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

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order
ODR No. 20338-1718AS
CLOSED HEARING

Child's Name:
S. I.

Date of Birth:
[redacted]

Date of Hearing:
04/30/2018, 05/18/2018, 05/21/2018, 05/31/2018

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[redacted]

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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
07/23/2018

Introduction

This matter concerns the educational rights of the Student, who is a person with significant cognitive disabilities.[1] The Student is identified as a person with Autism Spectrum Disorder and a Speech or Language Impairment, and qualifies for special education under those classifications. The Student also very likely satisfies the IDEA's definition of Intellectual Disability, although both parties agree that label does not apply to the Student. The Student's parents (the Parents) allege that the Student's school district (the District) failed to provide a free, appropriate public education (FAPE) to the Student from March 1, 2016 onward. The Parents placed the Student in a residential program operated by an approved private school (the Private Placement) in January 2018.

The Parents allege that the District's actions violate the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. They demand compensatory education and tuition reimbursement as remedies.

For reasons discussed below, the laws and jurisprudence I must apply in this matter require a finding that mostly favors the Parents. Under those standards, the Student was denied a FAPE during the period of time in question and is owed compensatory education as a remedy. The Parents are also owed a portion of the demanded tuition reimbursement.

Issues

The issues in this matter are:

1. Did the District deny the Student a FAPE from March 1, 2016 through the Student's move to the Private Placement? If so, what amount of compensatory education is owed?

2. Are the Parents entitled to tuition reimbursement?

Findings of Fact

I carefully reviewed and considered the entire record in this case. However, I make findings of fact only as necessary to resolve the issues presented. Consequently, not every document and not every point made during testimony is referenced herein.

This section of this Decision is *only* intended to be a chronology of events. That chronology is largely undisputed in this case. The evidence is discussed in depth in the "discussion" section below, with additional citation to the record. By way of example, this section of the decision catalogs the dates that IEPs were issued, but the substance of the IEPs is discussed in the "discussion" section.

1. In 2012, the Student's GAI[2] on the WJ-III/NU COG was measured with a standard score of 35 (0.1%) in 2012. S-2.

2. In 2015, the Student was tested again and the scores on sub-tests were so variable that the evaluator could not obtain a GAI or FSIQ. S-2.

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[1] Except for the cover page, identifying information is omitted to the greatest extent possible.
[2] The General Ability Index (GAI) is derived from the core Verbal Comprehension and Perceptual Reasoning subtests of the Woodcock Johnson test of cognitive abilities. The GAI provides an estimate of general intellectual ability, with reduced emphasis on working memory and processing speed relative to the full scale IQ (FSIQ).

3. The 2015-16 school year was the Student's 8th and 9th grade year. The Student repeated 8th grade in the District's middle school at the start of the 2015-16 school year through January 2016. S-5.

4. In March 2016, the Student received programming pursuant to an IEP of October 8, 2015, which was revised on December 10, 2015, and February 16, 2016. S-4, S-5, S-6.

5. The Student transferred from District's middle school to the District's high school on January 4, 2016, and became a 9th grader at that time. S-5. A positive behavior support plan (PBSP) was added to the Student's IEP shortly thereafter.

6. The Student's progress towards IEP goals and objectives during the 2015-16 school year is reported through progress monitoring, which is discussed below. S-8.

7. On September 30, 2016, the IEP team reconvened and drafted a new IEP for the Student (the 2016 IEP). Progress data collected during the first three weeks of the 2016-17 school year were reported during the meeting. The Parents approved the 2016 IEP via a NOREP the same day. S-9.

8. On October 27, 2016, the District revised the 2016 IEP to correct clerical errors. S-11.

9. On February 27, 2017, the IEP team met again and revised the IEP to reflect planning to address the Student's long-term independent living goals. The team agreed that the Student would participate in the work-based learning program during the 2017-18 school year. S-12.

10. On April 7, 2017, the IEP team met again to discuss independent living services from outside agencies that the Student may qualify for in the long term. S-13.

11. On June 2, 2017, the IEP team met again and revised the IEP to place the Student into a work-based learning program for the 2017-18 school year. S-14.

12. The Student's progress towards IEP goals is reported in a 2016-17 progress report, discussed below. S-15.

13. In the summer of 2017, the District conducted a reevaluation of the Student consisting of a review of records, progress data, teacher input, and classroom observations. S-17.

14. In the summer of 2017, the Parents retained an Independent Evaluator, who evaluated the Student and drafted an Independent Educational Evaluation (IEE). S-16.

15. In 2017, with the IEE, the Student's FSIQ was measured with a standard score of 64 with a GAI standard score of 68 (2.0%) according to the WAIS-IV. P-27.

16. The Student started the work-based program at the start of the 2017-18 school year.

17. On September 14, 2017, the District reconvened the IEP team to review the 2017 RR. The Parents gave the District a copy of the IEE about an hour and a half before the start of the IEP team meeting. S-17. During the meeting the Parents asked the District to fund the residential program at the Private Placement. S-18, NT *passim*.

18. On September 22, 2017, the District issued a revision to the 2017 RR. S-18.

19. On September 26, 2017, the IEP team reconvened and the District offered a new IEP (the 2017 IEP). S-19.

20. On October 16, 2017, the IEP team reconvened to address concerns raised by the Independent Evaluator. S-20.

21. On November 3, 2017, the IEP team reconvened to add a trial of text-to-speech software. S-21.

22. On November 14, 2017 the IEP team met at the Parents' request to discuss vocational training programs. The IEP team also discussed an increase in the Student's "stimming" and an increase in the Student's need for prompts, both likely resulting from a titration of the Student's medication. S-22.

23. On December 29, 2017, the Parents, via counsel, sent notice to the District of their intent to place the student in the residential program at the Private Placement. S-23.

24. Prior to the December 29, 2017 notice, the District had scheduled another IEP team meeting for January 2, 2018. The Parents declined to attend that meeting. S-23.

25. The Student started the residential program at the Private Placement, discussed below, in January 2018.

Witness Credibility

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

All witnesses testified credibly. Witnesses give testimony of facts to the best of their recollection and with candor. Opinion testimony was well explained and supported, even though opinions varied.

