

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

DUE PROCESS HEARING

Name of Child: C.F.

ODR #18805/16-17 KE

Date of Birth: [redacted]

Dates of Hearing:

May 24, 2017

June 8, 2017

June 22, 2017

CLOSED HEARING

Parties to the Hearing:

Radnor Township School District
135 S. Wayne Avenue
Wayne, PA 19087

Parent[s]

Date of Decision:

Hearing Officer:

Representative:

Tracey Waldmann, Esquire
Raffaele & Puppio
19 W. Third Street
Media, PA 19063

Michael Raffaele, Esquire
Frankel & Kershenbaum
1230 County Line Road
Bryn Mawr, PA 19010

July 26, 2017

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

Background

Student¹ is a mid-teen aged student residing within the boundaries of the District who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the current classifications of autism and speech/language impairment. As such, the Student is also an individual with a disability as defined under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 and a protected handicapped student under Pennsylvania Chapter 15.²

The Parents requested this hearing because they believe that the program and placement the District offered for Student through its June 15, 2016 IEP was inappropriate, and that in order to receive a free appropriate public education (FAPE) Student requires placement in the private school (Private School) where Student is currently unilaterally enrolled. They are seeking tuition reimbursement. The District maintains that the IEP it offered to Student is appropriate, that it can be implemented in the District high school, and that tuition reimbursement is not warranted.

Having carefully considered the witnesses' testimony and the documents entered into evidence, as well as reviewing the parties' written closing arguments, I find in favor of the District.

Issues

1. Is the June 15, 2016 IEP³ the District offered to the Student appropriate?
2. If the IEP is not appropriate, is the Parents' unilateral private placement appropriate?
3. If the District's IEP is not appropriate and the Parents' unilateral private placement is appropriate are there equitable considerations that would remove or reduce the District's obligation to fund the private placement?

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

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14) 29 U.S.C. § 794. The federal regulations implementing Section 504 are codified in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

³ The IEP date in the transcript on page 19 is incorrect.

Findings of Fact⁴

Developmental and Medical History

1. Student is an eligible student of high school age who resides in the District and has just completed 9th grade in Private School, a placement unilaterally selected by the Parents. Student has been previously diagnosed with Asperger's Disorder (high functioning autism) and Attention Deficit Hyperactivity Disorder (ADHD) and is currently classified under the IDEA as a student with autism and speech/language impairment. [NT 641, P-15, P-21]
2. As an infant and toddler Student reached developmental milestones late, walking at 18 months and not speaking until age two. Student received Early Intervention speech services from age two to three. [NT 638-639; P-21, P-26]
3. Student also received physical and occupational therapy as an infant and toddler to address generalized hypotonia, hip dysplasia, distal arthrogyriposis, and a vertical talus requiring surgery on the right foot and ankle. Student was diagnosed at age two with strabismus and had surgery to correct this at age three. [NT 639; P-1, P-21]
4. Student had a seizure in December of 4th grade and another several months later. A neurologist prescribed anti-seizure medication which Student took for two years; seizures have not returned since the medication was discontinued. [NT 640, 645; P-15, P-21]
5. Student receives private psychotherapy which began during grade school. In December 2015 Student began receiving private speech/language therapy. [NT 310, 367]

School History

6. From the ages of two to six years Student attended a private nursery school, spending two years in pre-Kindergarten by Parents' choice. [NT 639-640; P-1]
7. When Student was preparing to transition to Kindergarten the Parents asked the District to evaluate Student to help identify an appropriate educational program and placement. The District conducted an evaluation and determined that Student was eligible for special education programming under the classification of Specific Learning Disability. Student attended Kindergarten in a District school and received learning support services targeted to identification of letters, letter sounds, pre-primer words, numbers, and acquisition of basic addition skills. Student also received occupational therapy to address low muscle tone and poor fine motor skills. Student left the District after the Kindergarten year and enrolled in Parochial School. [NT 640; P-1, P-2]

⁴ NT references the transcript. S references School District exhibits and P references Parent exhibits. In cases where both parties submitted the same document one or the other, but not both, will be referenced.

8. Student attended Parochial School from 1st through 8th grades. While attending Parochial School Student did not receive any special education services from the Intermediate Unit. [NT 729]
9. The only routine accommodations Student received in Parochial School were extended time for tests and testing in a smaller room. [NT 729]

The District's Evaluation

10. The Parents contacted the District in December 2015/January 2016 to request an evaluation. [NT 25, 64; P-24]
11. The District issued a Permission to Evaluate (PTE) on February 1, 2016 and the Parents signed and returned it the next day. The Parents provided the District with a copy of a private psychological evaluation completed in September/October 2015 and a private speech/language evaluation completed in January 2016. [NT 25, 27 64; P-15, P-19, P-24]
12. In addition to providing the District with the evaluations they had obtained privately, the Parents supplied written input for the evaluation. They were concerned that Student be prepared academically and socially for life beyond high school. They want Student to enjoy school and learning while building up confidence and self-esteem. [P-21]
13. The Parents believe that Student requires a small, structured supportive setting in a language-rich environment with supports integrated into Student's day. They note that Student needs supports in the areas of learning, social/emotional functioning and self-advocacy. [P-21]
14. The Parents also noted that because Student is not a distraction in the classroom Student "flies under the radar" such that teachers may not realize that Student needs help given Student's difficulty in self-advocacy. [P-21]
15. As part of the District's evaluation the District psychologist observed Student in the Parochial School and asked Student's teachers to complete a behavior rating scale. [NT 120-121, 156-159]
16. Student's 8th grade Parochial School classroom had 24 students. The classroom was not distraction-free and had background noise. [NT 156, 159, 729]
17. Observed by a District evaluator for about 45 minutes in the Language Arts class, Student engaged in a friendly non-verbal teasing exchange with another student, attended to a speaker and volunteered a comment on topic. Student was also noted to fidget, look around the room and make a comment to a neighbor. Towards the end of the session Student appeared to be losing focus. [P-21]

