

*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: A.D.

Date of Birth: [redacted]

ODR File No. 15202-1415 KE

Dates of Hearing:

September 3, 2014

October 16, 2014

October 20, 2014

October 22, 2014

November 10, 2014

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Young Scholars – Kenderton Charter  
School  
1500 W. Ontario Street  
Philadelphia, PA 19140

Date Record Closed:

Representative:

Vanita R. Kalra, Esquire  
David J. Berney, Esquire  
Law Offices of David J. Berney  
1628 JFK Boulevard, Suite 1000  
Philadelphia, PA 19103

Patricia A. Felice-Moreland, Esquire  
Marks, O'Neill, O'Brien, Doherty &  
Kelly, PC  
1800 JFK Boulevard, Suite 1900  
Philadelphia, PA 19103

December 9, 2014

Date of Decision:

December 24, 2014

Hearing Officer:

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

### **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a late-elementary school-aged student in the Young Scholars – Kenderton Charter School (hereafter School) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parent filed a due process complaint against the School asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA; and that it violated Section 504 of the Rehabilitation Act of 1973<sup>3</sup> and the Americans with Disabilities Act (ADA),<sup>4</sup> as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing which convened over five sessions, at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the School failed to provide Student with FAPE in the least restrictive environment throughout the time period in question; and, sought remedies including an order for a prospective placement at a private school at the expense of the School. The School maintained that its special education program, as offered and implemented, was appropriate for Student. The record closed upon receipt of the parties' written closing arguments.<sup>5</sup>

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

### **ISSUES**

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<sup>1</sup> 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.

<sup>2</sup> 20 U.S.C. §§ 1400-1482.

<sup>3</sup> 29 U.S.C. § 794.

<sup>4</sup> 42 U.S.C. §§ 12101-12213.

<sup>5</sup> By email message with attachments on the afternoon of December 22, 2014, thirteen days after the record closed and two days before this decision was due, the Parent filed a Motion to supplement the record. The School objected. This hearing officer denied the Motion by email message that same day, without having opened the attachments or considered the content of the email message from counsel for the Parent.

1. Whether the School denied Student FAPE during the 2013-14 and 2014-15 school years, as well as over summer 2014, both procedurally and substantively;
2. If the School did deny Student FAPE, is Student entitled to an award of compensatory education; and
3. Should the School be required, at its expense, to place Student prospectively into a private school in order to provide FAPE?

## **FINDINGS OF FACT**

### **General Background**

1. Student is a late elementary school, preteen-aged student who is eligible for special education as a child with a specific learning disability. At the time of the due process hearing and throughout the time period relevant to the issues, Student attended the School. (Notes of Testimony (N.T.) 37-38 (Stipulation))<sup>6</sup>
2. Student has been diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). Student has been prescribed medication for the ADHD. (J-15 p. 3)
3. Student's behaviors and emotional manifestations, as well as Student's learning disabilities, impede Student's success in the classroom. Student's learning disabilities compound Student's behavioral and emotional difficulties because Student becomes more anxious and frustrated during academic tasks that are difficult. (N.T. 379-81; J-21; P-19, P-37)
4. Prior to the start of the 2013-14 school year, Student attended the same school building that was then part of the local school district. (N.T. 44-45, 46; J-15 p. 3)
5. Student was evaluated by the school district which issued an Evaluation Report (ER) on January 25, 2013. Information in the ER included Parent input, teacher recommendations, and an observation by the school psychologist. Cognitive testing (Kaufman Assessment Battery for Children – Second Edition) suggested overall intelligence in the below average range with areas of strength and need. Achievement testing (Kaufman Test of Educational Achievement – Second Edition) revealed below average scores on many of the reading and mathematics subtests and composites.

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<sup>6</sup> The "N.T." designation will be used for the transcript filed at this case number. Counsel also stipulated that the transcript of Student's sibling at ODR File No. 15203-1415KE could be considered as applicable. (N.T. 290) References to the transcript of the sibling will be designated as "N.T. II" followed by the page number. References to other evidence in the record will be made as follows: Joint Exhibits as "J-"; Parent Exhibits as "P-"; School Exhibits as "S-"; Written Stipulation of Counsel as "12/4/14 Stipulation"; Hearing Officer Exhibits as "HO-". This hearing officer appreciates and commends counsel for streamlining the record through Joint Exhibits and Stipulations. Finally, the Parent's email submission of Transcript Corrections on December 9, 2014 has been marked as HO-5 and is hereby admitted.

Although the school psychologist explained that Student's scores should be considered with caution because Student's medication was of concern, Student was determined to be eligible for special education on the basis of a specific learning disability; Student's history of behavioral difficulties was also referenced. (J-15; P-2)

6. The school district conducted a Functional Behavioral Assessment (FBA) of Student in April 2013 due to Student's disruptive behavior, including physical aggression toward peers, as well as off-task behavior. The hypothesis from the FBA was that Student engaged in these behaviors when frustrated in order to gain attention, and a resulting Positive Behavior Support Plan (PBSP) addressed those behaviors through a reward/incentive plan. (P-5, P-6)
7. The school district developed an Individualized Education Program (IEP) for Student in February 2013. This IEP contained annual goals addressing needs in reading (decoding, word recognition, and reading comprehension); mathematics calculation; and behavior (initiating appropriate interactions). Several items of specially designed instruction (SDI) were included, and a Positive Behavior Support Plan (PBSP) was referenced. Supplemental learning support was specified as the placement. Student was not eligible for extended school year (ESY) services. The Parent signed the Notice of Recommended Educational Placement (NOREP) for the placement proposed by the school district. (J-3; P-3, P-4)
8. The school district provided school therapeutic support (STS) staff to students in the building who exhibited disciplinary problems. The STS workers provided support in the classroom, or outside of the classroom by removing a student having difficulty in order to be redirected to return to class. They also worked on social skills and coping skills. (N.T. 55, 140, 164, 818-19)
9. Prior to the start of the 2013-14 school year, the Parent filed a due process complaint against the school district that resulted in a settlement agreement in October 2013. (N.T. 106, 175)