I do not, however, assign equal weight to all testimony. Specifically, the Parents' descriptions of the Student's behaviors in school are assigned less weight than descriptions provided by school personnel. While the Parents testified to their understanding, school personnel were present with the Student in school. To the extent that experts rendered opinions about the Student's in-school behaviors based on information provided by the Parents, the weight of those opinions is similarly reduced.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

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

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

Historically in the Third Circuit has interpreted Rowley to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

Under the historical meaningful benefit standard, a school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimus" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. *See, e.g., J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" T*ucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Endrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimus*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics — as is clearly evident in this case.

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Compensatory Education

Compensatory education is an appropriate remedy where a LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. The first method is called the "hour-for-hour" method. Under this method, students receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*, arguably, endorses this method.

More recently, the hour-for-hour method has come under considerable scrutiny. Some courts outside of Pennsylvania have rejected the hour-for-hour method outright. *See Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005). These courts conclude that the amount and nature of a compensatory education award must be crafted to put the student in the position that she or he would be in, but for the denial of FAPE. This more nuanced approach was endorsed by the Pennsylvania Commonwealth Court in *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) and the United States District Court for the Middle District of Pennsylvania in *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014). It is arguable that the Third Circuit also has embraced this approach in *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* and explaining that compensatory education "should aim to place disabled children in the same position that the child would have occupied but for the school district's violations of the IDEA.").

Despite the clearly growing preference for the "same position" method, that analysis poses significant practical problems. In administrative due process hearings, evidence is rarely presented to establish what position the student would be in but for the denial of FAPE – or what amount or what type of compensatory education is needed to put the student back into that position. Even cases that express a strong preference for the "same position" method recognize the importance of such evidence, and suggest that hour-for-hour is the default when no such evidence is presented:

> "… the appropriate and reasonable level of reimbursement will match the quantity of services improperly withheld throughout that time period, unless the evidence shows that the child requires more or less education to be placed in the position he or she would have occupied absent the school district's deficiencies."

Jana K. v. Annville Cleona Sch. Dist., 2014 U.S. Dist. LEXIS 114414 at 36-37.

Finally, there are cases in which a denial of FAPE creates a harm that permeates the entirety of a student's school day. In such cases, full days of compensatory education (meaning one hour of compensatory education for each hour that school was in session) may be warranted if the LEA's "failure to provide specialized services permeated the student's education and resulted in a progressive and widespread decline in [the Student's] academic and emotional well-being" *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 at 39. *See also Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 438-39 (E.D. Pa. Aug. 6, 2013); *Damian J. v. School Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, *7 n.16 (E.D. Pa. Jan. 22, 2008); *Keystone Cent. Sch. Dist. v. E.E. ex rel. H.E.*, 438 F. Supp. 2d 519, 526 (M.D. Pa. 2006); *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, *9 (W.D. Pa. Mar. 28, 2006); *M.L. v. Marple Newtown Sch. Dist.*, ODR No. 3225-11-12-KE, at 20 (Dec. 1, 2012); *L.B. v. Colonial Sch. Dist.*, ODR No. 1631-1011AS, at 18-19 (Nov. 12, 2011).

Whatever the calculation, in all cases compensatory education begins to accrue not at the moment a child stopped receiving a FAPE, but at the moment that the LEA should have discovered the denial. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Usually, this factor is stated in the negative – the time reasonably required for a LEA to rectify the problem is excluded from any compensatory education award. *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. N.J. 1996)

In sum, I subscribe to the logic articulated by Judge Rambo in *Jana K. v. Annville Cleona*. If a denial of FAPE resulted in substantive harm, the resulting compensatory education award must be crafted to place the student in the position that the student would be in but for the denial. However, in the absence of evidence to prove whether the type or amount of compensatory education is needed to put the student in the position that the student would be in but for the denial, the hour-for-hour approach is a necessary default – unless the record clearly establishes such a progressive and widespread decline that full days of compensatory education is warranted. In any case, compensatory education is reduced by the amount of time that it should have taken for the LEA to find and correct the problem.

Tuition Reimbursement

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

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

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

Discussion

I. Discrepancy Analysis

The Student's GAI on the WJ-III/NU COG was measured with a standard score of 35 (0.1%) in 2012 – a score that must be interpreted with extreme caution. S-2. The GAI, like the full scale IQ, is a composite of several index scores that are made up of several sub-tests. When the Student was tested again in 2015, the scores on sub-tests were so variable that the evaluator could not obtain a GAI or FSIQ. Only one composite score, Verbal Comprehension, could be scored. That was a standard score of 55 (extremely low range). S-2. In 2017, with the IEE, the Student's FSIQ was measured with a standard score of 64 with a GAI standard score of 68 (2.0%) according to the WAIS-IV. P-27.

The Student's expressive and receptive language (the ability to communicate and understand language) are significantly impaired, typically scoring below the 1st percentile on standardized assessments. *See, e.g.* P-27. The same is true of the Student's attention, executive functioning, and adaptive behaviors. *Id*. The Student is also diagnosed with Autism Spectrum Disorder, and scores in the "very elevated" to "elevated" range in nearly all domains assessed by autism rating scales. *Id*.

The Student's scores on standardized tests have been fairly consistent over time (the 35 GAI in 2012 notwithstanding). There is no doubt that the Student's cognitive processes are significantly impaired. The Student's social behaviors are also significantly atypical, and the Student needs significant interventions in order to gain whatever amount of independence the Student may ultimately attain. The parties do not dispute the severity of the Student's disabilities. Rather, the dispute focuses on the amount of progress the Student made. The Parents say that the amount of progress was too small, and consequently the District owes the Student compensatory education. The Parents also say that the amount of progress would not increase under the District's last offered IEP, and so they are owed tuition reimbursement.

The Parents presented evidence to support their argument that the Student's progress was insufficient, even considering the Student's significant cognitive impairments. Specifically, they point to a discrepancy analysis completed by the Independent Evaluator. S-27, S-27A.

A discrepancy analysis is a statistical method used to measure the degree to which things are different. In special education, discrepancy analysis is most frequently used in cases involving children with specific learning disabilities. In those cases, a discrepancy analysis gives information about whether a child's performance on academic tasks is statistically different from the child's intellectual ability. This case is the same. The IEE included a discrepancy analysis to determine whether the Student's scores on the WIAT-III (an achievement test) were significantly different than expected scores, based on the Student's GAI (P-27 at 42).

