade, but was only beginning to understand that giving a card to a communication partner led to Student receiving something in return, usually a sensory item. Student practiced with object symbols (used as communication cards) with the teacher or one-on-one aide once or twice per day. Student also continued to use the voice output device for greetings. (N.T. 800-06, 855-57; P-22 pp. 10-13, 17, P-38; S-36, S-39, S-42)
68. Student had three sessions of occupational therapy services in the fall of 2014, which continued to address sensory integration strategies within the classroom. (S-29 pp. 19-23)
69. Student required physical prompting to perform many tasks in first grade, and continued to engage in pica. (N.T. 789-91, 78)

⁶ An accurate, concise comparison summary of Student's skills in January and September 2014 appears as Appendix A to Parent's Closing Argument.

70. Student was aggressive toward others at times, and engaged in other problematic behavior including spitting and eloping. (N.T. 795-97, 905-06)
71. Student used the activity chair recommended by the occupational therapist. Student was able to receive sensory input using the chair (such as the ability to rock) and used it briefly during the school day. (N.T. 909-11)
72. The students had scheduled blocks for activities and classes throughout the day beginning with breakfast with typically-developing peers. Students had individual DTT and PRT sessions through rotating work stations; special classes (art, physical education, computer); pre-writing skills; functional routines; and socialization with structured play. Lunch was also with typically-developing peers. Student was given sensory breaks throughout the day. (N.T. 814-26, 829-36, 888-91)
73. The teacher used trial and error to determine what reinforcers would be effective with Student on any given day, and did not conduct a preference assessment. The items that were reinforcing for Student often changed from day to day. (N.T. 831-32, 885-87)
74. The District planned to develop a new PBSP for Student in first grade, but could not collect sufficient data before Student stopped attending. (N.T. 850)
75. Student's educational consultant observed Student on one occasion at school in October 2014. She did attempt to observe Student earlier in the school year, but had not made an appointment; pursuant to school and District policy, the consultant was asked to schedule an observation. (N.T. 233-34, 467-69, 913-15, 1195-96)
76. Student last attended school in the District on October 24, 2014, but was never disenrolled. (N.T. 132, 229-30, 240, 242, 244, 868, 920, 966-68; S-49, S-52)
77. The District's truancy policy for all students is to send a truancy notice when the child has three unexcused absences. For children in kindergarten through third grade who acquire ten unexcused absences, the policy is to refer the child to a family service agency. If interventions by that agency are not successful, the matter proceeds with truancy proceedings. The District cannot intervene further such as by creating a truancy elimination plan after ten excused absences are accumulated. (N.T. 959-62, 963, 965, 973-75; S-35)
78. The District sent a truancy notice to the Parent on October 31, 2014. The document says "2nd Notice" at the top but was the first the Parent received; there is no documentation that a first notice was ever sent. Truancy proceedings had not concluded by the time of the due process hearing. (N.T. 135-36, 161-62, 960-61, 971-72; S-49)
79. The Parent contacted the District's homeschool office seeking its guidance after receiving the truancy notice, and left a message but received no response. The home-based program was never approved as a homeschool program, nor was such approval sought by the Parent. (N.T. 136-37, 141-44, 1301)