#### Summer 2014 Independent Evaluation

10. During the summer of 2013, the Parent had Student privately evaluated by an independent psychologist in order to identify Student's educational needs. That evaluator, who is licensed and certified as a school psychologist, issued an Independent Educational Evaluation (IEE) report following interviews with the Parent and Student, review of records, cognitive and achievement testing, and various behavioral ratings scales and related forms. (N.T. 47-48, 296, 313; J-21; P-18)
11. The private psychologist conducted a cognitive assessment (Wechsler Abbreviated Scale of Intelligence – Second Edition) which reflected overall intelligence in the average range. This score contrasts with the score obtained by the school district earlier in 2013, which may be explained by the facts that the IEE testing included use of breaks and similar strategies to accommodate Student's attention issues, and that Student was then taking medication for ADHD. (N.T. 324-26; J-21 pp. 8-9)

12. The private psychologist conducted achievement testing (Wechsler Individual Achievement Test – Second Edition, abbreviated version (WIAT-II-A), and the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III-ACH)) revealing discrepancies between ability and achievement in reading, numerical operations, and spelling. (J-21 pp. 9-10)
13. The IEE included evaluation of adaptive behavior (Vineland-II Adaptive Behavior Scale), social skills and problem behaviors (Social Skills Improvement System (SSIS), and ADHD (Conners III). The results reflected below average social skills, and behavioral instruments revealed the most significant difficulties in the areas of aggression, opposition, emotional lability, hyperactivity/impulsivity, rule-breaking, social problems. (J-21)
14. The private psychologist observed Student in the school building when it was part of the local school district, but not when it was the School. (N.T. 393-96; J-21 pp. 14-15)
15. The IEE determined that Student’s classification was emotional disturbance as the primary disability category and specific learning disability in reading as the secondary disability category. The report contained a number of recommendations for Student’s educational program, including increased behavioral support (one on one) with social skills training, intensive reading intervention, exploration of assistive technology, accommodations for academics and incentives for task completion, an FBA followed by a new PBSP, and consideration of a private school placement to address both learning and behavioral needs. (J-21 pp. 16, 19-20)

#### Transition to Charter School

16. During the summer of 2013, the School took over the operation of the school building from the local school district for the start of the 2013-14 school year. At the time, the population of students was considered to be underperforming. Student was enrolled in the School by the Parent. (N.T. 44, 178-79, 230, 659-60, 676-78, 685, 691-92, 713-14, 815; P-7)
17. Student’s Parent has been and is a member of the School’s Social Advisory Council (SAC), also serving as an officer of the organization. She volunteers at the School on a regular basis several days each week and also attends SAC meetings in the building. (N.T. 41, 106-07, 196; N.T. II 897-98)
18. The SAC, including the Parent, was involved in contacting charter schools and making the selections that resulted in the School taking over the operations of the school building. (N.T. 104, 230-31, 678-80, 815-17)
19. For the first two weeks of the 2013-14 school year, the School focused on orientation, getting the students accustomed to the culture of the School and acclimated to routines such as class schedules as well as safety. One change for the 2013-14 school year was the School’s new procedures during times of transition such as structured use of the hallways. (N.T. 685, 827-28; N.T. II 210-12)

20. The same STS staff from the school district worked at the school building after the School took over operations. At the beginning of the 2013-14 school year, however, the School's use of the STS workers was more limited than it had been with the school district as School staff worked to get to know the students and "build a culture" (N.T. 686) while also identifying students who needed behavioral and emotional support. (N.T. 56, 108, 648-49, 686, 818-19, 821)
21. At the School, students are provided with more than the minimum number of hours of instruction, 34 hours per week. Students are dismissed early on Fridays after a fun activity such as a movie for approximately one hour. For students in special education, progress monitoring would occur on those afternoons before the fun activity and dismissal. (N.T. 208-09, 555-56, 586, 604)
22. The School performed diagnostic assessments of all of its students' oral reading fluency and mathematics computation skills using AIMSweb in the fall of 2013. Each student was assessed at grade level to determine baseline benchmarks. This instrument was also used for progress monitoring of students in the bottom quartile and those receiving special education, beginning at grade level. (N.T. 680-84; N.T. II 24-35, 376-77, 408-09)

#### Student's 2013-14 School Year

##### Fall 2013

23. Prior to the start of school in August 2013, the Parent gave a representative of the School a copy of the recently obtained IEE report. That representative did not want to retain the copy of the IEE because of the pending case against the school district, wanting to keep the two programs separate. (N.T. 49-50, 51, 153, 236-37)
24. Student began attending the School in third grade during the 2013-14 school year in regular education classes for a short period of time, approximately two weeks. The first day of school was August 27, 2013. (N.T. 44, 54-55, 626-28, 633-34, 647-49, 747-48)
25. Student was not provided with any modifications or specially designed instruction at the beginning of the 2013-14 school year. The School did not want to implement the school district IEP for Student, and did not, because they knew that the Parent had challenged its appropriateness through due process. (N.T. 187-88, 627-31, 633; N.T. II 235)
26. The Parent was in the School building on a regular basis in her volunteer role, and frequently discussed Student with teachers and other School personnel. (N.T. 82-83)
27. Student had an STS worker assigned to Student, and that STS worker would check in with Student daily but was not always present with Student in the classroom. (N.T. 499-500, 576, 650-51, 821)