18. Student's Language Arts teacher reported that Student is friendly and outgoing but struggles academically with multi-step directions, paying attention and focusing on tasks, thinking beyond black and white, and organization. [P-21]
19. The Parochial School Language Arts teacher would redirect Student's focus, repeat directions, do check-ins, offer some 1:1 support, and provide checklists and graphic organizers for writing. [P-21]
20. Student's Parochial School Math, Science and Social Studies teacher reported that Student is "a great kid" who is eager to please and wants to fit in. Strengths were noted to be participation, and math calculation and reasoning skills. He noted that reading and expressive language were areas of need, along with frustration with longer assignments and struggling in collaborative settings. [P-21]
21. In spring of 8th grade, as assessed by the District using the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) and reported in the Evaluation Report dated April 8, 2016 Student's cognitive abilities are in the Average Range with a Full Scale IQ of 92 (30th percentile). Standard Scores are as follows: Verbal Comprehension 89 (23rd percentile), Visual-Spatial 100 (50th percentile), Fluid Reasoning 94 (34th percentile), Working Memory 115 (84th percentile), Processing Speed 80 (9th percentile).⁵ [P-21]
22. In spring of 8th grade, as assessed by the District using the Wechsler Individual Achievement Test – Third Edition (WIAT-III) normed on a cohort of same age peers, Student's academic achievement in Reading was as follows: Total Reading 99 (47th percentile) composed of Basic Reading 101 (53rd percentile), Reading Comprehension and Fluency 99 (47th percentile), Reading Comprehension 99 (47th percentile), Word Reading 103 (58th percentile), Pseudoword Decoding 101 (53rd percentile), Oral Reading Fluency 100 (50th percentile), Oral Reading Accuracy 98 (45th percentile), Oral Reading Rate 100 (50th percentile).⁶ [P-21]
23. In spring of 8th grade, as assessed by the District using the WIAT-III normed on a cohort of same age peers, Student's academic achievement in Math was as follows: Mathematics 101 (53rd percentile), Math Fluency 100 (50th percentile), Math Problem Solving 93 (32nd percentile), Numerical Operations 109 (73^d percentile), Math Fluency Addition 103 (58th percentile), Math Fluency Subtraction 109 (73rd percentile), Math Fluency Multiplication 87 (19th percentile). [P-21]

⁵ Standard scores, as generated by the WISC-V and the WIAT-III, are expressed on the "bell-shaped curve" with 100 being exactly average.

⁶ As assessed privately with the Informal Reading Inventory (IRI) in November 2015 Student's reading scores were not as high as the WIAT-III results. The private psychologist opined that this difference was likely due to the fact that on the latter readers are permitted to check back through the passage to find information while on the former this is not permitted. [P-21]

24. In spring of 8th grade, as assessed by the District using the WIAT-III normed on a cohort of same age peers, Student's academic achievement in Written Expression was as follows: Spelling 100 (50th percentile), Essay Composition 111 (77th percentile). [P-21]
25. In spring of 8th grade the District assessed Student's Social/Emotional functioning. Responses on the Behavior Assessment System for Children – Second Edition (BASC-2) were provided by Student's mother and one of Student's Parochial School teachers. [P-21]
26. On Aggression, Conduct Problems, Anxiety, Depression, Somatization, Internalizing Problems, Externalizing Problems and Functional Communication both mother and teacher's ratings resulted in an "At-risk" rating for Leadership Skills. [P-21]
27. On Hyperactivity, Externalizing Problems, Social Skills, and Adaptive Skills the mother's and the teacher's BASC-2 responses yielded somewhat disparate results with mother's scores being "At-risk" and the teacher's scores being "Average". [P-21]
28. On Atypicality, Withdrawal, Attention Problems, and Adaptability the mother's and the teacher's BASC-2 responses yielded very disparate results with mother's scores being "Clinically Significant" and teacher's score being "Average". [P-21]
29. The only scale on the BASC-2 for which the teacher's rating was not "Average" was Study Skills, where the teacher's rating was "At-risk".⁷
30. Student's teacher completed the Vanderbilt ADHD Scales. Results did not indicate any level of concern around inattention or hyperactive behavior. [P-21]
31. The District issued its evaluation on April 2, 2016. The evaluation considered and incorporated some findings from the two private evaluations and identified strengths as well as deficits that needed to be addressed in the IEP. [NT 2, 116-118, 143, 160, 162-163; P-21]
32. The District concluded that Student's primary disability IDEA classification is Autism Spectrum Disorder with a secondary classification of Speech-Language Disorder. [P-21]

Private Evaluations –Needs, Strengths and Recommendations

33. Student was privately evaluated by a psychologist in the fall of 8th grade. [P-15]
34. Student's memory, attention and concentration skills were assessed as follows:
Children's Memory Scale: Visual-immediate 97 (42nd percentile), Visual-delayed 91 (27th percentile), Verbal-immediate 63 (1st percentile), Verbal-delayed 72 (3rd

⁷ The BASC-2 does not generate a parent score for this area item.

- percentile), General Memory 72 (3rd percentile), Attention/Concentration 103 (58th percentile, Learning 88 (21st percentile), Delayed Recognition 88 (21st percentile). [P-15]
35. Student's performance on the Auditory Attention subtest of the Woodcock-Johnson III yielded an Average Range score of 99. [NT 139; P-21]
 36. Student's language skills as assessed using the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) were as follows: Core Language 82 (12th percentile), Receptive Language 90 (25th percentile), Expressive Language 80 (9th percentile), Language Content 86 (18th percentile), Language Memory 84 (14th percentile). [P-15]
 37. In the ensuing October/November 2015 evaluation report Student's strengths were identified as solid basic math skills, good understanding of phonetic rules for decoding and spelling tasks, ability to marshal resources to attend to discrete information, ability to do well with a high degree of structure and a pleasant demeanor with motivation to please others and to meet expectations. [P-15]
 38. Student's functional limitations were identified as difficulty integrating small details into the bigger picture, significantly underdeveloped expressive language skills, weak receptive language skills, below expected reading levels due to weaknesses in expressive and receptive language skills, difficulty with less structured tasks of fluid reasoning, weak organization skills, difficulty maintaining focus and challenges relating to peers given Student's Asperger's Disorder. [NT 28; P-15; P-31]
 39. The private psychologist noted that while Student does well in familiar environments, Student finds "people in general overwhelming" and without situations that are familiar to Student and within Student's control Student can become quite anxious." [NT 577; P-15]
 40. The private psychologist made a number of school-based recommendations including a high degree of structure at school, work with a learning specialist, extended time for exams, use of a laptop for all written assignments, access to lecture notes prior to the lecture, posing questions and then allowing response time to increase classroom participation, structuring tasks into smaller segments, close proximity to teachers in class, keeping background noise to a minimum when possible, exemption from foreign language requirements, and use of audiobooks. [P-15]
 41. In the fall of 8th grade. Student was also privately evaluated by a speech/language pathologist. [P-19]
 42. In the ensuing January 2016 Speech and Language Summary testing scores were reported expressed in standard scores as follows: Peabody Picture Vocabulary