Home-Based Programming

80. The Parent made arrangements for a home-based program in late October 2014, because she did not believe that the District's program could meet Student's specific needs. She advised the District of the home-based program on October 31, 2014. (N.T. 76-77, 86, 213-14, 507-08; P-13)
81. The Parent considered a private school that provides ABA services, but the distance was too far for Student to travel safely on a daily basis. When traveling with Student, the Parents generally took public transportation so that they can keep Student secure. (N.T. 85, 133, 161, 599)
82. The first home-based program began on November 1, 2014, providing twenty hours per week of individualized ABA therapy with four hours of weekly BCBA supervision. Twenty hours per week was the minimum service level and half of the forty hours the provider recommended. The initial provider continued those services through the end of May 2015. (N.T. 87, 500-01, 508, 509-10, 512, 604-05)
83. The first home based program provided services at home and in the community, such as at a nearby playground. ABA therapy included DTT. (N.T. 605-06, 608-09, 613; P-48)
84. The first home-based program focused on behavioral interventions targeting specific behaviors. The goals addressed in the program addressed pivotal behaviors. Data collection is a foundation of ABA and was conducted daily, on an ongoing basis in the home and community, to ensure the effectiveness of the program for Student. Skills that were mastered were reviewed to check for maintenance and retention of skills. (N.T. 505-07, 510-11, 534, 609, 624, 626-27, 669)
85. The BCBA was responsible for overseeing the first home-based program, providing training to the ABA therapists and parents, monitoring data collected, and making changes as needed. The ABA therapists implemented the program designed by the BCBA, collected data, and communicated with the BCBA on an ongoing basis. (N.T. 510-14, 614)
86. The first home-based program provider used the (VB-MAPP), a curriculum-based assessment, to assess Student at the initial provision of services and throughout programming to evaluate Student's progress on those skills. This provider used the VB-MAPP to guide Student's programming based on the skills Student demonstrated. (N.T. 514-20, 628, 636, 1178-79; P-43)
87. When the first home-based program began, Student worked on pre-socialization skills that Student needed to acquire before interacting appropriately with peers. Student was at a very basic skill level. (N.T. 610, 638)
88. The first home-based program provider conducted a functional behavioral analysis because Student engaged in high rates of various problem behaviors: aggression, elopement, property destruction, and spitting. A motivation assessment scale was used to determine the function of Student's eloping behavior. A Behavior Intervention Plan was

developed to address those behaviors, which served as Student's means of communicating, to include teaching Student through PECS. (N.T. 520-25, 552-53; P-39, P-41)

89. The first home-based provider conducted a preference assessment to determine effective reinforcers for Student. (N.T. 529-32; P-40)
90. At the time that Student began the first home-based program, Student had very limited communication skills. Student began the first level of the PECS program when the home-based ABA services started. Student completed the first two levels of the PECS program and began the third level within a few months' time. Student was not required to discriminate among picture icon cards in the first two phases of PECS. (N.T. 87-88, 532-33, 553-56; P-44 p. 3, P-45, P-46, P-47)
91. After beginning the first home-based ABA program, Student demonstrated the ability to follow instructions for gross motor activities. Student's problematic behaviors also decreased. The provider collected data on Student's skill acquisition and behaviors on an ongoing basis throughout its provision of services. (N.T. 87-88; P-48, P-49, P-50, P-51, P-52 P-53, P-54, P-55, P-56, P-57)
92. The first home-based program provider discontinued services in May 2015 due to staffing difficulties given the location of Student's home. At the time that provider ended services, Student's initial and then-current VB-MAPP levels were summarized, with progress on those skills and the decrease in problematic behaviors also provided. (N.T. 639; P-44)
93. Parent training was provided because it was important for Student in receive consistency throughout Student's day and to permit generalization of skills across settings. (N.T. 558, 673-74)
94. The Parent changed to a different home-based ABA provider whose services were less expensive in June 2015. She also chose the minimum number of hours recommended so that the services could continue as long as possible. (N.T. 91-92, 664)
95. The second home-based program provider began in June 2015 with twenty hours per week of individualized ABA therapy with three to four hours of weekly BCBA supervision. The BCBA overseeing this program believed that twenty hours per week of ABA therapy was an appropriate level of service. This provider used DTT and PRT with Student. (N.T. 671-72, 724, 735-36; P-61)
96. The BCBA was responsible for developing and overseeing the second home-based program, providing training to the ABA therapists and parents, observing therapy, monitoring data collected, and making changes as needed. The ABA therapists implemented the program designed by the BCBA, collected data, and communicated with the BCBA on an ongoing basis. (N.T. 671-73, 708, 737)
97. The second home-based program focused on behavioral interventions targeting specific skills. The VB-MAPP was used to guide Student's programming. Data collection was

conducted daily on an ongoing basis in the home and community, to ensure the effectiveness of the program for Student. Skills that were mastered were reviewed to check for maintenance and retention of skills. (N.T. 675-77, 681-83, 685, 688-92, 698, 730-35, 737-38, 743; P-61)