28. Student was suspended by the School on two or three days at the very beginning of the school year. (N.T. 56-57, 636-38, 645-46; J-14 pp. 6, 8<sup>7</sup>)
29. The Parent attended a meeting with the Student and two School representatives, but no teachers, on September 9, 2013. During that meeting, the Parent gave signed permission for Student to begin a diagnostic placement. By agreeing to this placement, the Parent waived any and all special education services for Student for the period of that placement. (N.T. 58-61, 185, 206-07, 234-35; J-4)
30. The placement agreed to was in the School's "Diagnostic Support" classroom which was not a special education or a regular education classroom, and both regular education and special education students were part of the class. The classroom was described as "a short-term classroom-based option ... for elementary students experiencing difficulty in adapting to the [School's] model." (J-6 p. 1) The duration of any student's stay in the Diagnostic Support classroom was contemplated to be one to two months; for Student, the duration was to be 45 days to end on November 12, 2013. (N.T. 169, 186, 663-64; J-6; 12/4/14 Stipulation ¶ 8)
31. Some School staff intended that Student would need to demonstrate fewer challenging behaviors of eloping and physical aggression in the diagnostic placement before any change would occur. (N.T. 661-63; *see also* P-17 p. 6)
32. The diagnostic placement was recommended by the School because Student was not responding to the school-wide behavior support plan (SWBSP), wherein students obtained rewards for positive behavior (being professional, attentive, and hard working) in the form of a "paycheck" to be used for purchasing participation in class trips, activities, or toys. Student had been displaying problematic behavior through elopement from class or from the building, attempted physical aggression with peers and staff, refusing to follow directions, and disruptive behavior during class time including calling out. Student's behavior was discussed anecdotally at the meeting, but the only data shared were the daily point sheets. (N.T. 190-92, 199-202, 234, 559-60, 596, 633, 639-43, 647-49, 705-06, 770-71, 774)
33. The Parent understood that the diagnostic placement would be temporary and for no longer than three or four weeks, and provide the School with an opportunity to program appropriately for Student. The form that the Parent signed agreeing to the diagnostic placement specified October 9, 2013 as the "anticipated exit date" (J-6 p. 2). (NT. 59-63; J-6)
34. The diagnostic placement classroom where Student was placed had between ten and twelve students in first through third grades. The students were in that classroom for the majority of the day, including homeroom, breakfast, and lunch; teachers for the special classes (art, music, gym, and a foreign language) came into the classroom for thirty minutes four times each week. Student continued to demonstrate behavioral difficulties,

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<sup>7</sup> It should be noted that the Student's attendance records as a whole are incomplete.

more notably in the special classes than the non-special classes. (N.T. 240-42, 469-71, 490, 503-04, 553-55, 780-81)

35. The class-wide behavior plan tracked the behaviors of being on task, showing professionalism, working hard, and being thoughtful to peers. Students received tokens for exhibiting these behaviors and could later purchase activities during the daily 30-minute structured playtime such as computer time, game time, movies, and snacks. The difference in this plan from the SWBSP was that no deductions were taken in the class-wide plan. (N.T. 270-72, 495-97, 499, 585-86, 587-88, 720; N.T. II 670-71)
36. Student had two hours of reading and writing instruction each day in the diagnostic classroom, consisting of whole class instruction and small group reading centers. In the centers, the students rotated among guided reading or practice of a related skill, using an online computer program, and independent work. The teacher did not use a specific curriculum but followed unit plans and a “scope and sequence” or list of skills provided by the School to develop objectives and activities through her own resources based on the instructional levels of the students. (N.T. 473-79, 480-81, 483-84, 553-54)
37. Student’s reading level was determined after approximately two months of school using AIMSweb probes and classroom assessments. Student then began receiving some first grade level instructional materials. (N.T. 480-81)
38. Student had science class in the diagnostic classroom, taught at a second grade level. The teacher did not follow a specific curriculum but relied on personal resources for lectures, class readings, and experiments. Sometimes the teacher modified assignments and tests such as by reducing the number of multiple choice answers, and always read the test questions and answers aloud for all students. (N.T. 750, 755-57, 762-63, 777, 778-79)
39. Student had social studies class in the diagnostic classroom, taught at first-, second-, and third grade levels. The teacher did not follow a specific curriculum but relied on personal resources for reading and other materials. Students were required to read materials for homework; no accommodations were provided to help Student read those. However, the teacher always read test questions and answers aloud for all students. (N.T. 757-63)
40. Student had mathematics instruction in the diagnostic classroom that did not follow a specific curriculum, although the teacher did at times use Touch Math. The students used various centers for this subject depending on their instructional levels. (N.T. 479-80, 554)
41. The diagnostic class had social skills instruction which the teacher determined based on the behaviors of the students. This instruction included communicating with others appropriately, following rules, and interacting with others appropriately. The teacher used the class-wide behavior plan to assess the students’ use of those social skills in the classroom. (N.T. 485-87, 495-96, 782-84)
42. The only behavioral data taken for Student was the tracking system for the class-wide behavior plan. The School did not conduct a preference assessment to determine appropriate motivators for Student; incentives were determined by general survey of the

students and by teacher observation. The School never took data on Student's attention to task. (N.T. 194-95, 434-35, 490-94, 497-98)