- Test – Fourth Edition (PPVT-4-A): 90 (25th percentile); Test of Adolescent and Adult Language- Fourth Edition (TOAL-4): Spoken Language 90 (25th percentile), Written Language 98 (45th percentile), General Language 93 (32nd percentile); Oral and Written Language – Second Edition (OWLS-2): Listening Comprehension 84 (14th percentile), Oral Expression 83 (13th percentile) Oral Composite 83 (13th percentile). [P-19]
43. Student’s Social Language skills were as follows: Social Language Development Test – Adolescent (SLDT-A): Making Inferences 66 (1st percentile), Interpreting Social Language 60 (<1st percentile), Problem Solving 84 (15th percentile), Social Interaction 73 (3rd percentile), Interpreting Ironic Statements 70 (2nd percentile), Total 63 (1st percentile). [P19]
44. Student’s Problem Solving skills were as follows: Adolescent Test of Problem Solving – Second Edition (TOPS-A: 2): Making Inferences 85 (16th percentile), Determining Solutions 87 (19th percentile), Problem Solving 75 (5th percentile), Interpreting Perspectives 112 (79th percentile), Transferring Insights 95 (6th percentile), Total Test 90 (25th percentile). [P-19]
45. For purposes of the speech/language evaluation Student’s Language Arts teacher at Parochial School completed the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5) Observational Ratings Scale, identifying areas of concern related to attention, social interactions and verbal expression. [P-19]
46. The private speech/language evaluator identified Student’s strengths as a pleasant demeanor, being consistently polite, and having a desire to do well in school. [P-19]
47. The private speech/language evaluator identified deficits requiring remediation as expressive language, receptive language, and social language. [P-19]
48. The private speech/language evaluator made a number of school-based recommendations including a language-based curriculum, small student-teacher ratio, specially designed individualized or small group teaching, explicit teaching of strategies, multisensory teaching, minimal background noise and distractions, on-site speech/language support for teachers and individualized speech/language therapy, social skills support, support with executive functioning (organization and task management), and ongoing communication among all adults working with Student. [P-19]
49. The private speech/language evaluator recommended a scientifically research-based reading program provided by qualified professionals, and two-to-three 45-minute speech/language therapy sessions weekly. [P-19]
50. The private speech/language evaluator also recommended approximately 78 teaching strategies, many of which are simply good pedagogy. Some Student-

specific strategies were helping Student focus, preferential seating, avoidance of noise sources, quieter classroom with a “slower” pace and routine, encouraging Student to indicate when not understanding or needing repetition, provision of previewing of new information, breaking tasks into smaller steps, allowing processing time. [NT 208, 435-436; P-19]

The IEP Process

51. The District convened an IEP meeting on April 18, 2016. The Parents were accompanied by their special education advocate and the District’s counsel was also present. [NT 31-32]
52. Prior to the April 18, 2016 IEP meeting the District’s speech/language therapist had a telephone conversation with Student’s mother about the speech/language programming and the mother did not express any concerns. [NT 65-66, 84, 227]
53. Most of the one-hour meeting was spent going over the evaluation report “front to back”. Neither the Parents nor their advocate expressed any concerns about the evaluation during the meeting. [NT 32-33; 66-67, 163]
54. Student’s father spoke at length about concerns he had with the local Intermediate Unit (IU) when Student attended the Parochial School. [NT 66-67, 102]
55. The District explained to the Parents that it and the IU were separate entities and that the evaluation and IEP were the District’s product and not related to the IU. [NT 70]
56. Student’s father or the Parents’ advocate had to leave early and the meeting was cut short. As they were walking out the District asked the Parents if they had any questions or concerns about the draft IEP they had received. No concerns or questions were expressed but the District told the Parents how to go about raising subsequent questions or concerns. [NT 33-34, 67-68, 101, 660; P-5]
57. The District advised the Parents and their advocate that an IEP with a Notice of Recommended Educational Placement (NOREP) would be sent. The District’s Assistant Director of Student Services believed that the meeting had been amicable and that “everything seemed fine”. [NT 67-68, 101]
58. The District’s Assistant Director of Student Services and the mother had a telephone discussion to answer the Parents’ questions about the NOREP. The mother also expressed that the Parents wanted Student to finish eighth grade at the Parochial School rather than starting services with the District in April. [NT 70-71; S-5]
59. The Parents attended an open house at the High School on April 22, 2016 but observation of actual classes was not permitted. [NT 663; P-4, P-24]

60. In an April 28, 2016 letter the Parents notified the District that they were concerned about the comprehensiveness of the District's evaluation, and that they were concerned about the IEP and the District team's ability to meet all Student's learning needs. They returned the NOREP as disapproved. [NT 32; S-6, P-24]
61. This letter was the first time the Parents told the District that they had concerns about the evaluation or the IEP. [NT 34; P-6]
62. The Parents requested a meeting to continue to discuss Student's program and placement and following a series of exchanges about dates, the parties met again on June 15, 2016. [NT 35-37, 74-75, 103-104; P-24]
63. At the June 15, 2016 meeting the Parents' advocate and the private psychologist evaluator participated briefly by telephone. Student's private speech/language therapist⁸ participated in person for most of the meeting. The Parents and District personnel were present. The team went over the entire IEP and discussed Student's needs and strengths. [NT 37-38, 351-352; 669; S-4]
64. Although the private speech/language therapist did not express any concerns about the speech/language goals or SDI in the IEP at the June 15, 2016 meeting, she did opine that the District's proposed amount of speech and language group therapy was insufficient, that pull-out services and push-in services were not going to address the whole continuum of Student's needs, and that a regular education classroom would be too large, too noisy, and too fast-paced for Student. [NT 84, 352-354]
65. At the meeting the Parents expressed a concern that Student needed a small, more structured environment so Student would not be overwhelmed and would not be distracted. [NT 57-58]
66. The Parents requested that the District increase Student's level of services to full-time support in lieu of participation in the proposed regular education classes. The District declined to offer this type of placement. [NT 107-108; 670]
67. The team added four more Specially Designed Instructions (SDIs) to the IEP to address concerns raised at the June 15, 2016 meeting. [NT 42; S-4]
68. At no time in the meeting did the Parents, their advocate, or the private professionals working with Student express concerns about the IEP's goals, SDIs, or transition planning. [NT 83-84]
69. On June 20, 2016 the District issued a NOREP to the Parents with the final proposed IEP. [S-8]

⁸ A different speech/language therapist than the person who conducted the Speech/Language Evaluation in the fall of 2015.