Unfortunately, on the IEE, the GAI used to calculate the discrepancy was 92, which is incorrect. NT 71.[3] A corrected discrepancy analysis was entered as P-27A, page 8. That analysis compares expected WIAT-III scores to the Student's actual WAIT-III scores, based on a GAI of 68. There is considerable variability on a sub-test by sub-test basis. Examining composite scores, there was no statistical difference between actual and expected scores in Total Reading, Basic Reading, Reading Comprehension and Fluency,[4] and Math Fluency. There was a statistically significant (greater than or equal to one standard deviation)

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[3] I appreciate the Independent Evaluator's candor about the error.

[4] The discrepancy analysis found a statistical difference between expected and actual scores in the Reading Comprehension and Fluency composite score, but the difference was less than one standard deviation.

between actual and expected scores in Oral Language, Written Expression, and Mathematics. There was also a statistically significant discrepancy between the GAI and the Student's Total Achievement.

The Independent Evaluator testified that the difference between the Student's actual and expected scores on the WIAT-III establishes that the Student was capable of greater progress than the Student actually made, even when factoring in the Student's cognitive impairments. *See, e.g.* NT 73. The Independent Evaluator also clarified that no one single number quantifies the Student's rate of learning, and that the discrepancy analysis should be considered domain-by-domain. NT 131-133.

The District did not challenge the validity of the test scores obtained by the Independent Evaluator. The Independent Evaluator's testimony concerning the discrepancy analysis was un-rebutted. Importantly, however, the WIAT-III is a test of academic achievement and does not measure anything other than what it purports to assess. The only conclusion that can be drawn from the discrepancy analysis, therefore, is that the Student's performance in certain academic domains specifically assessed by the WIAT-III was below expectations based on the Student's GAI. Further, the impact of the Student's executive functioning, attention, and stereotypic autistic behaviors on the actual WIAT-III scores is not measured or addressed in the record. The discrepancy analysis also says nothing about the Student's progress towards the non-academic IEP goals, and has limited probative value regarding academic IEP goals that do not align with the WIAT-III. Similarly, finding that the Student could have made more progress in some academic domains is not necessarily evidence of a lack of progress in those domains. A single discrepancy analysis does not reveal whether the difference between expected and actual achievement has grown or shrunk over time, and there is no historic discrepancy analysis for comparison. The discrepancy analysis does not say how quickly or slowly the gap between expected and actual performance on the WIAT-III should close, even under optimal circumstances. Lastly, in all cases (and specifically in this one as well) children are not instructed in the WIAT-III itself. Rather, curriculum based assessments are usually the best measure of children's mastery of the particular instruction they receive in school. *See, e.g. Derek B. v. Donegal Sch. Dist.*, No. 06-2402, 2007 U.S. Dist. LEXIS 2983, at *24-25 (E.D. Pa. Jan. 12, 2007).[5]

In sum, the Parents presented preponderant evidence that the Student is capable of greater academic progress than the Student actually made in three domains assessed by the WAIT-III: Oral Language, Written Expression, and Mathematics. This, by itself, does not prove a denial of FAPE. To establish a denial of FAPE, I look to the totality of the Student's circumstances, and the appropriateness of IEPs at the time they were offered.

II. Appropriateness of the District's Programming

II(a) - March 1, 2016 Through the End of the 2015-16 School Year

Noted above, the Parents point to the Student's actual progress relative to the Student's potential as evidence of a denial of FAPE. In most cases, a child's actual progress under an IEP is not good evidence of the appropriateness of the IEP at the time it was offered. IEPs must be reasonably calculated to provide a FAPE, given the information available about the child at the time. The child's subsequent actual progress is evidence of the appropriateness of a school's actions after the IEP is in place. For example, depending on the circumstances, a school must take action when actual progress demonstrates that an IEP is not working as expected. Additionally, a child's actual progress under an IEP becomes information that is available to the school when the next IEP is drafted. A child's actual progress under one IEP may become evidence of the appropriateness of the child's next IEP.

[5] Coincidently involving the same Independent Evaluator.

The Parents demand compensatory education from March 1, 2016 through the time that the Student started attending the Private Placement.[6] The 2015-16 school year was the Student's 8th and 9th grade year. The Student repeated 8th grade in the District's middle school at the start of the 2015-16 school year through January 2016. S-5. The Student transferred to the District's high school on January 4, 2016 and became a 9th grader at that time. S-5.

In March 2016, the Student received programming pursuant to an IEP of October 8, 2015, which was revised on December 10, 2015, and February 16, 2016. S-4, S-5, S-6. The December 2015 revisions are the most significant, as they implement the change from middle school to high school and revise the Student's programming. The February 2016 revision updated the present education levels reported in the IEP, and qualified the Student for extended school year (ESY) services in the summer of 2016. The IEP was revised again on March 21, 2016. S-7. The March 21 revisions added a positive behavior support plan (PBSP) to the Student's IEP. The PBSP included a room clear procedure.

In sum, the Student received instruction under the December 2015 revisions to the October 2015 IEP from January 4, 2016 through the end of the 2015-16 school year. Of that, the period from March 1, 2016 through the end of the 2015-16 school year is in question.[7] Evidence of the Student's progress during this period of time is captured in the Student's progress reports from the 2015-16 school year. S-8. During this time, the Student worked towards a reading comprehension goal, a writing goal, two math goals, three social skills goals, a behavior goal, and three communications goals. S-8. Each of those was broken into several short-term objectives. S-8.

The Student's progress towards those goals is described below. However, the initial question is whether the December 2015 revision to the October 2015 IEP was appropriate at the time it was offered. The record establishes that both parties agreed that it was proper to transition the Student from middle school to high school after the holiday break, and continue working towards the same goals. There is no preponderant evidence that the December 2015 revised IEP was inappropriate at the time it was offered. The Student's progress under that IEP, however, informs the remainder of this decision.