43. The School's policy for a diagnostic placement included a "comprehensive summary" upon a student's discharge from that placement including a Comprehensive Student Profile; an Academy summary with recommendations; a Behavior summary with recommendations; and Plans and Suggestions for improved behaviors. No such comprehensive summary was developed for Student; nor does the School provide one for any student for whom an IEP is developed because some of this information is incorporated into the IEP. In addition, no data was collected as planned. (N.T. 190-92, 203-04, 238; J-6)
44. The diagnostic support classroom was actually an emotional support classroom, one of two such classrooms at the School. In October 2013, the Parent learned for the first time that the diagnostic placement for Student was an emotional support classroom. (N.T. 66-67, 185-86, 466-68, 557).
45. The school district IEP was not implemented after the expiration of the 45-day diagnostic placement. (N.T. 187-88)
46. The School never notified the Parent of four incidents of physical intervention/restraint of Student in October 2013 or of one incident in January 2014. She may have had notice of one restraint in September 2013. (N.T. 91-94; J-8, J-9, J-10, J-11, J-12, J-13)
47. In early December 2013, the Parent asked in writing for up to date testing of Student in order to update Student's IEP. (P-8)
48. An STS Treatment Plan was developed in December 2013 to address Student's problems behaviors of verbal aggression, physical aggression toward peers, and hyperactivity and/or inattention. This plan included goals, responsibilities of STS and School staff as well as the Parent. (S-30 pp. 3-5)

#### Spring 2014

49. In mid-January 2014, the Parent sent a written request for Student's IEP to be updated. (P-9)
50. The first IEP meeting for Student was held in January 2014. The Parent attended with her educational consultant. The regular education teacher identified as a team member on the IEP document did not attend. (N.T. 70-71, 75, 186, 226, 505-06, 561-62, 630-32, 880; P-10 p. 1)
51. The IEP team discussed Student's transition to the regular education classroom and agreed to a plan for Student to "rotate out" to two classes, art/gym and math. That plan depended upon Student demonstrating consistent appropriate behavior. The School did not find that Student achieved this level of appropriate behavior through the end of the 2013-14 school year in the emotional support classroom, and this "rotation out" was attempted only once or twice. Student's teachers determined that the one or two

instances were unsuccessful because Student engaged in disruptive behavior. There was never a discussion at an IEP meeting about Student's need for ESY services for 2014. (N.T. 79-80, 245-48, 563-64, 576-78, 594-95, 605-06, 610-12, 614, 649, 651, 662-63)

52. After the January 2014 IEP meeting, the School collected data to develop baselines at the request of the Parent's educational consultant. AIMSweb was used for this data collection, although there were probes prior to the meeting that were also used for baselines. (N.T. 244-45, 507, 509-11, 563-64, 883, 887)
53. There was never a follow up IEP meeting after January 2014. However, an IEP dated February 3, 2014 was developed.<sup>8</sup> That document provided information about Student's levels of academic achievement and functional performance and noted the Parent's desire to have Student return to regular education and suggestions for two classes for inclusion. Significant focus on improving behaviors particularly during September, October, and November 2013 were described: following directions, appropriate socialization with peers, eliminating elopement, and encouraging academic engagement. This IEP contained two goals addressing reading (oral reading fluency and comprehension), mathematics (calculation and computation), and behavior (verbalizing emotions and refraining from calling out). A "Positive Rewards System" and a few items of SDI were also included, and the placement was supplemental learning support. Student was not eligible for ESY. (N.T. 80, 226, 245; P-10; S-4)
54. A Notice of Recommended Educational Placement (NOREP) was signed as approved by the Parent on March 18, 2014.<sup>9</sup> Although the NOREP provided for a supplemental level of support, the Parent understood that Student would remain in full time emotional support. (N.T. 80-81, 245; S-4 pp. 20-21)
55. The Parent also signed, on March 18, 2014, a "Physical Intervention Permission Form" for use of passive restraints under certain circumstances. (S-4 p. 25; S-5)
56. In April 2014, Student along with Student's sibling and a peer entered the School building outside of school hours at a time it was closed. The three children stole keys and transportation passes. (N.T. 85-86, 249-50, 699-700; P-17 pp. 43-44)
57. Student was suspended from school for eight days and fined \$320 for the incident. (N.T. 86, 131-32, 159-60, 250; J-8; P-17 p. 47, P-25)
58. Student was no longer able to participate in classroom rewards such as movies after the April 2014 incident. The decision to discontinue Student's participation was not made

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<sup>8</sup> There are two IEPs dated February 3, 2014 in the record. One document, J-5, contains much less detail on Student's present levels of academic achievement and functional performance, suggesting that this is the plan discussed at the January meeting. (*Compare* J-5 and P-10/S-4) The record is unclear as to who actually participated in creating the second February 3, 2014 IEP, P-10/S-4; and, although that document is marked with a "Draft" watermark, it contains much more information in the present levels section such as AIMSweb scores, additional reference to regular education classes, and revisions to several goals to reference AIMSweb. An invitation to participate was sent to the Parent for a meeting on February 3, 2014; however, the Parent's signature of her intent to attend was not signed until March 18, 2014. (J-7; S-4 pp. 1-3, 20-21)

<sup>9</sup> This date is the same as on the invitation to participate in the February 3, 2014 meeting.

during or as a result of an IEP team meeting; Student's teachers were directed to remove the reward system from Student. However, Student still sometimes earned snacks after that time. (N.T. 99-100, 534-35, 582, 592-94, 607-09, 613-14, 668-69, 789, 803-04; J-23 pp. 16-22)