70. The Parents informed the District by letter dated June 28, 2016 that they believed the IEP was not appropriate and did not offer FAPE, and that they intended to enroll Student in a private school at District expense. The District responded that it believed its offered IEP provided FAPE. [NT 62-63, 107; S-9, P-25, P-26]
71. On June 29, 2016 the Parents signed as rejected the issued NOREP related to the IEP as revised on June 15, 2016 and requested an informal meeting. [NT 85; S-8]
72. On July 15, 2016 Parents enrolled Student at Private School. [P-30]
73. Nevertheless, the District and the Parents held the parentally-requested informal meeting on July 18, 2016⁹. The Parents were accompanied by a new education advocate associated with the Parent attorney's firm. Most of the discussion revolved around the Parents' concerns about the size of the high school and the District's responses about how the environment is made smaller through the classes offered. [NT 87-88, 107, 109-111, 727; S-10]
74. The District did not convene another meeting because it believed it had offered FAPE. The next communication the District received regarding Student was the Due Process Complaint filed on February 17, 2017. [NT 88-89, 108; S-7]
75. Student entered 9th grade in Private School in September 2016. [NT 463]

IEP Goals and Specially Designed Instruction

76. Based upon the private evaluations and the District's evaluation which incorporated some findings from the private evaluations, Student's strengths are as follows: average intellectual functioning; average academic achievement/mastery; well-developed math skills; strong encoding (spelling) skills; average sight word recognition and phonetic decoding; ability to learn and improve with focused interventions; motivated learner; desire to please others and meet expectations; benefits from structure, familiarity, and routine. [NT 561-562; S-4]
77. Based upon the private evaluations and the District's evaluation which incorporated some findings from the private evaluations, Student's deficits/needs are as follows: improving reading comprehension; improving written expression; improving cognitive and visuo-motor processing speed; improving math problem solving and fluency skills; learning to think at higher levels of abstraction; learning to integrate information into an overall concept or narrative; developing self-advocacy skills; developing speech/language skills; developing organizational skills; working toward decreasing anxiety in new situations. [NT at 561-562; S-4]
78. The final IEP the District offered to Student was completed on June 15, 2016. [S-4]

⁹ At an earlier point the record had an incorrect date for this meeting.

79. To address Student's needs in the area of reading comprehension the IEP provides a goal addressing reading a passage and answering questions both explicit and implicit. [S-4]
80. To address Student's needs in the area of written expression the IEP provides a goal addressing writing complete paragraphs that together merit a score of proficient on a writing rubric. [S-4]
81. To address Student's needs in the area of organization in math the IEP provides a goal addressing algebraic expressions, equations and analysis of data sets to identify patterns. [S-4]
82. To address Student's needs in the area of verbal communication the IEP provides a goal of comprehending non-literal expressions. [S-4]
83. To address Student's needs in the area of socialization the IEP provides a goal for initiating and following through with conversations. [S-4]
84. To address Student's needs in the area of self-advocacy the IEP provides a goal for seeking clarification of demands, working with teachers to create a manageable schedule for work completion, and requesting additional time, explanations and/or teacher assistance. [S-4]
85. To address Student's needs in the area of anxiety/managing environmental stressors the IEP provides a goal for identifying and utilizing learned coping strategies for calming. [S-4]
86. Given that the District had not yet had the chance to educate Student, baselines for each of the goals were to be determined either within two weeks of school attendance or ten days of IEP implementation. [S-4]
87. The IEP's Specially Designed Instruction (SDI)¹⁰ to address Student's learning needs includes structured study hall, meeting/conferencing with teacher over writing assignments, provision of lecture notes, repeating and clarifying directions, teacher monitoring of group work to ensure Student has a defined role and participates appropriately, providing a writing/editing checklist and a graphic organizer for writing assignments, pairing visual/auditory directions for complex multi-step directions, access to a word processor for written assignments over two paragraphs, access to audio books when available, teachers providing the speech/language therapist with classroom vocabulary to review and reinforce instruction, provision of study guide/outline for assessments within two days of an assessment, provision of a word bank for assessments to aid word retrieval, weekly check-in with case manager, access to a paraprofessional in social studies,

¹⁰ Some of the SDIs are repeated in separate findings of fact as they address more than one area of need.

- science and math, small group direct instruction in language arts using computer based reading software.
88. The IEP's Specially Designed Instruction (SDI) to address Student's organization (executive functioning) needs includes structured study hall, monthly locker check-in, chunking of long-term assignments, providing a writing/editing checklist and a graphic organizer for writing assignments, provision of study guide/outline for assessments within two days of an assessment, weekly check-in with case manager.
 89. The IEP's Specially Designed Instruction (SDI) to address Student's attention and focusing needs includes extended time on assessments, extended time on projects/assignments, preferential seating, visual or verbal prompts, small group testing, pairing visual/auditory directions for complex multi-step directions, allowing for wait time to formulate responses, allowing a quick break after a long period of instruction.
 90. The IEP's Specially Designed Instruction (SDI) to address Student's social skills needs includes direct instruction in social skills and communication, teacher monitoring of group work to ensure Student has a defined role and participates appropriately.
 91. The IEP's Specially Designed Instruction (SDI) to address Student's need for structure and issues around anxiety includes being alerted about a schedule change in advance, reminders about preparing for a smooth transition, visit to the high school with parents, attending Freshman Fundamentals orientation, scheduling (an IEP team) meeting during first week of school, access to a safe adult throughout the school day, weekly check-in with case manager.
 92. The IEP's Specially Designed Instruction (SDI) to address Student's need for developing self-advocacy includes encouragement to ask clarifying questions, weekly check-in with case manager.
 93. The IEP provides the related service of speech/language therapy in a small group for 30 minutes per week. The District's speech/language therapist found that this was the appropriate level of this related service, but testified that as she worked with Student she would have the option of changing from small group to individual sessions. [NT 225-228; S-4]
 94. A large part of the District's speech/language therapist's interventions would be working with Student's teachers to obtain the vocabulary that would be used in class so that she could conduct pre-teaching/re-teaching to address Student's difficulty with complex language and pragmatic aspects of language. [NT 217; S-4]