The Student's progress in reading comprehension was essentially flat at the 3rd grade level (which was the target of the goal), but substantial at the 2nd grade level. Reading comprehension scores were between 60% and 70% at the 3rd grade level. The Student scored a 90% and a 50% on two individual probes, but these appear to be outliers. At the same time, the Student was also probed at the 2nd grade level, and scored in the mastery range. S-8.

The Student's progress in writing was measured two ways: "completed sentences" and "complicated sentence structures" when writing paragraphs. In "completed sentences," the Student bounced from 80% to 100% on various probes. This skill was not mastered because mastery called for 100% on two out of three consecutive probes. "Complicated sentences" peaked at 20% in late January 2016 and remained at that level for the rest of the school year. The goal called for 50% on two out of three consecutive probes. S-8.

One of the math goals called for the Student to solve 4th grade math problems with 85% accuracy on three consecutive probes. After transitioning to the high school, the Student scored 75% on two 2nd grade level probes in March 2016. The District then probed the Student at the 3rd grade level during the fourth

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[6] In their complaint, the Parents demand compensatory education from March 1, 2016 through the present. The Student's entitlement to special education ended after the transfer to the residential private placement. From that point forward, the District had no opportunity to educate the Student.
[7] The District issued a new IEP on September 30, 2016, which is discussed separately below.

progress interval in the 2015-16 school year. The Student scored below 30% on those probes. S-8. At the same time, the math goal also included a money objective. The Student was required to select an item that could be purchased based on a named price with 80% accuracy. The Student's progress towards this goal was highly variable, sometimes as high as 80% or 90%, and sometimes as low as 30% or 40%. S-8.

The second math goal focused on calculation, and called for the Student to solve 4th grade timed math problems with 85% accuracy. Again, the Student's progress was variable, but the Student scored between 70% and 75% more often than not. Short term objective reports under the same goal were also highly variable. S-8.

The social skills goals called for the Student to demonstrate rehearsed peer interactions, identify behaviors as "expected" or "unexpected," express emotions using "I statements," increase understanding of emotions using "Zones of Regulation," and practice calming strategies to avoid "acting-out behaviors."[8] S-8. Of those, the Student did not make progress towards the peer interaction goal, maxing out at 40%. Progress toward the other social skills goals is not reported in the progress monitoring, but the report says, "see progress notes for IAS [Itinerant Autistic Support] teacher." S-8. Those notes are reported in the present education levels of the next IEP. S-9. Generally, the Student scored in the high 60% to low 70% across all domains. S-9.

The behavior goal called for the reduction of the Student's aggressive behaviors from a baseline of 5 per month (in October 2015) to 0 per month. S-8. For the time in question, there were two incidents total: one in May and one in June.

The first communications goal called for the Student to independently direct comments to a specific adult by using the adult's name. The Student mastered an objective under this goal, calling for the same but relying on prompts, in January 2016. Progress toward the overarching goal itself was measured between 50% and 65% on nearly all probes. The second communications goal called for the Student to demonstrate the ability to ask "when" questions in the speech therapy room. The Student mastered objectives under this goal "with cues" but consistently scored at 60% on other objectives. The third communications goal called for the Student to demonstrate comprehension of synonyms. The Student did not come close to mastery level on any probe under any objective of this goal. S-8.

With this quantum of progress known to the District, the question becomes whether the District should have taken action before the end of the 2015-16 school year. I find that the District acted appropriately during this period of time. The transition to high school was prompted by many factors, including the Student's age, and access to transition skills and independent living classes. A mid-year transition from middle school to high school would be difficult for even neuro-typical students. Progress monitoring completed after the move to high school did not show regression. Rather, it shows inconsistency for the most part. In some cases, scores clustered in a range approaching a mastery level. At the same time, the Student's aggressive behaviors decreased. The only goal in which the Student was clearly and consistently failing was comprehension of synonyms. I do not find that this warranted substantive changes to the Student's IEP during the period of time in question.

Regarding the PBSP, the Parents argue that the addition of the PBSP in March 2016 shows that the Student's behaviors were not well-regulated during the second half of the 2015-16 school year. I disagree. The Student had a behavior goal, and incidents of aggressive behaviors had decreased. The record as a whole establishes that the District's high school uses certain procedures, such as the room clear, to keep other students safe if there is any risk of significant aggressive behaviors. The District added those

[8] The emotional control goal, part of social skills, included the "I" statements, Zones of Regulation, and calming strategies.

procedures to the Student's PBSP, but they were never used. Arguably, this is evidence that the PBSP was not individualized for the Student, but that claim is not before me.

In sum, the IEP in place from March 1, 2016 through the end of the 2015-16 school year was appropriate at the time it was offered. Data collected during that period of time – two months after a major transition – does not indicate progress but also does not indicate regression. Consideration of the totality of circumstances, including the variability of progress probes, yields the conclusion that the District's decision to not reconvene the IEP team before the end of the 2015-16 school year is not an IDEA violation. The Parents did not prove a denial of FAPE during this period of time.

II(b) - The 2016-17 School Year

The Student's IEP team reconvened on September 30, 2016 and drafted a new IEP for the Student. S-9. The Parents approved the 2016 IEP via a NOREP the same day. S-9. Changes between the revised 2015 IEP and the 2016 IEP are well and fairly summarized in the District's closing brief:

> [The Student] continued with a similar academic program in 10th grade to the autistic support program that [Student] received for the last half of 9th grade. At [the Student's] annual IEP meeting in September 2016, the IEP team reduced speech instruction from 500 minutes per month to 240 minutes per month. This change was made to allow the IEP team to add job training and community based instruction to [the Student's] IEP for [the] 10th grade year to target transition needs. Job training was also added for ESY 2017.

District's Written Closing Statement at 4, citations omitted.

By this point in time, the District had over five months of data in similar programs in the same school building from the 2015-16 school year, and a month of data from the 2016-17 school year. Progress data collected during the first three weeks of the 2016-17 school year are reported in the present education levels of the 2016 IEP. S-9. In this period of time, the Student mastered a short term objective calling for the Student to accurately complete simple addition and subtraction word problems. Otherwise, generally, the Student's performance was slightly less variable and more accurate compared to probes taken in the prior school year. Despite this, the Student was not yet at the level of mastery required by the goals as written.