59. Student's behavior deteriorated after the April 2014 incident. (N.T. 549, 578, 581-82, 787-88)
60. Student never left the diagnostic support/emotional support classroom during the 2013-14 school year. (N.T. 662-63)
61. At times, particularly after April 2014, Student would sit with the Parent while she was volunteering at the School rather than attend class. (N.T. 139, 196-98, 536, 538, 787)
62. The Parent's educational consultant conducted two observations of Student in the School in May 2014. (N.T. 889-92, 893-95; P-20)
63. The School monitored Student's oral reading fluency progress using AIMSweb at a first grade level. Between November 4, 2013 and June 9, 2014, 12 probes were taken and graphed with extremely variable results on both words read correctly and errors. (J-16)
64. The School monitored Student's mathematics computation progress using AIMSweb at a second grade level. Between November 4, 2013 and June 9, 2014, 10 probes were taken and graphed with widely variable results despite a trend line that crossed and was somewhat steeper than the aimline. (J-17)
65. During the 2013-14 school year, Student was provided with a total of 95 minutes of individual social skills instruction and a total of 490 minutes in the social skills group. (12/4/14 Stipulation ¶ 6)
66. Student scored in the Below Basic level for both reading and mathematics on the Pennsylvania System of School Assessment (PSSA) in the spring of 2014. (P-28)
67. Student's final report card grades reflected passing grades (As) in Music and a foreign language, and As and a B- in all other subjects. (P-12 p. 3, P-13 p. 1)

#### Summer 2014

68. The private evaluator who conducted the IEE in 2013 performed an updated evaluation and issued a report in August 2014 and an addendum to that report in October 2014. (N.T. 316-17; P-19, P-37)
69. The addendum to the IEE provided a comparison of Student's achievement test scores on Word Reading, Numerical Operations, and Spelling, as well as the Total Composite, using the WIAT-II-A over time. Student's standard scores slightly declined between the 2013 and 2014 administrations, reflecting that Student regressed in those areas during that time period; and, Student's achievement remained markedly below expectations given an average cognitive ability. (N.T. 330-35; P-19, P-23)

70. Updated information using the SSIS reflected that Student had minor improvement with social skills and a slight decrease in problematic behaviors when compared to the first administration. The Conners III results revealed that ADHD was still a significant concern. (P-19 pp. 3-4)
71. Additional achievement testing for the update and addendum to the IEE included select subtests of the WJ-III-ACH, on which Student achieved standard scores of 68 and 70 for Reading Fluency and Passage Comprehension, respectively. These scores were virtually unchanged from the summer 2013 administration. (N.T. 336; P-37)
72. Curriculum-based assessment of Student's reading and mathematics abilities were also conducted in August 2014 for the IEE addendum. Student performed poorly on both measures, reading 13 words correct per minute at grade level with an accuracy of 44% and answering no comprehension questions; and in mathematics, Student did not obtain any correct answers on grade level materials. (N.T. 338-39, 341-42; P-37)
73. Recommendations in the IEE Addendum were essentially the same as in the initial IEE report with an additional suggestion of strategies to address sensory needs. (P-19 p. 5-7)

#### 2014-15 School Year

74. For the 2014-15 school year, Student was in an emotional support classroom full time except when attending specials. There were eleven students in the class of third, fourth, and fifth graders. Student had science, social studies, reading, writing, and mathematics in that emotional support class. (N.T. 763-65, 769, 772-73; P-41)
75. The first day of school was August 19, 2014. (N.T. 747-48)
76. Student continued to exhibit problem behavior during the 2014-15 school year including verbal aggression, physical aggression, and attempted elopement. Student exhibited less willingness to engage than in the prior school year. Student was placed in a manual hold on several occasions. (N.T. 789-92; P-47; S-31, S-32)
77. Student's educational consultant conducted an assessment of Student's reading abilities using the Dynamic Indicators of Basic Early Literacy (DIBELS) in September 2014, concluding that Student demonstrated very poor reading skills at the first grade level. (N.T. 851; P-39)
78. In early October 2014, the Parent revoked her prior consent to the use of physical interventions with Student. (P-43 p. 3)
79. The Parent's educational consultant conducted two observations of Student in the School in October 2014. (N.T. 898-99, 900-05, 908)
80. Student was provided with 240 minutes of social skills group in the fall of 2014 prior to the close of the record. (12/4/14 Stipulation ¶ 4)

## Private School

81. The private school has eleven campuses that serve children with social, emotional, learning, and behavioral needs. Behavior and social skills are integrated into the program. All teachers are certified in special education. The private school has on staff neuropsychologists, psychologists, school social workers, a psychiatric nurse practitioner, and speech, occupational, and physical therapists. (N.T. II 730-31, 746-47, 750-51, 753, 762-63)
82. Every child at the private school has an IEP. Academically, the private school provides individualized schedules depending on the student's levels. Staff:student ratio is individually determined. Students receive instruction at grade level as well as instructional level, and are assessed every two weeks to determine his or her success and to make revisions to the program. (N.T. II 751-55, 757, 780-81, 784-85)
83. The private school provides each student with an individualized behavior plan that is modeled on Applied Behavior Analysis (ABA). A number of Board Certified Behavior Analysts (BCBAs) are on staff to assist in identifying appropriate behaviors for the student and for the creation and monitoring of the behavior plan. Each student is also expected to adhere to school-wide behavioral expectations. (N.T. II 731-34, 743-44, 780)
84. Student behaviors, including the school-wide behaviors, are tracked each period of the school day, including lunch, using a form wherein the student and teacher both assess the student's behavior based on the child's specific behavior plan. Behavior goals are individualized for each student. Data is recorded daily on the student's behavior and reported quarterly to the parents. (N.T. II 733-37, 740, 745)
85. Students earn rewards from the points accumulated through the form. Once a week, the teacher reviews the behavior plan with the student to discuss how successful the child was, and they identify the reward(s) that the child will earn. (N.T. II 737-40, 744)
86. Student was accepted into the private school. (N.T. II 757; P-40)