95. The District's speech/language therapist would also contact the teachers and/or case manager to find out if Student was participating in the class, following the directions, and completing work in order to address these functional areas with Student. [NT 230]
96. In addition to the direct speech/language therapy, Student's communication-related needs would be addressed by the relevant SDI across settings, in the Academic Success Center, and in the very small group (2 student) Effective Communications Strategies class. [NT 229, 239-240; S-4]
97. The IEP provides that Student would participate in general education classes for social studies, science and math, and would also be with typical peers during lunch, recess, and electives. [NT 57; S-4]
98. The IEP provides that Student would receive direct instruction in a special education writing class, direct instruction in a reading comprehension class, and direct instruction in a social skills class. Student was also to be given a structured study hall. [NT 57; S-4]
99. In the high school all teachers are highly qualified¹¹ and trained. They move around the classroom monitoring students and adjusting instruction. Classes offer multiple learning modalities in that most classrooms have visuals and Smart Boards, and students have access to iPads. [NT 61, 208, 397, 402-403, 426-427]
100. Student's projected schedule for the 2016-2017 year lists the courses, names of the instructors, and number of students in each class as follows: Reading/Writing (special education) double block with 6 students and certified special education teacher; Effective Communication Strategies (social skills)(special education) with 2 students and certified special education teacher; Essentials of Algebra (regular education) with 12 students and a certified special education teacher; Algebra I CP (regular education) with 16 students and a certified special education teacher; Biology (regular education) with 17 students and a regular education teacher; Academic Success Center (structured study hall)(regular education) with 13 students and a special education teacher; Health & Wellness (regular education) with 28 students and a regular education teacher¹². [NT 89-97; S-12]
101. As per an SDI added to the IEP at the June 15th meeting, a paraprofessional would be present in classes with more than 10 students. The paraprofessional would be available to assist Student as well as other students depending on the class. The paraprofessional would not "be on" Student, given that the District aims for its students to be as independent as possible. Typically

¹¹ "Highly Qualified" is a term of art indicating that the teacher has met certain rigorous requirements.

¹² The Health & Wellness class is a gym class and would not involve processing of academic information. [NT 96; S-12]

more than one student has a question or needs assistance, so the paraprofessional would gather these students and assist them through an assignment. [NT 60-62; 82-83]

102. The private psychologist evaluator acknowledged that how a class is structured is more important than size, and having a dually certified teacher is helpful because the teacher would know what question to ask Student to ensure that Student is understanding as the class is moving along. [NT 610]
103. Another SDI added during the June 15th meeting was that Student would have access to a “safe adult” throughout the school day to act as a mentor. The District puts multiple people in place such as the case manager, a guidance counselor, a psychologist and/or a teacher to get to know the student and establish rapport, and frequently the student will then choose the particular person with whom he/she feels comfortable. [NT 81-82]

Plans for Transition from Parochial School to the District

104. After the registration paperwork for high school is completed, the guidance office schedules placement testing for English and Math. [NT 282-283]
105. On April 22, 2016 following the April 18, 2016 meeting the guidance secretary sent an email to the Parents inviting them to the prospective student open house scheduled for Friday, April 22nd. The email also indicated that as a prospective student, Student was welcome to shadow a high school student. The guidance counselor later sent follow up information in regard to the Parents’ questions. [NT 73; P-24]
106. The District also hoped to discuss transition planning at the follow-up IEP meeting that was being scheduled and ultimately was held on June 15, 2016. Transition planning has to do with looking at a student as he or she changes from building to building within the District and for students who are coming from outside schools to the District. There are various things put into place to promote student success in a new environment with new peers, new teachers, and new expectations. The special education teacher who is heavily involved in helping students transition was invited to the IEP meeting. [NT 75-78; S-7]
107. One of the SDIs in the IEP provides that District administration will call and arrange a time and date over the summer for the Parents and Student to visit the high school. [NT 79-80; S-4]
108. The IEP provides that Student would attend “Freshman Fundamentals”, a transition program in which Student would meet other same-grade students and be given an opportunity to see the building in student-led tours, with schedule in hand, to identify location of classrooms and facilities. During this program, students are also given a study skills book and taught over the course of a half-hour how to take notes effectively, how to organize, and how to outline. The

counselors run a session on stress and anxiety and how to identify resources within the building and within the student's life, and talk about the use of a "safe person" to whom they can go to for help. The counselors also run a session on school/life balance and finding clubs or activities that interest students and how to become part of the high school community. [NT 278-279]

109. In addition to Freshman Fundamentals, Student would also be afforded the opportunity to come to the high school before school started to meet with Student's counselor, be given a personal tour of the building, walk through Student's schedule, see the locker location, and see the cafeteria and other facilities. [NT 276]

110. With the exception of the Parents' attending the Open House without Student, neither the Parents nor Student participated in English/Math placement testing or any of the other offered transition activities. [NT 79-80, 112, 701]

Enrollment in Private School

111. On January 7, 2016, prior to returning the signed PTE to the District in February 2016, the Parents submitted an application to Private School with a \$100 application fee and selected from a drop down menu or wrote in that the family was "currently pursuing school district funding." In a later letter the Parents informed the District that they were enrolling student in a private placement and were seeking tuition reimbursement. [NT 705; P-26, P-29]

112. At about this same time the Parents also applied to two other private schools for students with learning differences and considered two religiously-affiliated high schools. [NT at 648, 651-654; P-29]

113. During spring 2016 the District invited Student to shadow a student at the high school, but Parents did not schedule any shadow day for Student. However, Student did shadow students at Private School and either one or two other private schools. [NT 708-709]

114. Although neither they, nor their private providers, nor their education advocate, raised any concerns about the evaluation or the IEP in the April 2016 meeting the Parents sent a subsequent letter stating their disapproval of the IEP. [NT 66-68, 712-713; S-6]

115. Neither the Parents, nor their private providers, nor their education advocate, raised any concerns about the goals or SDI at a second IEP meeting on June 15, 2016. Accordingly, the District sent a Notice of Recommended Educational Placement (NOREP) on or about June 20, 2016. [S-8]

116. On June 28, 2016, Parents emailed a "10-day letter" to the District's Director of Student Services and Special Education stating that they intended to unilaterally place Student at a private school, and were seeking tuition reimbursement. That

- same day, June 28, 2016, the District responded to Parents' 10-day letter and stated that the District believed it offered FAPE and was eager to address any concerns the Parents had. [P-25, P-26]
117. On June 29, 2016, the Parents signed the June 20, 2016 NOREP requesting an informal meeting. The informal meeting, held on July 18, 2016, occurred after the Parents, on July 15, 2016, had paid Private School a down payment of \$3,500, with a commitment to pay the \$35,000 balance. [S-10, P-30]
118. During the July 18th meeting, the main concern of the Parents was the class size and the placement at the high school rather than program elements of the IEP. [NT 109-110; S-8, S-10]
119. The Parents placed Student at Private School, and seven months later filed their due process complaint seeking tuition reimbursement. [S-11]
120. Student attended Private School for 9th grade and attends the summer program there. Student independently takes the commuter train to Private School in the morning, after school takes the train home or to speech or psychotherapy appointments, and then whenever scheduled takes the train to sports practice. [NT 677, 682, 697]