I find that it was appropriate for the IEP team to focus on the services most likely to increase the Student's independent living skills at the start of the 2016-17 school year. The team did this by focusing on transition and post-secondary goals. The 2016 IEP also makes projections about the functional skills and pre-vocational services that would be provided during the 2017-18 school year. *See* S-9 at 19.

The 2016 IEP included reading comprehension and writing goals that were substantively identical to those in the prior IEP. The math goal was revised to focus on functional skills; primarily the use of money. The social skills goals remained unchanged. A pre-vocational goal was added calling for the Student to demonstrate pre-vocational skills in the classroom and on the worksite as measured by a "work crew rubric." S-9. All of these goals targeted critical skills that the Student had not yet obtained.

The Parents argue that repetition of goals from IEP to IEP evidences a denial of FAPE. In the abstract, I must disagree. If a child has a need that is targeted by a goal, and the child does not master the goal, the child very likely still has the same need. The fact that the child did not master the goal says more about what the school did to enable the child's progress than it does about whether the goal should be repeated.

In this case, the 2015-16 progress monitoring and the data collected in September 2016 indicate that the goals in the 2016 IEP were appropriate, even though many of them repeat from the prior IEP.

Given the foregoing, it is surprising that the specially designed instruction (SDI) in the 2016 IEP is nearly identical to the SDI in the prior IEP. With the exception of instruction targeting pre-vocational skills, the special education that the District offered through the 2016 IEP was no different than the special education offered previously.[9] *C/f* S-7, S-9. Said differently, the things that the District was doing to enable the Student to attain IEP goals did not change. After roughly seven months of data collection, I find this lack of change was inappropriate.

The discrepancy analysis described above is helpful at this point. Without the discrepancy analysis, one might assume that the Student had effectively "maxed out" academically. The discrepancy analysis shows that is not true, particularly in writing and math – two domains targeted by the 2016 IEP. The Student's progress towards social skills goals was also much lower than mastery level, and was not improving. Social skills programming did not change, despite the availability of this information. As such, the 2016 IEP was not reasonably calculated to provide a FAPE at the time it was offered.

In making this determination, I must note the severity of the Student's disabilities. At the time that the 2016 IEP was issued, the discrepancy analysis was still in the future and the most current testing available at the time revealed a student who was so impaired that a reliable FSIQ and GAI could not be obtained. The Parents described the educators who worked with the Student as caring and hard-working. I have no doubt that the educators who worked with the Student genuinely believed that they were offering a good program for the Student. However, I cannot escape the fact that the data available to the District showed seven months of stagnation at best – some individual objectives notwithstanding – followed by no meaningful change to the Student's SDI. As a legal matter, this constitutes a denial of FAPE.

Importantly, the 2016 IEP was appropriate in many ways. The District properly identified a need to develop the Student's pre-vocational skills, placed the Student in pre-vocational programs, drafted pre-vocational goals, and added new SDIs targeting those goals. Those portions of the 2016 IEP were appropriate when the 2016 IEP was offered.

The 2016 IEP was revised on October 27, 2016 to correct clerical errors. S-11. The IEP team met again on February 27, 2017, to discuss the Student's long-term independent living goals, and the need to revise the IEP goals due to the Student's then-anticipated participation in a work-based learning program during the 2017-18 school year. The team agreed that the Student would participate in the work-based learning program during the 2017-18 school year. S-12. The IEP team convened again on April 7, 2017. Again, the focus was on the Student's long term plans. The team explicitly discussed that the Student would potentially receive services from the District for another four years from that point (through the end of the school year in which the Student turns 21 years old). S-13. Even so, the IEP was not substantively revised at any time during the 2016-17 school year.[10]

It was possible, at least in theory, for the Student to make progress toward IEP goals despite the lack of changed SDI. Actual progress in this case would mitigate against a compensatory education award. The Student's actual progress is reported through progress monitoring. S-15.

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[9] "The term "special education" means specially designed instruction…" 20 U.S.C. § 1401(29).

[10] Changes in June 2017 to be applied in the 2017-18 school year are discussed below. Technically, this is a substantive revision that occurred during the 2016-17 school year, but it did not alter the Student's programming during the 2016-17 school year.

Regarding reading, the Student mastered a reading comprehension objective at the 3rd grade level. The goal called for mastery at the 4th grade level, but this is progress compared to the prior year. The Student stagnated, typically scoring around 60% in all other reading objectives and did not master the reading goal. S-15.

Regarding writing, the Student's initial probes during the 2016-17 school year were promising, but probes became highly variable during the second marking period and then bounced between 60% and 80% during the third and fourth marking period. Probes on individual writing objectives were even more volatile. S-15.

Regarding math, progress was only reported on an objective by objective basis. The probes on all math objectives throughout the entire 2016-17 school year hovered around 60% (sometimes as high as 90% or as low as 50%, but never consistently at those levels). This was below the mastery level of 80% to 90%, depending on the objective. S-15

Regarding social skills goals, the Student made progress towards some objectives and regressed in others, but inconsistency was the hallmark of the progress reported through progress monitoring. *See, e.g.* S-15. The same is true for the Student's progress towards the pre-vocational goal, which is not surprising since one of the two pre-vocational objectives depended upon social skills instruction. S-15.

In sum, the 2016 IEP repeated the same goals as the 2015 revised IEP, and added pre-vocational goals and programming. That carryover was appropriate. The 2016 IEP did not change the SDI that the Student received during the prior school year. Given the information available at the time, that lack of change was inappropriate. Further, given the Student's unambiguous need for pre-vocational training and the IEP's agreement to focus on that need, it was inappropriate for the District to take no action during the 2016-17 school year as it accumulated progress data indicating the pre-vocational goal would not be met as expected. For these reasons, the Student was denied a FAPE during the 2016-17 school year.

II(c) - The 2017-18 School Year Through the Private School Placement

On June 2, 2017, (the very end of the 2016-17 school year) the IEP team met again and revised the IEP to place the Student into a work-based learning program for the 2017-18 school year. The change gave the Student access to job training services (often work crews with a job trainer) provided through the Intermediate Unit serving the District at least five times per marking period, group work crews in the community three times per month, and creation of a job portfolio (including a resume and documentation of the sort of information potential employers may be interested in). S-14

Even with those changes, the Student was still placed in the same full-time life skills/autistic support program as in the prior school year. Some of the IEP goals changed, however, to reflect the more functional, work-oriented focus of the Student's overall educational program in the 2017-18 school year. S-14

The reading comprehension goal was changed so that it now called for the Student to identify the "appropriate source of information of a prompted service." S-14. This means that the goal expected the Student to know where to find job-related information after instruction in this area and with assistance. S-14.