## **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 each of the witnesses to be generally credible, and necessary determinations with respect to specific testimony are discussed further below. It should also be noted that the Parent, as well as the School personnel, all presented as dedicated individuals who care about Student and Student’s education, despite their conflicting positions at the hearing.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.<sup>10</sup> The private psychologist who conducted the IEE provided highly credible and extremely persuasive testimony about Student’s abilities and achievement, including reasonable expectations of Student’s growth and progress had appropriate instruction and interventions been provided. (N.T. 331-38, 401-02, 445-46, 459-62) His IEE reports were also given significant weight. This evidence contrasts sharply with the somewhat unfocused testimony of the second expert witness presented by the Parent, the

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<sup>10</sup> The Parent objected to the admission of certain pages of S-31 and S-32 (N.T. 1006-11). Those exhibits were collections of email messages and incident reports from the 2014-15 school year, and the basis of the objection was that there were prejudicial statements contained therein. Finding no reasonable means to distinguish among the pages of those exhibits, the Parent’s objection is hereby overruled and S-31 and S-32 are admitted in their entirety, although this hearing officer placed little weight on the uncorroborated hearsay evidence about which the Parent complains.

educational consultant, who was clearly well qualified; although she testified with firmness and conviction, she did so in a manner that at times failed to answer the questions posed, and was remarkably critical of nearly every single action taken, or not taken, by the School, seemingly in response to its representatives' lack of deference to her at IEP meetings. This bias on her part significantly undermined her opinions, and this hearing officer accordingly placed only minimal reliance on her testimony and written summaries.

The private psychologist who conducted the IEE also provided a description of an appropriate diagnostic or interim placement, which was consistent both with this hearing officer's understanding and interpretive guidance provided by the U.S. Department of Education;<sup>11</sup> namely, that such a placement may be an appropriate avenue when a child is not attaining success with the current level of support and services, and the team has the opportunity to conduct necessary evaluations and assessments to develop a plan to address unmet needs. (N.T. 348-51, 354-55, 390, 392-93; N.T. II 96-97) He also acknowledged the difficult position the School found itself in (N.T. 456-58). Nevertheless, this hearing officer shares his view that the critical question is whether the School programmed appropriately for Student's needs and, additionally, whether the record establishes the School's ability to program appropriately for this Student's needs. (*Id.*)

#### Relevant IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify 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 Court held that this requirement is met by providing personalized instruction and support

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<sup>11</sup> 34 C.F.R. APPENDIX A TO PART 300—NOTICE OF INTERPRETATION (2002).

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 Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). Local education agencies (LEAs) 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). Most critically, the IEP must be appropriately responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, “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).

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); *see also Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Nevertheless, the U.S. Supreme Court over thirty years ago recognized that a child with a disability who is “advancing from grade to grade” is not necessarily a child who has been provided with an appropriate education. *Rowley*, *supra*, at 203 n.25; *see also* 34 C.F.R. § 300.101(c)(1) (“Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.”) An appropriate

education, thus, encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (citing *M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir. 1996)). Moreover, a child's educational performance can be affected in ways other than achieving passing grades, such as by an inability to engage in appropriate social relationships with peers or to attend to tasks and instruction at school. Furthermore, where a student's behavior impedes his or her learning, the IEP team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.124(a)(2)(i);

The IEP is developed by a team. Pursuant to the IDEA and its implementing regulations, unless the parents and agency otherwise agree, the team of people who develop a child's IEP must include, at a minimum, the child's parents, teacher(s), someone who can interpret evaluation results, and an LEA representative. 20 U.S.C. § 1414(d)(1)(B) – (C); 34 C.F.R. § 300.321. Further, a child's educational placement must be determined by the IEP team based upon the child's IEP, as well as other relevant factors. 34 C.F.R. § 300.116. Although there is no requirement that an IEP "incorporate every program requested by the child's parents," *Ridley, supra*, at 269, there can be no question that a major premise of the IDEA is that parents must be permitted to participate meaningfully in making educational decisions about their children. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 OSEP 2001) (confirming the position of OSEP that local education agencies cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). 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).

Also crucial to special education 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); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the LRE as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. *Id.* In evaluating the first prong, the efforts the school has made to include the child, a comparison of the benefits to the child of placement in a regular classroom versus a separate special education classroom, and the effect on the other students, must be considered. *Id.*

#### Applicable Section 504 Principles

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

*Ridgewood* at 253.

Finally, charter schools are required to comply with the federal regulations implementing the IDEA and Section 504. 22 Pa. Code §§ 711.1 – 711.62.

Before addressing the Parent’s claims, it is prudent to mention one central aspect of the School’s presentation in this case.<sup>12</sup> There is no question that the School accepted significant challenges in taking over the operations of the underperforming student body and struggling environment that was transferred to it from the local school district. The School, and particularly its representatives who testified at the hearing, must be commended for their well-intentioned efforts to reverse this trend. Nothing in this decision should be read to minimize the determination of the many dedicated individuals who accepted these challenges and worked diligently to improve the educational environment for the School’s students.