98. Throughout the time the second home-based program provider worked with Student, Student exhibited very early learning skills. (N.T. 667, 676-77, 700, 716, 736, 745)
99. Student used PECS with the second home-based program provider, beginning at the third level. (N.T. 704-05, 739-40, 745-46, 759; P-61 p. 2)
100. The second home-based program provider collected data on Student's skill acquisition and behavior on an ongoing basis. The BCBA reviewed the data to determine whether Student was making progress and whether programming changes were necessary. (N.T. 669-71; P-61, P-67, P-68)
101. The second home-based program provider continued services over the summer of 2015 and through the time of the final due process hearing session. (P-61, P-67, P-68)
102. In both the first and second home-based programs, therapists worked with Student in a work area set up for Student. One of the Parents or another relative was present during the therapy. No certified teachers provided instruction to Student, and Student was not provided direct speech/language or occupational therapy by providers certified in those fields. (N.T. 612-13, 636-37, 730-33, 735, 737-39)

Funding of Home-Based Programming

103. The Parent and District entered into an agreement on April 30, 2014 that resolved a previous dispute between the parties. Pursuant to that agreement, the District would fund a specified number of hours of compensatory educational services. Permitted uses of the compensatory education included "ABA programs, including home programs and consultation and implementation by a [BCBA]; one of many explicitly excluded uses was "tuition for out-of-District or private placement[.]" (S-5 at 2-3) The agreement included other provisions not relevant to the current dispute. (S-5)
104. The Parent submitted the cost of the home-based ABA programs to the District for reimbursement as a form of the compensatory education to which the parties had agreed. The District did not object to use of the compensatory education for the home-based program. (N.T. 88, 124-27, 216)
105. The District delayed payment to the first home-based ABA program provider. As a result, the Parent used an outside source to make payments so that services would continue. (N.T. 89-90, 125-28, 564-65)
106. The first home-based program provider initially submitted invoices to the District in the form of a retainer in an effort to secure prepayment of services, and for services after they were provided. The first invoice was submitted in November 2014, and the first payment

to the first home-based provider occurred in April 2015. (N.T. 560-63, 570; P-37, P-59; S-48)

107. The Parent and first home-based program provider contacted counsel for the Parent in order to ensure that payments for services was made by the District. (N.T. 569-71; P-60)
108. The first home-based provider notified the Parent in March 2015 that it could not continue services because no payment had been made by the District, unless some payment was received. The first home-based provider then sent a bill to the Parent, who made a payment toward the services in April 2015. (N.T. 564-65, 633; P-59)
109. The District does not process some invoices for services that have not yet been provided. If such invoices are submitted, they were held for future processing, with a possible result that they would be overlooked if no one remembered to process them at a later date after the services were rendered, or they would be lost. Other invoices could be paid in advance. (P-60 pp. 21, 26-27)
110. As of the time of the due process hearing, the first home-based program provider had been paid in full. (N.T. 632)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize 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 rests with the Parent who requested this hearing.

Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as 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 the witnesses to be generally credible, testifying to the best of their recollection of events, some of which occurred after a significant lapse in time. The testimony of the two private BCBA providers of the home-based programming was particularly persuasive with respect to Student's specific needs as well as progress in developing fundamental early learning skills through those programs; and was further supported by the Parent's educational consultant, who has exceptional credentials and spoke with a well-informed understanding of Student's learning profile.

In addition, the Parent is clearly a loving parent who is quite knowledgeable of Student's strengths and needs as well as the efficacy of ABA interventions for Student. All of the District professionals were clearly well qualified and dedicated to their field, and each had training in educating children with autism. The parties' similar viewpoints on the lack of productivity of various IEP meetings is, perhaps, due to the collective level of knowledge that the team participants brought to the table that was somewhat divergent based on individual expertise.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' thorough Closing Arguments.⁷

IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to a student who qualifies for special education services. 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

⁷ Counsel for both parties must be commended for their comprehensive closing arguments, particularly in light of the size of the record and the limited time available for submitting those filings in advance of the due date for this decision.

Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing 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 v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995). Local education agencies (LEAs), including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Substantively, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. An LEA “need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a ‘basic floor of opportunity.’” *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 533-534 (3d Cir. 1995) (quoting *Rowley*, *supra*, at 201). In other words, the IEP need not “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). Importantly, “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).

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).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any “concerns” parents have “for enhancing the education of their child” when it formulates the IEP.

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007).

Another essential consideration in this matter is the IDEA obligation for eligible students to be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); 22 Pa. Code § 14.145; *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). All local education agencies are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa Code § 14.145(5).

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253. Thus, the IDEA and Section 504 claims will be addressed together.

The Substantive Issues

The first issue is whether the District proposed and provided an appropriate program for Student’s needs for the time period beginning May 1, 2014 and continuing through October 31, 2014.

Student began the program implemented in the spring of 2014⁸ pursuant to an IEP from November 2013. That IEP contained goals for communication, pre-toileting, cleaning up, sorting, matching and number correspondence, letter identification, and functional play; it did not address any of Student's well-documented problematic behaviors. In contrast to the goals, Student's STAR program learning profile assessment revealed that Student lacked even the most basic early learning and pre-academic skills; tellingly, even Student's teacher opined that those IEP goals were not realistic for Student. (N.T. 321-22) The teacher instead based Student's instruction on the skills identified from the STAR program rather than on the IEP; and, thus, the progress monitoring reports did not accurately reflect how Student was performing.

Review of the IEPs developed between June 2014 and May 2015 reflect a number of significant facial flaws that render them inappropriate, particularly with respect to baselines and objective measurement. By way of example, many of the goals in the June 2014 IEP lacked levels of Student's current performance, or merely provided a baseline of 0; and the actual goal set forth expectations that cannot be measured or quantified even with an identifiable baseline (e.g., "acquire the ability to look at objects" with no level of mastery and a baseline of 0-2 minutes; "demonstrate pre-toileting skills" in 3 out of 5 opportunities (P-5 pp. 25, 29)). Discussions of baselines at IEP meetings cannot suffice to enable accurate assessment of needs and progress.

The August 2014 IEP, finalized without further input from the Parent despite her request for another meeting, made some revisions that responded in part to a few of Student's most critical needs. Student's clear need to develop communication/manding skills through ABA interventions, and to demonstrate toileting skills independently through use of task analysis,

⁸ Although some of this time period is outside the scope of the hearing, the evidence relating to Student's entry into the program is relevant since the programming continued through the end of the 2013-14 school year.

reflected some understanding of Student's significant developmental deficits in these areas, as well as the recognition that ABA was an appropriate approach for teaching Student these skills. Nevertheless, this IEP lacked baselines for any of the goals, and few included any objective measurement (*e.g.*, "remain in a designated location ... and complete a non-preferred activity;" "maintain joint attention" for some unspecified period of time (S-14 pp. 20, 30)). Neither of these IEPs included a positive behavior support plan that is required when a student demonstrates behaviors that impede his or her learning or that of others; neither otherwise meaningfully addressed Student's recognized problematic behaviors.

In addition to these significant flaws in the IEP documents, the record establishes that the program was substantively inappropriate for Student on several fundamental bases. The evidence of record, and particularly the testimony of the Parent's private BCBA's and educational consultant, overwhelmingly demonstrates that Student requires intensive, one-on-one ABA therapy implemented consistently with BCBA supervision that provides high levels of reinforcement in order to gain social, behavioral, and academic skills. (N.T. 506, 620, 666-69, 1077-78, 1093; P-35 p. 4) Student needs to have tasks broken down into specific basic steps, with strategies to include errorless teaching and backward chaining. (N.T. 544-45, 667-69, 696-97) The program implemented for Student in the District, while including ABA principles, was not individualized for Student and did not sufficiently adhere to strict ABA methodology to meet Student's unique and complex profile (N.T. 1102-08, 1110; P-35 pp. 8-9). The amount of time that Student engaged in DTT and PRT is unclear at best (N.T. 310-19, 350-51, 827-36, 888-89), and as a whole cannot be deemed appropriately intensive for Student. Use of reinforcement was not based on a preference assessment, a critical aspect of ABA programming (N.T. 530-32), and the teachers conceded that they were unsure of how to effectively provide reinforcement to

Student. Additionally, the extent of any involvement by a District BCBA was minimal at best.

