

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

ODR No. 14362-1314KE

Child's Name: N.K.

Date of Birth: [redacted]

Dates of Hearing: 1/7/14, 1/15/14, 1/24/14, 2/21/14
2/26/14, 3/7/14, 3/20/14, 3/27/14,
4/4/14, 4/16/14, 4/22/14

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney

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Date Record Closed:

June 6, 2014

Date of Decision:

July 3, 2014

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student and twin Sibling, both IDEA eligible in the autism disability category, recently completed their first year of school age services in a private school selected by Parents. Parents filed a due process complaint in early October 2013 requesting tuition reimbursement, as well as payment for a number of other services not included in the private school tuition. At the time the complaint was filed, Parents alleged that although the District had offered Student a placement in a kindergarten autistic support classroom, the District had not offered an appropriate IEP for Student.

For a number of reasons, including the logistics of compiling a combined record for two Students, hearing session and witness scheduling difficulties, numerous bad weather delays and hearing session cancellations, and for a time, early in the process, efforts to resolve the case, the hearing spanned an inordinate amount of time and 11 sessions, from early January through late April 2014.

Between the date the 2013/2014 school year began and the date the hearing was convened, the parties had several IEP meetings, the District conducted additional evaluations and prepared several draft IEPs. The District offered a final IEP and NOREP in December 2013, which Parents rejected. By the time the hearing record closed, the question whether the District had offered an appropriate placement and related services during the 2013/2014 school year was divided into several periods. In addition, claims originally asserted for current services became reimbursement claims for the entire school year and for ESY for the summer of 2014.

For the reasons that follow, the decision is in favor of Parents on some claims and in favor of the District on others.

ISSUES

1. Did the School District fail to timely offer an appropriate IEP for Student prior to the beginning of the 2013/2014 school year in compliance with IDEA procedural and substantive requirements, including conducting an appropriate IEP meeting with full Parent participation?
2. Did the School District offer an appropriate IEP for Student at any time during the 2013/2014 school year?
3. If the District failed to offer an appropriate IEP for any period during the 2013/2014 school year, are Parents entitled to tuition reimbursement for Student's private school placement during any such period, in that, in addition to the District's failure to offer an appropriate educational placement, the private school provided an appropriate placement for Student?
4. If the private school was appropriate, are there any equitable reasons that support denying or reducing tuition reimbursement?
5. Are Parents entitled to reimbursement for any/all of the following additional services provided to Student during the 2013/2014 school year, either by the private school at an extra cost to Parents, or directly by Parents:
 - a. A one-to-one aide during the school day;
 - b. Transportation to and from the private school;
 - c. 2 hours/week of speech/language services;
 - d. 1 hour/week of occupational therapy;
 - e. 10 hours/week of home-based ABA therapy;
 - f. ESY services for the summer of 2014 at the private school?

FINDINGS OF FACT

Background/2012-2013 School Year

1. Student, [an elementary school age] child born on [redacted] is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 19, 20)
2. Student has been identified as IDEA eligible in the Autism disability category in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 19)
3. Disability-related issues and concerns that have been consistently identified for Student are significant social skills deficits, including "peer blindness" (marked inattention to other children in the vicinity, even Student's twin Sibling); receptive, expressive and pragmatic language deficits; elopement, need for high levels of prompting and redirection, requiring 1:1 assistance; sensitive to auditory stimulation, self-stimulatory behaviors (head rocking, vocalizing "eeee"); emotional/behavioral regulation, screaming,

aggression toward others; distress when separated from Parents; delayed response time to questions; short attention span; hyperactivity, distractibility. (N.T. pp. 504, 506, 507, 520, 530, 737, 842, 843, 1446, 1484, 1647, 1648, 2291—2293; P-31 pp. 4, 5, 6, 8, 14, S-62 p. 34)