### The Parent’s Claims

The first issue is whether the School denied Student FAPE during the 2013-14 and 2014-15 school years, as well as over summer 2014, both procedurally and substantively. Following careful review of the record, the inescapable conclusion is that it assuredly did deny FAPE to Student.

Student began the 2013-14 school year in regular education without any special education support and without the benefit of implementation of the local school district’s IEP,<sup>13</sup> despite the

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<sup>12</sup> See, e.g., School’s Closing Argument at 1, 9.

<sup>13</sup> The rationale for non-implementation of the school district’s IEP (N.T. 172, 238, 242-43) is puzzling at best, and provided no justification for failing to provide any special education services to Student.

clear knowledge that Student required special education and related services. Not unexpectedly, almost immediately, Student began to display problematic behaviors. Rather than attempt to address them through appropriate special education programming and interventions, Student was placed into a “diagnostic” placement that similarly afforded no special education services to address Student’s individualized needs. The Parent was given little to no opportunity to participate meaningfully in this decision.

There was no IEP meeting held until January 2014, well after the 45-day “diagnostic” placement was to conclude. The team itself did not include the required team members. The IEP that followed that meeting, finalized seven months into the school year, was not the result of a collaboration of team members on the components of that document. Its goals generally addressed only a few of Student’s well documented and significant academic and behavioral needs, were not individualized to Student, lacked important SDI to help Student reach those goals, and were not reasonably calculated to enable Student to make meaningful educational progress. Furthermore, both before and after development of the IEP, there was little if any consideration given to the concept of LRE.

Implementation of Student’s program both before and after the IEP does little to remedy these deficiencies. Aside from some undefined STS services, at no time was an individualized behavior plan created for Student; indeed, after the April 2014 incident, Student was no longer even participating in any group behavioral plan. Further, the School’s use of physical restraints were not in compliance with applicable law.<sup>14</sup> Academically, while the School’s teachers undoubtedly provided instruction to their classes of students, nothing was individualized for Student and the program lacked any learning support as specified in Student’s IEPs. The limited

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<sup>14</sup> 22 Pa. Code § 711.46.

progress monitoring that was conducted was not specific to Student and Student's academic needs, and was directly contradicted by the private psychologist's initial and updated IEE reports that assessed Student's growth in areas of significant academic deficits. Student was never able to successfully transition from the very restrictive diagnostic support/emotional support setting; nor was Student provided with any interventions to address the problematic behaviors seen by the School as an impediment to a lesser restrictive placement, and which contributed to Student's academic difficulties.

Student's program for the 2014-15 school year was merely more of the same. The prior IEP is in place, and the placement had not changed. Despite some suggestion in the record that the School was altering some of its approaches to academic instruction and behavioral intervention (N.T. 255-56), the record simply does not establish sufficient individualization based on Student's specific needs for this school year, now already almost half over, such that one might anticipate meaningful educational progress.

There was some anecdotal evidence in the record that suggested that Student's behaviors improved following the diagnostic support/emotional support placement. (*See, e.g.*, N.T. 212, 488-90, 559-60, 572, 774-76) However, that evidence contradicts other credible evidence in the record, such as information in the February 2014 IEP and December STS plan that Student's problematic behaviors continued throughout the school year, as well as the clear deterioration following the April 2014 incident. There is no consistent and systematic data collected on Student's behavior in this rather voluminous record; no FBA was conducted;<sup>15</sup> and Student's

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<sup>15</sup> There is an undated two-page document that may be an FBA (P-42); however, it lacks the detail that one expects from an FBA. *See, e.g.*, [http://pattan.net-website.s3.amazonaws.com/images/2014/06/10/FBA\\_Process\\_Bklt\\_0514.pdf](http://pattan.net-website.s3.amazonaws.com/images/2014/06/10/FBA_Process_Bklt_0514.pdf) (last visited December 23, 2014).

behaviors clearly did not improve enough to allow Student to “earn” some transition from the restrictive emotional support classroom to any meaningful extent as of the close of the record.

### ESY

With respect to ESY, the evidence is preponderant that Student’s eligibility was never seriously considered. Entitlement to ESY services derives from both federal and state special education provisions. Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/he receives FAPE. 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for charter schools for making ESY determinations:

- (1) At each IEP meeting for a student with disabilities, the charter school or cyber charter school shall determine whether the student is eligible for ESY services and if so, make subsequent determinations about the services to be provided.
- (2) In considering whether a student is eligible for ESY services, the IEP team shall consider the following factors, however, no single factor will be considered determinative:
  - (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).
  - (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
  - (iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
  - (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.
  - (v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.
  - (vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

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

22 Pa. Code § 711.44.<sup>16</sup> This hearing officer concludes that Student demonstrated a clear need for ESY during the summer of 2014 based on each of these factors, and particularly subsections (iv), (v), and (vi) in order to be provided with FAPE.

### Remedies

Before turning to the specific remedies, one point relevant to this aspect of the decision must be addressed. The law is crystal clear that “a child's entitlement to special education should not depend upon the vigilance of the parents[.]” *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). To the extent that the School has argued that the Parent’s acquiescence to Student’s programming or failure to request IEP meetings is determinative, the argument is rejected.

### Compensatory Education

It is well settled that compensatory education is an appropriate remedy where a school 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 school fails to remedy the problem. *M.C.*, *supra*. 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 to correct the deficiency. *Id.* In addition to this “hour for hour” approach, some courts have endorsed a scheme that qualitatively awards the “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

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<sup>16</sup> The factors in subsection (b) are identical to those for school districts found at 22 Pa. Code § 14.132.