Another major concern with the District's program is the lack of a systematic and consistent approach to Student developing functional communication, one of Student's most critical deficits. Student at times had access to symbolic or picture icons or a voice output device, but Student's use of these modes of communication was sporadic and inconsistent, and did not truly serve as a means of communicating functionally. PECS was recommended but not attempted due to the inaccurate belief that Student was required to discriminate between picture icons in order to use even the first phases of that system. The failure to appropriately address Student's communication needs is made further apparent in considering how the home-based program did so effectively, discussed *infra*.

Student's problematic behaviors were similarly not targeted in Student's programming, other than through the presence of the one-on-one aide to prevent elopement and aggression. At times the one-on-one aide was not available, and Student was not able to participate in programming as a result. Physical, hand-over-hand prompting was necessary for Student to accomplish the majority of tasks, and there was no evidence on how, or if, the District planned to try to fade those prompts. Moreover, while Student's progress could certainly be expected to be inconsistent and incremental, Student did not demonstrate any meaningful acquisition of the basic early learning skills that Student was working on by the time Student left the District in October 2014.⁹ And, while there was anecdotal evidence and testimony by Student's teachers that Student did, at times, show growth in some skill areas over time (*e.g.*, N.T. 307, 397, 399, 402-09, 416-18, 439-40), the absence of data to support that conclusion, and the lack of any consistency in Student's overall performance, undermine any suggestion of meaningful progress.

⁹ I recognize and accept the District's position that the teacher for the 2014-15 school year needed time to get to know Student.

The ESY program proposed for the summer of 2014 must similarly be deemed inappropriate, as it was based on the same IEP goals discussed above. Furthermore, the Parent cannot be faulted for declining to send Student to an ESY program that was not yet confirmed in July 2014. While the District correctly observes that Student likely regressed as a result of the decision not to send Student to ESY, I cannot conclude that the program that had been inappropriate in the spring of 2014 would have somehow transformed into one that met Student's needs over the summer.

In addition to these substantive deficiencies,¹⁰ the Parent also asserts that the District committed a number of procedural errors that further operated as a denial of FAPE. With respect to the reevaluation in the fall of 2014, the record is clear that the Parent did at least constructively consent to the RR issued by the District in October 2014, even without a signed permission to reevaluate form. There were other procedural irregularities, such as the District's proposal of the August 2014 IEP without the requested additional IEP meeting. However, there was also substantial evidence that the IEP team convened on a number of occasions throughout the time period in question, strongly indicating that the District was not ignoring its obligation to involve the Parent meaningfully in programming decisions and instead took that mandate seriously. That those meetings were viewed as something less than productive by the various participants is unfortunate, but does not necessarily mean that the Parent was not heard. In any event, I conclude that any procedural flaws in the program offered and provided to Student did not impede Student's right to FAPE or prevent the Parent from participating meaningfully in development of Student's educational program.

¹⁰ There was some testimony elicited and argument advanced that the use of the activity chair amounted to a restraint (N.T. 1136-38, 1158); however, the evidence on this issue was quite limited and, in this hearing officer's estimation, does not support a denial of FAPE substantively or procedurally.