4. Student began receiving early intervention services (EI) at the age of 18 months, prior to the formal diagnosis of Autism Spectrum Disorder (ASD) in May 2009. During the year before [Student turned school-aged] (2011/2012 school year), EI services included an intensive language program, home-based ABA services (Applied Behavior Analysis), 3 afternoons/week in the nonacademic portion of a typical preschool with ABA support. Student also received speech/language, occupational and physical therapies. (N.T. pp. 219—223, 1111, 1112, 1632, 1634; P-1, P-31 p. 5; P-38, S-62 p. 59)
5. As Student approached the first year of eligibility for school-age services, Parents contacted the District to begin the transition process and registered Student in the District in mid-April, 2012. The District issued a permission to reevaluate (PTRE) and began a psycho-educational evaluation at the end of April after receiving Parents' permission on April 9, 2012. (S-48, S-62 p. 59)
6. Based on the school psychologist's observations in each setting where Student received services and on assessment results, the District's evaluation report (ER) noted the following characteristics and disability-related needs: need for sensory input for calming and to complete tasks, vocal self-stim ("eeee"), unresponsive to name, head rocking, socially disengaged, difficulty focusing, prompt dependent; high level of movement, lack of spontaneous language, play skills, difficulty with fine motor skills, generalizing skills to other settings. (S-41)
7. The ER and accompanying psycho-educational report confirmed the ASD diagnosis and IDEA eligibility (N.T. Vol. 6B p. 225¹; S-41)
8. On June 12, 2012 the parties met for an IEP meeting to review the District's proposed IEP and NOREP offering a kindergarten autistic support (AS) class, opening in the fall of 2012, that the District believed would meet Student's needs. (N.T. Vol. 1B pp. 12, 13; S-40)
9. Although Parents had signed the NOREP on the date of the IEP meeting, they notified the District in August 2012 that they had elected to keep Student in EI services for the following school year (2012/2013). (S-40 p. 40, S-62 p. 64)
10. Since Parents' uncertainty with respect to whether Student should begin kindergarten in the fall of 2012 or take advantage of the extra year of EI eligibility had been discussed at the June 12 IEP meeting, the District's regional special education liaison (SEL), who

¹ Much of the testimony at all hearing sessions applied equally to Student and Student's Sibling, but any testimony applicable to Student only is cited by the volume number, followed by the letter "B," of the session in which the testimony was taken and the page number in the "B" volume.

participated in the IEP meeting and received Parent's email notice, was not surprised at Parents' decision. (N.T. Vol. 1B pp. 14, 15)

Services, Reevaluation, IEP Process/February to August 2013

11. During the 2012/2013 school year in EI, Student received ABA (Applied Behavior Analysis) instruction (36 hours/week), behavior support, speech therapy (2 hours/week), OT (2 hours/week) and PT (1 hour/week) in various settings, including at home, at provider locations and at pre-school. For three days each week, Student attended three 4 hour sessions/week at the same typical pre-school program as the prior year, but switched from afternoon sessions to the more academically-oriented morning sessions. (N.T. pp. 1632, 1633; P-31 p. 5, P-25)
12. In February 2013, Parents again contacted the District about Student's kindergarten placement. The District SEL advised Parents that after they registered Student again, she would send a permission to reevaluate (PTRE) for an updated evaluation. (N.T. pp. 447, 448, Vol. 1A p. 18, Vol. 6A p. 175; S-62 p. 61)
13. Although Parents did not re-enroll Student in the District between February and early April 2013, the District SEL directed her secretary to complete the enrollment process in order to generate a PTRE and send it to Parents. (N.T. Vol. 1A p. 21)
14. Parents enrolled Student on April 18, 2013, and simultaneously returned the PTRE and Parent Input Form, which the District had sent on April 12. (N.T. Vol. 1A p. 20; S-36, S-62 p. 56)
15. Parents also requested the opportunity to visit a District kindergarten classroom, advised the District that they had contracted for an independent evaluation which they expected to be completed by the end of April, and a report by mid-May. Parents provided a list of the assessments the independent evaluator was using in order to avoid duplication in the District evaluation. (N.T. Vol. 1A p. 23; S-36, S-62 p. 56)
16. Parents arranged to visit two District AS kindergarten classrooms in early June 2013, located in Student's neighborhood school and at the school the SEL had recommended in 2012. (N.T. Vol. 1A pp. 26—29; S-62 pp. 38, 40, 45, 46, 49, 53, 54)
17. At the beginning of June, the District school psychologist contacted the independent evaluator to discuss the assessments administered to Student and the expected completion date of the independent evaluation, which had not been released due to a delay in completing the speech/language portion of the evaluation. (N.T. Vol. 6A pp. 179, 180, 186)
18. Parent transmitted the independent school psychologist's report to the District school psychologist via e-mail on June 18, 2013, and reported that they were still waiting for the speech/language evaluation report. (P-31 p. 1)