The writing goal was changed to enable the Student to complete job applications. S-14.

The math goal was changed to completely focus on money and time telling. The goal expected the Student to calculate change when paying for purchases, and determine the duration of an event to the nearest hour. S-14.

The Student's social skills goals remained unchanged (since at least the 2015-16 school year). S-14.

Pre-vocational goals were removed, which seems odd at a surface level but makes sense in context. The Student was being placed into a work-based program. Pre-vocational skills were part and parcel to the program as a whole. It was no longer necessary to add separate pre-vocational goals to supplement other goals. Rather, "academic" goals were changed to reflect the pre-vocational program. S-14.

Despite the substantial changes in the Student's program and the changes in some of the Student's goals, the Student continued to receive the same SDI as in years prior. The SDI in the June 2017 IEP revision are identical to those in the September 2016 IEP. This error constituted a denial of FAPE in September 2016 when the District had seven months of data. At this point, the District had an additional school year's worth of data. That new data was strikingly similar to the data collected in the 2015-16 school year. Despite significant changes in the Student's program and (some) goals, it is not clear how the District expected the Student to make progress with the same special education that had been in place for a school year and a half. This constitutes a denial of FAPE.

The Parents did not approve or disapprove the NOREP issued with the June 2017 IEP revision. Rather, the Parents wrote comments on the NOREP and returned it to the District without indicating approval or disapproval. None of the comments indicate disapproval of any of the services offered through the June 2017 IEP revision. In context, I find that the Parents approved implementation of the June 2017 IEP.

The Student started the work-based program at the start of the 2017-18 school year. Just prior to the start of the 2017-18 school year, the District completed the 2017 RR (which involved no new testing). The District reconvened the IEP team to review the 2017 RR on September 14, 2017. The Parents gave the District a copy of the IEE about an hour and a half before the start of the IEP team meeting. S-17. The 2017 RR, completed before the District had the IEE, concluded that no new testing was necessary. S-17.

At the September 2017 IEP team meeting, the Parents asked the District to fund an out-of-district residential program at the Private Placement. S-18, NT *passim*.

On September 22, 2017, the District issued revision to the 2017 RR. S-18. The revision includes consideration of the IEE, and highlights areas in which the District agreed and disagreed with the IEE. Generally, the District voiced no disagreement with the testing scores reported in the IEE. Specifically, the District disagreed that the Student should be considered a person with an Intellectual Disability for IDEA purposes.[11] The District also disagreed with statements in the IEE that the Student's behaviors in school were unmanageable. The record as a whole more than preponderantly supports a finding that behavior was the one domain where the Student clearly improved.[12] More generally, the District did not agree that the Student did not make progress in its programs. S-18.

On September 26, 2017, the IEP team reconvened and the District offered what was, technically, a new IEP. S-19. In substance, the September 2017 IEP was the same as the June 2017 IEP revision, although the present education levels were updated to reflect available data and the 2017 RR and the IEE. The

[11] The Parents do not argue in favor of ID, and do not demand an ID designation.

[12] Based on the Parents' testimony, it is easy to find that the Student's behaviors in school and at home were different – which is not uncommon.

District officially proposed the 2017 IEP via a NOREP on September 28, 2017 (although the IEP was already in place substantively with the June 2017 IEP revision). S-19.

The Parents never approved or disapproved the September 2017 NOREP. S-19. Instead, they sought guidance from the Independent Evaluator. The Independent Evaluator raised concerns about the September 2017 IEP. The Parents shared those concerns with the District, and the IEP team reconvened on October 16, 2017. At that meeting, the District offered a revision to the September 2017 IEP. S-20

The October 2017 IEP revision was intended to directly address the Independent Evaluator's concerns. The Independent Evaluator was concerned that the IEP goals were not baselined. Regardless of the validity of that concern, the District supplied baselines for each goal. The Independent Evaluator was concerned about a general lack of SDI. The IEP was revised to specify what SDI will be used under each goal. The remaining concerns were addressed with acknowledgement of the concern and a response, but not a revision to the IEP in substance.

More specifically regarding the SDI, I find that the change was of form, not substance. SDIs were written under each goal. These showed what teaching strategies and, in some instances, what curriculum or program would be used to enable the Student to achieve the goal. This provides clarity about the type of instruction that the teachers were providing, but this does not represent a change in the services that were already in place. The special education provided in the October 2017 revision to the September 2017 IEP is not substantively different from the special education provided in the June 2017 revision to the September 2016 IEP. This lack of change was inappropriate for the same reasons stated above.

On November 3, 2017, the IEP team reconvened to add a trial of text-to-speech software.[13] The revised IEP does not contain information about the Student's progress towards goals. S-21. The Parents approved the revision, via a NOREP, on November 7, 2017. S-21. The Parents then requested another IEP team meeting, which convened on November 14, 2017. The team discussed three vocational training programs that the Parents and District explored, and plans for the Student's participation in school social events. The team also discussed an increase in the Student's need for prompts and increased "stimming," likely resulting from a titration of the Student's medication. S-22.

On December 29, 2017, the Parents, via counsel, sent notice to the District of their intent to place the student in the residential program at the Private Placement. At that point, another IEP team meeting was scheduled for January 2, 2018. The Parents told the District in their notice that they would not attend the IEP team meeting. S-23. The Student started the residential program at the Private Placement in January 2018.

In sum, the Student's program in the 2017-18 school year was significantly different from programs in prior years. The Student moved to work-based learning, and the Student's goals were revised accordingly. These changes were appropriate. Unfortunately, the District continued to provide the same SDI; the same special education to enable the Student to achieve IEP goals. At this point, there was ample evidence to predict that the Student's performance with the same special education would not change.