In sum, the program implemented for Student when attending in the District between May 1 and October 24, 2014 when Student left the District was not appropriate for Student on substantive grounds and constituted a denial of FAPE. As a result, in addition to the remedies set forth below, Student's IEP team shall be directed to reconvene to develop a program that is consistent with the recommendations for intensive ABA therapy individualized for Student's needs, as set forth in P-21 and P-35. It is respectfully suggested that the team request an IEP facilitator from the Office for Dispute Resolution, or arrange for a facilitator through another source; and that a specific itemized agenda be created to guide the participants through discussion of a draft IEP document, with questions on matters such as the qualifications of various District professionals be provided in writing before or immediately after the meeting as may be necessary, so that the team may focus first and foremost on the critical content of the IEP.

Remedies

Compensatory Education

It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem.

M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* Compare *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Cmwlth. 2006) (rejecting the *M.C.* standard for compensatory education, and holding that "where there is a finding that a student is denied a FAPE and ... an award of compensatory education is

appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE.”); *Reid v. District of Columbia Public Schools*, 401 F.3d 516 (D.C. Cir. 2005). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Having found that the District denied FAPE to Student between May 1, 2014 and October 24, 2014, compensatory education is warranted. There was no evidence presented from which one could arrive at an award that would place Student in the same position Student would be in absent a denial of FAPE; thus, an hour for hour award will be ordered. Although the District contends that it should be allowed a reasonable rectification period as it proceeded with the agreed reevaluation, I conclude that it was aware, or should have been aware, prior to May 1, 2014, that its program was not meeting Student's needs; and, it was armed with more than adequate information about Student and Student's needs to make appropriate programming changes well before the RRs in the fall of 2014. Thus, it would be inequitable to remove any period of time from the compensatory education calculation.¹¹

Student's various IEPs provide for 6.65 hours of instruction for each regular school day; and the 2014 ESY program proposed 690 minutes of such services per week for a five week period. Accordingly, the award of compensatory education shall be for 6.65 hours for each school day that Student attended school (for all or part of the school day) between May 1 and October 24, 2014, plus 57.5 hours for ESY in 2014. For May and June 2014, the award will provide for 34.5 school days, since Student was excused on 2 of the 36.5 school days during that

¹¹ I do find that Student is not entitled to compensatory education for the several day period after Student stopped attending the District program but before the Parent notified anyone that Student would not return.

time period.¹² (S-52) For September and October 2014, the award will provide for 28 days since Student was excused on 5 of the 33 scheduled school days.¹³ (*Id.*) Thus, the total award (rounded up to the next hour) is for 474 hours (62.5 days plus 57.5 hours for ESY).

The award of compensatory education is subject to the following conditions and limitations. Student's Parent 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. 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 fourteen (14).

The remaining issue with respect to compensatory education is whether the District should be ordered to create a special needs trust fund with a third party administrator. The Parent suggests that this remedy is appropriate given the history of this case, and cites to, *inter alia*, *Q.H. v. School District of Philadelphia*, 16378-1415 AS (Culleton, November 9, 2015).

As noted above, compensatory education is an equitable remedy. As such, hearing officers, like courts, have broad discretion in fashioning such relief. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712 (3d Cir. 2010) (relying on *Lester C.*, *supra*, and *Burlington*, *supra*). "Appropriate remedies under the IDEA are determined on a case by case basis." *D.F. v. Collingswood Borough Board of Education*, 694 F.3d 4888, 498 (3d Cir. 2012) (recognizing a

¹² http://www.philasd.org/calendar/2013_2014/academic_calendar.html (last visited January 7, 2016)

¹³ *Id.*

compensatory education trust fund as one available remedy for a FAPE violation). Nevertheless, such an award is unusual, and, in this hearing officer's judgment, is one that requires extraordinary circumstances such that merely ordering compensatory hours or services would not be sufficient to remedy the deprivation.