Private School

121. Private School created a learning profile for Student at the beginning of the 9th grade year. [NT 464-465]
122. Private School does not provide objective progress monitoring on goals addressing Student's needs. Instead goals are curriculum based and measured through assessments, and subjective teacher input. [NT 511-512, 522]
123. Student received direct instruction in notetaking, study skills, social interactions, and language skills throughout the day and assignments were individualized. [NT at 467, 473-474, 479-481, 520-521]
124. Instruction at Private School is multimodal. The teachers record their classes so students can review lessons as needed and students are able to record lectures on their laptops. [NT 467, 483-485]
125. An advisor met with Student twice a day to work on organization and self-advocacy. [NT at 474-477]
126. Student's classes ranged in size from five to eleven students with 9 students in English and Math classes, and 11 in History class. [NT 466, 498]
127. Teachers at Private School all have at least a Bachelor's degree in education and subsequent experience, and have received training regarding Orton-

- Gillingham (reading instruction) and/or are Wilson (reading program) certified. The Private School does not require its teachers to hold state certifications in regular education or special education. [NT at 502-504, 523-526, 681-682]
128. Private School utilizes a research-based reading program based on Orton Gillingham methods. [NT 513-515]
129. Private School has no reached-based writing programs. [NT 515]
130. Private School does not have a research-based program for social skills instruction. [NT 516]
131. The Private School does not offer speech/language therapy. The Parents privately fund this service for Student. Private School does not have a speech/language therapist on staff to consult with teachers and integrate subject content into speech/language treatment. [NT 504, 511, 729-730]

Discussion and Conclusions of Law

General Legal Principles

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

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). In general I found most of the witnesses credible. As I am finding in favor of the District, I will address three

of the Parents' witnesses whose testimony I considered under the first prong of Burlington-Carter.

Student's mother provided heartfelt and credible testimony as to her beliefs about what she thought best for her child. Her credibility was enhanced by the fact that some of her answers (e.g. class size and lack of IU services at Parochial School), perhaps unwittingly, supported the District's position. Her testimony about when Parents paid the deposit for Private School was contradicted by documentary evidence (see P-30 vs. NT 679-680) but I attribute this to the difficulty in remembering close in time dates from nearly a year ago rather than to artifice. She presented as a loving parent who was thoughtful, sincere and respectful of the hearing process. [NT 37-729]

The private evaluating psychologist's contact with the family was confined solely to the evaluation she conducted about eighteen months before her testimony. Although she clearly was of the opinion that Private School was appropriate for Student, she was open to considering what the District was offering and her responses on both direct and cross examination were moderate and thoughtful in that she did not present as being so fixed in her perspective that she was unwilling to consider an alternate point of view. However she did present misconceived ideas about the high school and its pedagogy, opining that the biggest obstacles for Student coming to the high school would be the size of the building and "hustle and bustle" of the halls, Student's inability to sit in class and listen to somebody who stands up at the front of the room and talks, and peer interaction [NT 540-636]

In striking contrast to the private psychologist's openness to considering reasonable alternate positions, the private treating speech/language therapist was so wedded to her position that Student could *only* be appropriately served in a setting such as the one Private School offered that her credibility was so severely undermined as to be accorded very little weight. She displayed a clear bias against public schools, and her conception of the District's high school, its classrooms and its pedagogy was outmoded and patently false. She testified that Student would be in "standard curriculum classes – Science, Social Studies, English, Math" with 15 to 25 students, and that Student was not someone who could handle a "traditional typical programming" in a classroom where material would be presented by a teacher "merely lecturing to a classroom of students" in the front of the room, with the burden on the student to listen, write and prioritize information. Without having observed Student in any classroom setting she was adamant that not only could the District not meet Student's needs, but that Private School was the best placement for Student. While characterizing the IEP as "well-intentioned and well-meaning and sensitive to the fact that [Student] is a complex learner with multiple problems" and recognizing the "breadth of specially designed instruction" she did "not feel that there could have been anything added [to the IEP to make it appropriate] because the instructional format in a typical large high school does not meet what this child needs in [her] opinion" and there was nothing the District could have added due to the high school being a "typical large high school." [NT 305-382]

FAPE: Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; and provided in conformity with an Individualized Educational Program (IEP). Further, a child's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982)). 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). The Third Circuit has held that in order to provide FAPE, the IEP 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). Recently, the U.S. Supreme Court considered a lower court's application of the *Rowley* standard, observing that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017). The Supreme Court concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 352. This standard is consistent with the above interpretations of *Rowley* by the Third Circuit. An IEP is not a lesson plan and does not provide the specific methodology to be utilized, but is instead a broad overview or roadmap of a student's special education program, setting forth the present level of education performance, goals, objectives, and special services and staff to be provided. *Avila v. Spokane Sch. Dist. #81, No. CV-10-0408-EFS, 2014 U.S. Dist. LEXIS 155317 (E.D. Wash. Nov. 3, 2014), reversed and remanded on other grounds, Avila v. Spokane Sch. Dist. 81, 2017 U.S. App. LEXIS 5532 (9th Cir. Wash., Mar. 30, 2017).*

Local Educational Agencies need not provide the optimal level of service, maximize a child's opportunity, or even set a level that would confer additional benefits; the child must be offered a basic floor of opportunity. Thus, a school district is not required to provide the best possible program to a student, or to maximize the student's potential. *Andrew F.*, (requiring what is reasonable, not what is ideal); *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. *Ibid.* The program's appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014). An IEP is not required to incorporate every program, aid, or service that parents desire for their child. *Mary Courtney T.* A child's IEP does not have to carry a distinct goal for each of a child's needs. See *Coleman v. Pottstown Sch. Dist.*, 64 IDELR 33 (3d Cir. 2014, *unpublished*) (The court "could not conclude that the District

Court erred in finding that the School District was not required to create "distinct measurable goals for each recognized need of a disabled student to provide a FAPE."") 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, as noted in several recent federal district court decisions. *See, e.g., J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). In a homespun and frequently paraphrased statement, the court in *Doe v. Tullahoma City Schools* accepted a School District's argument that it was only required to "...provide the educational equivalent of a serviceable Chevrolet to every handicapped student." and that "...the Board is not required to provide a Cadillac..." *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993). *Andrew F.* did not disturb this standard.