As in the 2016-17 school year, the Student's actual progress during the 2017-18 school year may mitigate against compensatory education. Quantitative data concerning the Student's actual progress during the portion of the 2017-18 school year that the Student attended the District's program was not entered into evidence.

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[13] At this point, the IEP was 87 pages. An IEP's length says very little about its appropriateness, but it is worth keeping in mind that IEPs are supposed to be functional documents.

III. Compensatory Education

Above, I find that the District's IEPs were not reasonably calculated to provide a FAPE during the 2016-17 school year, and the portion of the 2017-18 school year that the Student attended. The Student's actual progress during this period of time does not mitigate against a compensatory education award. I must, therefore, determine the amount and type of compensatory education that the Student is owed.

In their closing brief, the Parents "adopt" the standard for compensatory education that I articulated above (in this case and others). Despite this, there is no preponderant evidence in the record to establish the amount and type of compensatory education required to place the Student in the same position that the Student would be in but for the denial of FAPE. This includes consideration of the IEE, and testimony from the Independent Evaluator. That evidence helps quantify the Student's deficits and provides program recommendations. Those recommendations were considerations for the IEP team at the time they were made and, as such, are an opinion about what the Student needed to receive a FAPE at that time. They are not an opinion about what kind of service or how much service is required to remediate the denial of FAPE.

The hour-for-hour method is equally confounding in this case. Again, there is no preponderant evidence about the quantity and type of service that the Student should have received during the 2016-17 and 2017-18 school years. This is not the type of case where a child required a service that was not provided. Rather, this case concerns the efficacy of the services that were provided. It is too much of an oversimplification to simply say that the Student either needed more of the services that were provided, or a different form of the services that were provided but in the exact same quantity. The record does not support either type of finding.

The Parents demand placement at a post-high school vocational program for adults with disabilities at the District's expense as compensatory education. That would certainly be equitable. However, compensatory education and tuition reimbursement are separate remedies. Compensatory education cannot be used as tuition reimbursement. Those remedies are different, and what parents have to prove to obtain those remedies are different. *See P.P. ex rel. Michael P. v. West Chester Area School Dist.* 585 F.3d 727, 739-740 (3rd. Cir. 2009)(quoting *In re The Educational Assignment of J.D.*, ODR No. 1120 at 14 (Pa. Spec. Educ. Appeals Panel 2001); *see also Ms. M. ex rel. K.M. v. Portland School Committee*, 360 F.3d 267 (1st Cir. 2004), *J.T., Perkiomen Valley Sch. District*, ODR No. 2036-1011KE, *H.C., School District of Philadelphia*, ODR No. 3158-1112KE.

Compensatory education is, at its core, an equitable remedy. With no better method available, I look to what equity requires. During the entirety of the 2016-17 school year, the Student received special education that, at the time it was offered, promised no real opportunity for progress. The Student attended a full-time special education placement. The parties agree that quantity of special education was necessary. During this school year, the Student did not master IEP goals, but made some progress towards some objectives. Further, the Parents established that the Student was capable of more in certain academic domains, but did not present similar evidence concerning the educational but non-academic domains targeted by the IEP. Under these circumstances, I find that the Student is owed one half (.5) hour of compensatory education for each instructional hour of the 2016-17 school year.

During the 2017-18 school year, the focus appropriately shifted to work-based learning but the SDI did not change in substance. Given the overall appropriate shift in the Student's program during the 2017-18 school year, I find that the Student is owed one quarter (.25) hours of compensatory education for each instructional hour that the Student attended school during the 2017-18 school year.

The Parents may decide how the hours of compensatory education are spent. Compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student's current or future IEPs or educational programs. If the Student returns to the District's programs, compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should be provided through the Student's IEP. When purchasing products or services, the cost of compensatory education shall not exceed the market rate within the District. Compensatory education shall not be used for products or services that are primarily for leisure or recreation, and may not be used as tuition reimbursement.

IV. Tuition Reimbursement

IV(a) – The Appropriateness of the District's Last-Offered IEP

The test for tuition reimbursement is described above. The District's last-offered IEP before the Parents placed the Student in the residential program at the Private Placement was a January 2, 2018 revision to the September 2017 IEP. S-24. For clarity, the September 2017 IEP was previously revised in October 2017, and twice in November 2017. Like the three prior revisions, the January 2018 revision was primarily a response to the Parents' concerns. Comparing the original September 2017 IEP (S-19) to the January 2018 revisions (S-24) reveals no substantive change to the Student's program, goals, or SDI. Consequently the January 2018 IEP revision is inappropriate for the same reasons as the original September 2017 IEP and the prior revisions discussed above.[14] The Parents satisfy the first prong of the *Burlington-Carter* test.

IV(b) – The Appropriateness of the Private Placement

There is no question that the Private Placement would not be considered appropriate were it held to the same standard as the District. Under current case law, the Private Placement is held to a lower standard. In this case, I find that the academic, social skills, and pre-vocational components of the Private Placement are appropriate under the lower standard applied in the *Burlington-Carter* test. The Parents have not proven by preponderant evidence that the Student requires a residential placement in order to derive a benefit from those programs.

Regarding academics, as discussed above, the Parents highlight the Independent Evaluator's discrepancy analysis when demanding compensatory education. That discrepancy analysis suggests that the Student is capable of greater academic progress than the Student attained in the District's program. It is odd, therefore, that the Parents have selected a program that reduces the Student's instruction in reading and math by 46%. *See* NT 362-363. In this case, however, the amount of time spent receiving instruction does not necessarily correlate with the appropriateness of the instruction. The primary focus of the Private Placement is pre-vocational training and emotional support. It is reasonable to expect the Student to derive a greater benefit from more compressed instruction, given the Student cognitive level, attention deficits, and autistic behaviors.

Beyond academics, the Private Placement is based on the Waldorf theory of education. NT 133-135. This is also known as Steiner education, based on the philosophy of Rudolf Steiner. I am unaware of any peer-

[14] It is noteworthy, again, that transitioning the Student to a work-based program was appropriate. My analysis is of the special education that the District provided within that program, as described in the IEP, and whether that was reasonably calculated to provide a FAPE at the time it was offered.

reviewed research validating Waldorf educational practices, and none has been cited.[15] Regardless, preponderant evidence in this matter establishes that instruction in the Private Placement is provided with a focus on movement, the arts, interpersonal relationships, and learning though experience. The Student's academic instruction is interspersed throughout the school day, along with movement, music, art, and various electives, from 9:00 a.m. to 3:00 p.m. *See, e.g.* NT 321-326.