I conclude that this is such a case. Here, the Parent arranged for intensive, home-based ABA programming, because the District's program was not meeting Student's complex needs. The District, while not contesting the Parent's requested use of the previously agreed compensatory education services, belatedly made payments for the home-based program to such an extent that the first provider gave notice of its inability to continue providing services without recompense. As a result, the Parent was forced to turn to other sources to fund the home-based program, and to engage the services of counsel to assist in securing delayed payment to the providers. It is indeed fortunate for Student that other financial resources were available to maintain the program, since any interruption in programming would almost certainly have been extremely detrimental to Student's continued progress, perhaps irrevocably. In the meanwhile, the District was not required to comply with its statutory ongoing responsibility to provide an educational program to Student and, outside of a few IEP meetings, that obligation was left to the Parent and the home-based providers.¹⁴ The District's resistance to allowing Student access to compensatory education services to which it agreed simply cannot be accepted under these circumstances.

There is also very real doubt that the District would reverse its precedent set with Student regarding prompt provision of compensatory education services if additional hours were

¹⁴ I recognize that it is the Parent who elected to remove Student from school. Nonetheless, the District was well aware that it was no longer required to implement Student's program after Student stopped attending on October 24, 2014 and over the course of the 2015 calendar year.

awarded. At Student's age, Student has a critical need to continue acquiring very basic learning skills, including functional communication, and has already lost ground during the relevant time period while Student was attending school in the District. Regression is an obvious danger such that any further interruptions would be, in a word, unconscionable. Thus, these circumstances are sufficiently extraordinary to warrant the creation of a special needs trust fund rather than a straight award of compensatory education services. I note that I reach this conclusion on the specific remedy because of the evidence in this particularly case, and not based upon the facts in any other matter involving this District.¹⁵ I also find it appropriate to use the dollar amount which other hearing officers in this Commonwealth have found to be reflective of the average teacher salary in the District for purposes of creating that trust fund.¹⁶

Reimbursement for Private Program

Parents who believe that a public school is not providing FAPE may unilaterally remove their child from that school, and place him or her in a private placement and seek tuition reimbursement for the cost of that alternate placement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); *Mary Courtney T.*, 575 F.3d at 242. Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's special education services 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). Consideration of equitable principles is also relevant in deciding whether reimbursement for tuition is warranted. *Carter, supra*; see also. *See Forest Grove School District v. T.A.*, 557 U.S. 230 (2009)

¹⁵ Consistent with HO-5, I declined to consider P-62 and P-64 in reaching this conclusion.

¹⁶ *Q.H., supra* (relying on *X.J. v. Walter D. Palmer Leadership Learning Partners Charter School*, 15961-1415AS (McElligott, August 11, 2015)).

(explaining that tuition reimbursement award may be reduced where equities warrant, such as where parents failed to provide notice). In considering the three prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not controlling in evaluating parents' unilateral placements. *Ridgewood, 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.*

The evidence overwhelmingly establishes that the home-based programs provided to Student were appropriate for Student's unique and complex needs. Both programs, supervised by a BCBA, were intensive and individualized, addressing Student's functional communication deficits and targeting Student's problematic behaviors identified by an FBA. Student worked on early learning skills that Student lacked, through systematic and intensive discrete trials and with ongoing, systematic data collection with analysis and monitoring of efficacy. Although the District correctly observes that no certified teachers, or occupational or speech/language therapists, have been involved, I do not find their absence fatal to the overwhelming evidence that the home-based programs provided the intensive ABA services that Student required.

The evidence of Student's progress speaks volumes as well. While receiving services by the first home-based program provider, Student acquired skills such as responding to Student's name, demonstrating progress in areas that included motor imitation, following directions, receptive identification, sound discrimination, communication, and problematic behavior. (*See, e.g.,* N.T. 515-16, 519, 538, 541, 547-51, 556-57; P-43, P-44 pp. 2-5, P-45, P-46, P-49, P-51, P-52, P-55, P-56) In that first period of home programming, Student was acquiring a new skill in each domain approximately every 2-4 weeks. (N.T. 622, 625-28) After the second home-based

provider began services, Student continued to acquire skills, exhibiting progress in the areas of, among others, behavior, attending, and communication. (*See, e.g.*, N.T. 698-701, 703-07, 722, 745-46, 753-54, 760-61; P-61 pp. 8, 13-14, 17, 19-21, 31, 45, 49; P-67 pp. 6-8, 14-15, 21, 29, 33; P-68 pp. 7-10, 25, 37, 47) Student's rate of skill acquisition increased to approximately weekly. (N.T. 700-01, 744-45, 751) Significantly, Student progressed to the third phase of PECS during home programming, learning how to discriminate among icons (N.T. 1290-91), and thereby demonstrating functional communication skills that Student previously lacked in a very short period of time. Taken as a whole, I conclude that this progress in the home-based programs was meaningful for Student.