FAPE.” *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); see also *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.”)) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

The record does not establish a basis for a qualitative award. This hearing officer concludes that Student must be awarded full days<sup>17</sup> of compensatory education for the 2013-14 school year and the 2014-15 school years, less the hours during which Student was provided with social skills instruction, until such time as Student begins to attend the private school discussed more fully below. Student’s academic and behavioral needs clearly pervaded Student’s entire school day and any educational benefit that Student may have received is impossible to quantify beyond the social skills instruction. See *Keystone Cent. School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). For ESY, this hearing officer equitably estimates that Student should have been provided with a minimum of 48 hours of academic and behavioral services, calculated conservatively at 2 hours per day, 4 days per week, for 6 weeks during the summer of 2014.

The hours of compensatory education are subject to the following conditions and limitations. Student’s Parent may decide how the hours of compensatory education are spent.

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<sup>17</sup> Although the School provides more than the state-mandated minimum hours of instruction, compensatory education shall be calculated at 5 hours per day. 22 Pa. Code § 11.3.

The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's social/emotional goals and skills. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided 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 eighteen (18).

There are financial limits on the Parent's discretion in selecting the compensatory education; the costs to the School of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the School professionals who did and would have provided social/emotional services to Student during the period of the denial of FAPE.

#### Prospective Private Placement

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 school, and also seek tuition reimbursement for the cost of the 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 placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). 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) (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.*

Here, however, the Parent is seeking not tuition reimbursement, but a prospective private placement. This hearing officer has concluded that this is a remedy which is within her jurisdiction to order. (HO-4) Hearing officers do enjoy broad discretion to fashion an appropriate remedy under the IDEA. *See, e.g., Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009); *Ferren C., supra*, at 718. In a case such as this, there is no reason to forego application of this discretion to an order for a private school placement. *See, e.g., School Committee of Burlington v. Department of Education*, 471 U.S. 359, 370 (1985); *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1285-86 (11<sup>th</sup> Cir. 2008); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 248-49 (3d Cir. 1999).

While the tuition reimbursement test may not be directly applicable, its prongs do provide concrete guidance for evaluating this type of claim. Additionally, however, the record must, in this hearing officer's estimation, support a conclusion that the LEA is not in a position to make timely and reasonable revisions to its special education program in order to offer and provide FAPE. *See, e.g., Burlington, supra*, at 369 (explaining that private placement at public expense is warranted where an appropriate public school program is not possible). This does not mean

that the Parent must establish that the LEA cannot “in theory” provide an appropriate program, *Draper, supra*, at 1285 (quoting *Ridgewood, supra*, at 248-49), but the equitable nature of the requested remedy logically demands something more than a past denial of FAPE.

This hearing officer has already concluded that the School’s program has not provided Student with a placement and services reasonably calculated to allow Student to make meaningful progress. The flaws in the School’s program for Student discussed above are substantial; and this hearing officer concludes that they are so insurmountable that the School would not be able to make sufficient revisions at this point in the 2014-15 school year to adequately address all of Student’s needs. Thus, the next question is whether the private school is appropriate. This question must be answered in the affirmative.

The private school offers a staff of certified special education teachers and various other professionals, including BCBAAs, to address student needs. Behavior and social skills are integrated into the program. The ratio of staff to student is determined on an individual basis, and each child has an IEP. Schedules are also individualized to student levels, so that instruction can be provided both on grade level content and instructional level. Assessments are performed every two weeks to provide guidance on success and the need for revision of programming decisions. Behavior is a central focus through individualized behavior plans and goals, with tracking and data collection throughout the school day, in addition to school-wide expectations.

The record establishes that the private school will provide a program to Student that addresses Student’s specific behavioral and academic needs on an individualized basis. While Student’s success there cannot be guaranteed, this hearing officer concludes that the Parent has established that the proposed program is appropriate for Student. Finally, the equities in this

case do not weigh against the Parent. For all of these reasons, the Parent's requested prospective private school placement will be awarded.

Finally, having reached the above conclusions based on the IDEA, there is no need to discuss further the Parent's Section 504 and ADA claims.

### **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the School denied Student FAPE, and that Student and the Parent are entitled to an award of compensatory education and a prospective private placement.

### **ORDER**

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

1. The School failed in its FAPE obligations to Student.
2. The School shall provide Student with five hours of compensatory education to address Student's academic and/or social/emotional needs for every day Student attended the School during the 2013-14 and 2014-15 school years, less the hours of social skills instruction provided, subject to the conditions and limitations set forth above, until Student begins attending the private school.
3. The School shall provide Student with 48 hours of compensatory education to address Student's academic and/or social/emotional needs for the lack of ESY services in 2014, subject to the conditions and limitations set forth above.
4. The School shall collaborate with the private school and Parent to transition Student to the private school as soon as possible.
5. The School shall directly pay Student's tuition at the private school for the remainder of the 2014-15 school year upon presentation of invoices.
6. It is **FURTHER ORDERED** that the private school shall be considered and shall remain Student's pendent placement after the conclusion of the 2014-15 school year until such time as:

- a. Student's IEP team, including Parents and members from both the private school and the School, develop an appropriate IEP for Student that can be implemented in an appropriate School regular or special education placement with appropriate supports and services, and Parent approves a NOREP for such placement, or
- b. The Parent otherwise agrees to return Student to a School recommended educational placement, or
- c. The Parent enrolls Student in another LEA or private school, or
- d. The Parent and/or the private school staff determine that the private school is not appropriately meeting Student's educational needs.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: December 24, 2014