The Student participates in a pre-vocational program from 3:00 p.m. to 5:00 p.m. In a literal sense, the Student learned how to weave in one section of the pre-vocational program (the Student was, by all accounts, proud of the trinkets the Student made during this time), and how to care for horses in another section (this included mucking stalls – a vigorous physical activity that the Student seemed to enjoy). *See, e.g.* NT 614. In a less literal sense, credible testimony establishes that these units teach pre-vocational skills such as being on time, learning to work with other people, learning to use the tools or the machines, and compliance with some non-preferred activities. *See, e.g.* NT 152-153, 188-189.

Regarding social skills instruction, the Private Placement imbeds social skills training through the entire day, providing instruction in a natural environment as opportunities arise. NT 162-163. The Private Placement does not use a social skill curriculum or have a dedicated time for social skills instruction. *Id.* Given the Student's constellation of disabilities, and failure to make any appreciable gains towards social skills goals in the District, the lack of a formal social skills program in the Private Placement is problematic but not fatal. The record establishes that teaching social skills through a formal program at a designated time and place did not work for the Student. The record as a whole supports a finding that the embedded social skills training provided at the Private Placement is appropriate for the Student in this case, despite the fact that it is less systematic than the District's social skills instruction.

For all of the reasons outlined above, the academic, pre-vocational, and embedded social skills program that the Student receives at the Private Placement from 9:00 a.m. to 5:00 p.m. is appropriate for the Student. The Parents have satisfied the second prong of the *Burlington-Carter* test in these domains.

The record does not establish that the residential component of the Private Placement is necessary for the Student to derive a meaningful benefit from the non-residential component of the Private Placement. The Parents argue that the residential component enables the Student to learn independent living skills in a natural environment. I agree. The purpose of the residential program is to develop independent living skills. Credible, un-rebutted testimony indicates that the residential program has helped the Student develop some independent living skills. However, as with social skills, life skills are also embedded through the day portion of the Student's program. The Student moves to different parts of the Private Placement's campus, maintains a schedule, and helps plan and prepare meals during the day component of the Private Placement. Extending and enhancing life skills and independent living skills through the residential component is superior to the day program by itself. It is, perhaps, the optimal program for the Student. The IDEA, however, creates no right to an optimal placement. Moreover, the record does not establish that the residential portion of the Private Placement is inextricably intertwined with the day portion (some students attend the day portion only) or that the residential portion is a fundamental component of FAPE for the Student.

IV(c) – The Equities

[15] Other Hearing Officers have noted that the Waldorf teaching philosophy includes a belief in reincarnation, the existence of Atlantis and the karma inherent in individuals. *See* ODR No. 1803-1011KE. No such evidence was presented in this case, and testimony from teachers in the Private Placement does not establish that these specific beliefs drive the Student's program in this case.

The District argues that equitable considerations warrant a reduction or elimination of tuition reimbursement in this case. I mostly disagree.

The District highlights the timing of the Parents' initial request for the residential Private Placement to suggest that the Parents had a long-standing goal of obtaining a residential placement at the District's expense. Paraphrasing the District's argument in colloquial language, the District advances a theory that the Parents were gunning for a private, residential placement, and the Parents' behavior should not be rewarded.

There is evidence to support the District's theory. However, neither the IDEA itself nor case law permit me to consider the Parents' underlying objectives unless the Parents took actions that inhibited the District's ability to provide a FAPE. Parents should not derive a benefit from their efforts to block a school's provision of a FAPE to a student. *See, e.g. C.H. v. Cape Henlopen Sch. Dist.,* 606 F.3d 59, 71 (3d Cir. 2010). There is no evidence in the record that the Parents inhibited the District's ability to provide a FAPE. I considered the timing of the IEE when making this determination. It is true that the Parents gave the District no opportunity to consider the IEE before the September 2017 IEP team meeting. Even so, the District did not propose substantive changes to the IEP in any of the four subsequent IEP revisions.

I also considered evidence that the Parents desired a residential program, as opposed to a day program, for their own benefit. There is evidence in the record that the Parents had difficulty controlling the Student at home, and that moving the Student to a residential program would nicely coincide with transitions that the Student's siblings were undertaking around the same time. This evidence tends to suggest that considerations other than the Student's particular needs were a factor in the Parents' decision to obtain a residential placement when a day placement was also available. These factors may warrant a reduction in tuition reimbursement for the residential component of the Private Placement. However, I have found that the Student is not entitled to the residential component of the Private Placement. I will not address the extent to which the record supports a reduction of a remedy that I am not awarding.

An appropriate order follows.

ORDER

Now, July 23, 2018, it is hereby **ORDERED** as follows:

1. For the period from March 1, 2016, through the end of the 2015-16 school year, the Parents did not prove by preponderant evidence that the District denied the Student a FAPE.

2. The District denied the Student a FAPE during the 2016-17 school year. The Student is awarded one half (0.5) hour of compensatory education for each instructional hour that the District was in session during the 2016-17 school year.

3. The District denied the Student a FAPE during the 2017-18 school year from the start of that school year through the day that the Student began attending the Private Placement. The student is awarded one quarter (0.25) hours of compensatory education for each instructional hour that the Student attended the District's program during the 2017-18 school year.

4. Compensatory education may be provided pursuant to the terms and limitations described in the accompanying memorandum. Any unused compensatory education shall revert to the District on the Student's 25th birthday.

5. The Parents are awarded tuition reimbursement for the day component of the Private Placement (9:00 a.m. to 5:00 p.m.) that the Student attended during the 2017-18 school year. Tuition reimbursement is limited to cost of the day program that the Private Placement charges to students who attend the day program only, less any scholarships or financial aid the Parents received.

6. This order shall constitute the Student's pendent placement. Nothing herein prohibits the parties changing the Student's placement, or the Student's pendent placement, either through the IEP process or any written agreement.

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

/s/ Brian Jason Ford
HEARING OFFICER