There is one aspect of the home-based program that amounted to a sharp divide between the parties: whether Student was able to, and benefitted from, interaction with peers. There was some evidence that, at times, Student showed awareness of peers during times of play while at the District (N.T. 302, 408, 441, 792-94, 893, 900). However, Student did not consistently exhibit this awareness or regularly interact with other children at school. There was contrary, and much more persuasive, evidence that Student is not yet able to imitate or model peers, and cannot engage in reciprocal relationships such as friendships. (N.T. 736, 748-50, 759-60, 1080-81, 1087-91, 1289) While the least restrictive environment is, of course, an important consideration in programming, it is not controlling in evaluating a private placement. For all of these reasons, I cannot conclude that Student's lack of exposure to peers while in the home-based programs renders those services inappropriate based on this record for purposes of the reimbursement analysis.

I also find that the equities do not favor, or disfavor, one party or the other in this case, and find no reason to reduce or deny reimbursement. The record establishes that both parties

worked in good faith to collaborate on an appropriate program. I also specifically reject the District's contention that the Parent should not be reimbursed for this programming because it amounted to private school tuition which was outside the parties' agreement, a matter that is outside of my authority and irrelevant. Similarly, to the extent that the District contends that the Parent cannot demand reimbursement for private services that it has already paid for (through its agreement to provide compensatory education), this argument overlooks a fundamental principle of compensatory education: that it is a remedy for past deprivation of FAPE, and not a substitute for a school district's mandate to comply with its continuing obligations under the IDEA. Accordingly, this argument lacks merit.

Finally, having reached all of the above conclusions with respect to the IDEA, the same determinations are made with respect to a denial of FAPE under Section 504. There is, therefore, no reason to address Section 504 separately.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, I conclude that the District denied FAPE to Student, and that Student is entitled to compensatory education. The Parent is also entitled to reimbursement for the expenses associated with the home-based programming. The remedies will be awarded in the form of a special needs trust.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District failed to provide an appropriate program to Student for the time period May 1, 2014 through October 24, 2014, including five weeks of ESY services.
2. The Student is entitled to 474 hours of compensatory education, valued at \$78.67 per hour, subject to the following.
 - a. The compensatory education hours shall be reduced to a special needs trust fund to be administered by a third party mutually agreed upon by the parties or, absent such agreement, selected by the Parent. Any distribution from the trust fund shall be governed by the terms of the trust and the conditions set forth in Paragraph No. 2(b) below.
 - b. The compensatory education is subject to the following conditions and limitations. Student's Parents may decide how compensatory education is provided, and 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. 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 fourteen (14).
3. The District failed to offer an appropriate program to Student for the time period October 25, 2014 through the present.
4. The Parent and Student are entitled to reimbursement in full for expenditures associated with the home-based ABA programs. Within thirty calendar days of receipt of itemized invoices for all services provided by the two home-based program providers through the date of this Order and continuing until an appropriate program is developed for immediate implementation, the District shall reimburse the Parent through deposit into the special needs trust described in Paragraph No. 2(a) above and subject to the same conditions. Reimbursement for future services shall be consistent with the number of hours that have been provided by the second home-based program provider through the date of this Order.
5. Within twenty calendar days of the date of this Order, the District shall convene a meeting of Student's IEP team to discuss and develop a new IEP that includes no less than twenty hours per week of intensive, individualized ABA therapy, supervised by a

BCBA, consistent with the recommendations of P-21 and P-35. The District shall offer no less than three meeting dates and times to the Parent to allow for her participation.

6. 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
January 8, 2016