Least Restrictive Environment [LRE]: There is a strong and specific preference in the IDEA that, (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.114(a)(2). The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled, "to the maximum extent appropriate ..." 20 U.S.C. §1412(a)(5)(A). The United States Supreme Court has interpreted this mandate to require districts to educate children with disabilities with non-disabled students "whenever possible." *Rowley*. The United States Court of Appeals for the Third Circuit has construed the statutory language to set forth a "strong Congressional preference" for integrating children with disabilities in regular classrooms. *Oberti v. Board of Ed. of Bor. Of Clementon Sch. Dist.*, 995 F.2d 1204, 1213-1214 (3d Cir. 1993). The Court characterized this preference as creating a "presumption" in favor of educating children with disabilities in the general education environment, *id.* at 1214, at least for "a significant portion" of the school day. *Id.* at 1215 n.21.

Parental Participation: A placement decision is a determination of where a student's IEP will be implemented. Placement decisions for children with disabilities must be made consistently with 34 CFR 300.116. The IEP team, including parents, makes placement decisions. Like the formulation of an IEP, a placement decision is not a unilateral matter for LEA determination 34 CFR 300.116(a)(1) however, is also clear that parental preference cannot have been the sole nor predominant factor in a placement decision. The IDEA merely mandates parental participation in the placement decision 34 CFR 300.116(a)(1), but does not suggest the degree of weight parental preference should be given.

Numerous court decisions have noted that although Parents are members of the IEP team and entitled to full participation in the IEP process, they do not have the right to control

it. See, e.g. *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) [noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives”]; *Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002) [“[P]arents who seek public funding for their child's special education possess no automatic veto over a school board's decision”]; *Rouse v. Wilson*, 675 F.Supp. 1012 (W.D.Va.1987); 34 C.F.R. Pt. 300 App. A, at 105 9 “The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive [a free appropriate public education”].

Tuition Reimbursement: Parents who believe that an LEA’s proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement. The IDEA’s implementing regulations at 34 C.F.R. §300.148 (c), make it clear that tuition reimbursement can be considered under specific conditions:

“If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency enroll the child in a private...school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment...”

Before becoming a matter of statute, the right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985). A court may grant “such relief as it determines is appropriate”. “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” *Burlington*, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

Then, in 1997, a dozen years after *Burlington*, the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i)In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

Discussion

In deciding this case I am not charged with weighing two proposed programs and discerning which is better. The District must afford Student an appropriate program, not the better of two programs or the best program. Once the responsible educational agency has offered an appropriate program, other potential programs are not under consideration. Applying standards for FAPE to the above findings and the record as a whole, I conclude that the District has offered Student an educational program that was appropriate in view of Student's circumstances at the time it was created and that could be expected to confer meaningful educational benefit upon Student in view of Student's unique learning style and needs.

Given the Parents' position that Student requires a small, highly specialized educational environment in order to learn, it is remarkable and a significant factor in my analysis of this matter that after having received virtually no special education services for eight years while enrolled in Parochial School, where specifically the 8th grade classroom had 24 students and was not distraction free, Student's academic skills as assessed by the WIAT-III and compared against a nationally normed sample of same age peers were all solidly in the average range. It is also notable that, having repeated pre-Kindergarten, Student was a chronological grade behind the same age peers in Student's WIAT-III cohort, thus, arguably, presenting Student with a higher bar than these same age peers faced.

This evidence based in scientifically-acquired data makes the Parents' and the private speech/language therapist's fixed belief that, despite the District's comprehensive and well-constructed IEP, Student cannot learn in any setting other than Private School difficult to comprehend. One possible explanation for the Parents' position lies in their long-standing preference for private education and their naturally-following desire to find a private school that could meet Student's learning needs. As did Student, each of Student's siblings enrolled in private parochial grade schools and those of high school age moved on to private high schools. Whatever their underlying motivation, the record is clear that early in Student's 8th grade year the Parents had sought out private evaluations and, contemporaneously with their later request for a District evaluation, they began pursuing private specialized schools for Student, Private School in particular.

The chronology of events including early engagement with an education advocate supports the proposition that while the Parents went through the process of requesting an evaluation and an IEP from the District they were primarily interested in a private placement for Student. From the beginning, as early as the District's evaluation process and during the ensuing IEP team meeting process, the Parents' written and verbal input revealed a strong bias for a program that closely mirrored the description of Private Program. In fact, there is little evidence to conclude that they were even minimally open to what the District was offering.

In their closing brief, the Parents posit the three ways in which they believe the District's IEP fails to offer Student FAPE: 1) the IEP does not offer a program that will allow

Student to make appropriate progress in all areas of need known to the District at the time it proposed the IEP; 2) the IEP proposes a placement for Student that ignores the “compelling need for a small, highly-structured, distraction-minimized environment with direct and immersive instruction; 3) the IEP was not clear about how some of its most critical SDI and modifications (and most notably the paraprofessional) would be implemented for Student. I shall address each of these in turn.

First, the Parents argue that the IEP does not aim to address all of the areas of need known to the District at the time it proposed the IEP, for example while including a goal for the development of skill in conversation volleys, not including goals to address Student’s deficits in recognizing facial expressions, body language, and other non-verbal cues, or for interpreting tone of voice and, apart from one modification for seating near the point of instruction, including no other SDI or modifications aimed at addressing Student’s purported need for instructional environments with reduced distractions. However, as our Third Circuit courts have ruled in *Mary Courtney T* and *Coleman v. Pottstown*, an IEP is not required to incorporate every program, aid, or service that parents desire for their child and does not have to carry a distinct goal for each of a child’s needs.

I find the IEP’s goals and SDIs comprehensively address the constellation of Student’s complex needs. With regard to the Parents’ criticism of amount of speech/language therapy as a related service, I note that although the private speech/language therapist was highly critical on this issue, she was virtually silent on the fact that Private School offers no speech/language therapy at all, nor does it have a speech/language therapist on staff to consult with the teachers. I find the District’s witness credible on the point that in addition to discrete pull-out speech/language therapy, Student’s program will address communication needs through, among other things, consultation between the speech/language therapist and Student’s teachers, incorporation of subject matter vocabulary into speech/language sessions, and scheduling of social skills teaching in the Effective Communications class.

Next, the Parents argue that the placement proposed by the District is one in which Student cannot learn because Student would be 75% of the day in regular education classrooms that are not distraction free. They contend that in order to make meaningful progress, Student needs a small, highly structured environment in which to receive direct instruction and in which material can be delivered at Student’s pace. As noted previously, aside from the opinions offered by the Parent’s private evaluating psychologist and private treating speech therapist who have never observed Student in any school setting, there is no substantial evidence that Student requires the level of restrictiveness that the Parents are seeking. Again, in Parochial School with large classes and their attendant distractions, and with absolutely no special education services, the Student was able to learn reading, mathematics and writing skills at a rate commensurate with peers at least one year older than Student was at the time Student was given a nationally-normed assessment.

While class size was a salient issue for Parents, there was disagreement between Parents' experts as to the appropriate size. The private speech/language therapist was adamant that Student could only be in a class of 8 or fewer students, which would disqualify Private School with Student having classes of 9 or 11 students, let alone Parochial School with 24 students. The private evaluating psychologist on the other hand testified candidly that there is no magic number, and did not recommend small class sizes in her report.

Accepting for the sake of argument that Student does require small highly structured environments, I find that the District's proposed classes offered those advantages at a level far above IDEA's guaranteed "basic floor of opportunity". Student's projected schedule for the 2016-2017 year provided a double block of Reading/Writing in a special education class with 6 students and a certified special education teacher; Effective Communication Strategies in a special education class with 2 students and a certified special education teacher; Essentials of Algebra in a regular education class with 12 students, a teacher certified in regular and special education and a paraprofessional aide; Algebra I CP in a regular education class with 16 students, a teacher certified in regular and special education and a paraprofessional aide; Biology in a regular education class with 17 students, a regular education teacher and a paraprofessional aide; Academic Success Center (structured study hall), in a regular education class with 13 students and a special education teacher; Heath & Wellness in a non-academic regular education gym class with 28 students, a regular education teacher and a paraprofessional aide.

Additionally the IEP contains an array of Specially Designed Instruction to address Student's specific learning and executive functioning needs. Among others these SDI include meeting/conferencing with teacher over writing assignments, provision of lecture notes, repeating and clarifying directions, providing a writing/editing checklist and a graphic organizer for writing assignments, pairing visual/auditory directions for complex multi-step directions, teachers providing the speech/language therapist with classroom vocabulary to review and reinforce instruction, provision of study guide/outline for assessments within two days of an assessment, provision of a word bank for assessments to aid word retrieval, weekly check-in with case manager, locker check-in, chunking of long-term assignments, extended time on assessments and projects, preferential seating, visual or verbal prompts, small group testing, allowing for wait time to formulate responses and allowing a break after a long period of instruction.

Both explicit and implicit in the Parents' case that Student can only receive FAPE in Private School is the factor of the size of the high school and that it is too large and would be intimidating for Student. I find that while the District cannot shrink the building, it has made provisions to modify the environment through small classes, the paraprofessional aide, and availability of a "safe person" to serve as a mentor. Further, the group and individual transition activities that the District offered to Student would have likely served to make the high school more accessible. I agree with the District that "[a teenager] who can maintain a school/sport/therapy schedule, take public transportation on a daily basis, follow the train schedule and stops with all of its attendant noises, distractions, and 'hustle and bustle,' is someone who can certainly handle walking to class in a 'typical' high school hallway".

Finally, while acknowledging that the District's proposed SDI and modifications were "derived from the reports and recommendations of the [private psychological evaluator and the private speech/language evaluator]", Parents argue that the IEP does not offer sufficient detail on how they could or would be implemented. While generally expecting very specific detail in all aspects of the IEP the Parents focus particularly on the provision of access to a paraprofessional. They contend for example that the IEP does "not offer any additional information or guidance on what purpose or purposes this person would serve", "leaves open the question of whether this person would intervene with [Student] on her or his own initiative or wait for Student to seek out help" and "does not even specify whether the paraprofessional would work with multiple students or Student alone".

In contrast, given the testimonial evidence I find that the role of the paraprofessional, as conceived prior to Student's setting foot in the high school, to be straightforward. This person would be present in classes with more than ten students. This person would be available to assist Student as well as other students depending on the class. This person would not "be on" Student, given that the District aims for its students to be as independent as possible.

As the 9th Circuit court recently noted in *Avila*, "an IEP is not a lesson plan and does not provide the specific methodology to be utilized, but is instead a broad overview or roadmap of a student's special education program, setting forth the present level of education performance, goals, objectives, and special services and staff to be provided." At the time it proposed Student's IEP, the District had not had the opportunity to work with this mid-teen aged student in an educational setting since Kindergarten. In crafting its IEP for Student I find that the District in a fair and thorough manner collected its own observational data, its own formal testing data, and data it gleaned from the input of teachers and Parents, and also considered detailed data offered by the private evaluating psychologist and the private evaluating and treating speech/language therapists. Given this wealth of data, virtually none of which was informed by its own hands-on experience teaching Student, the District did a superlative job of designing an IEP to address Student's complex needs. What cannot be overlooked is that an IEP is a living document, and the District demonstrated every intent and capability of adjusting the IEP as the Student's evolving needs presented. The private evaluating psychologist acknowledged that the IEP goals and SDI are "a good place to start" and the District argues that this is exactly what an IEP is supposed to be. The goals are what the IEP team would want Student to achieve in one year's time, the baselines are the starting point for Student, and the progress monitoring would be done to gauge whether Student was making progress or whether the team needed to meet and make any necessary adjustments with new goals added as old goals are met. The IDEA in its original conception – and as it continues to be interpreted over the years in our Third Circuit and most recently by the United States Supreme Court – is not a lesson plan, it does not require that LEAs foretell in exact and minute detail how a child's program will be carried out, but rather demands that the IEP team make a "reasonable calculation" of what the child needs to "make progress appropriate in light of the child's circumstances".

I find that the IEP the District proposed for Student more than meets the requirements of the statute and the applicable case law.

Conclusion

After reading all the documents entered into evidence, reviewing the testimony from the three hearing sessions, and considering the parties' written closing arguments I conclude that the Parents have not met their burden of proving that the program and placement offered to Student in the June 15, 2016 IEP and its accompanying NOREP were inappropriate. To the contrary I find that the District has more than met its obligation under the IDEA to offer Student a free, appropriate education in the public high school.

When a school district's last-offered program is appropriate, as is the case here, the school district has met its obligations to the student, and the second and third steps of the *Burlington-Carter* analysis (respectively, whether the private placement is appropriate and whether the equities between the parties impact the tuition reimbursement remedy) are not undertaken.

As the District's June 15, 2016 IEP was appropriate, there is no tuition reimbursement remedy owed to the Parents.

Order

It is hereby ordered that:

1. The June 15, 2016 IEP was appropriate.
2. The District does not have to reimburse the Parents for the tuition and expenses incurred through their unilateral placement.

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

July 26, 2017

Date

Linda M. Valentini, Psy.D., CHO

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