19. The District's RR, issued on June 20, 2013 included a full description of the independent evaluation and the results, as well as a review of earlier evaluations, including the District's 2012 evaluation. The District RR also included updated input from Parents and Student's ABA instructors and a report of the District school psychologist's May 28 observations of Student at home. Although the typical pre-school program that Student attended at the time of the 2013 evaluation had changed to a different time of day with a different focus, the school psychologist was not aware of the change did not observe Student in the pre-school setting. (N.T. Vol. 6A pp. 190—192, Vol. 6B p. 231, 232, 255, 257; S-28 pp. 4—6)
20. The only formal assessments the District school psychologist administered were the Oral and Written Language Scales (OWLS), given to Student, and an adaptive behavior checklist completed by Mother. The District did not re-administer other measures of Student's abilities and academic skills because those kinds of assessments were included in the testing completed for the independent evaluation. (N.T. Vol. 6B pp. 226, 229, 230, 237; S-28 pp. 10, 11)
21. Based on the observations, input, and assessments included in the 2013 RR, the District school psychologist again concluded that Student met the criteria for IDEA eligibility in the autism disability category. (P-35 p. 8)
22. Pursuant to an email discussion on June 10 and an invitation issued on June 18, 2013 a joint IEP team meeting was scheduled on June 20, 2013 for Student and Sibling. Participants were Parents, accompanied by the psychologist serving as Student's behavior specialist, the District SEL, identified as special education teacher, the school psychologist and speech/language pathologists. (N.T. p.142, Vol. 1A p. 29, Vol. 6A p. 196; P-32, S-54 pp. 38, 40)
23. The IEP team began by reviewing the draft IEP the District had prepared for Student, which was not completed before the meeting ended after approximately an hour and forty-five minutes. The draft IEP did not identify a proposed location of the supplemental autistic support placement recommended for Student, and the District did not issue a NOREP based upon the draft at that time. (N.T. Vol. 1A pp. 32, 34, 36, 37, Vol. 1B pp. 20—22, Vol. 6A pp. 198, 202, 203; P-48)
24. Initially, the parties planned to reconvene the meeting the next day, but the meeting was not held. Mother offered to attend the meeting without Father, who was not available, if it would "be detrimental" not to meet. (N.T. Vol. 1A pp. 37, 38, Vol. 6A p. 198, Vol. 6B p. 235; S-62 pp. 27, 28)
25. The District does not conduct IEP meetings during the summer, but no one from the District informed Parents of that policy, prior or subsequent to the June 18th transmission of the independent psychological and speech/language evaluation reports. (N.T. pp. 123, 125, 154, Vol. 1A pp. 33, Vol. 6B p. 236)

26. The District SEL informed Parents that there was “no rush” with respect to having another IEP meeting because the parties could exchange IEP revision suggestions via e-mail during the summer. The SEL contacted the special education supervisor on the evening of June 20, advising her of the IEP meeting that day, the number of changes Parents had requested to Student’s Sibling’s IEP and in inquiring how to proceed during the summer. (N.T. pp. 154, 155, Vol. 1A p. 41; P-35 p. 27, S-54 p. 27)
27. Parents e-mailed the District SEL on July 23 to inquire about the process of working on an IEP for Student, but got no response. The SEL answered Parents’ August 5 email inquiring about the IEP by informing them that she had notified other District staff that Student’s IEP was incomplete, that her position had changed, so she was no longer the SEL for Student, and that she would again follow up with other District staff. She told Parents that the special education director would contact them. (N.T. pp. 138, 157, Vol. 1A pp. 42—44; S-62 pp. 14, 22—26)
28. On August 5, Parents also contacted the District EI coordinator, describing the unfinished IEP meeting for Student and asking how to proceed. The EI coordinator responded, telling Parents that she would contact the special education director. (P-36 pp. 32—34)
29. On August 20, Parents notified the District via a hand-delivered letter that within ten days, they would enroll Student in a private school to assure an appropriate placement by the beginning of the school year and to seek tuition reimbursement. Parents also noted their willingness to continue with the IEP process. (N.T. pp. 75, 76; P-41)
30. In July 2013 the District special education director identified an AS kindergarten classroom for Student based on availability of space for both Student and Sibling, proximity of the school to their home school, and the special education director’s conclusion that support program available at the school would be beneficial for one of the children. At the time of the June 20 IEP meeting, the SEL who had been working with Parents had no idea that school was a possible placement for Student. (N.T. pp. 81—83, 107, 116, 117, 142)
31. Knowing that no IEP had been developed for Student, and after receiving Parents’ notice of private school placement, the special education director instructed the school team at the identified location that, as soon as the school reopened for the new school year, they should “get right back on it to make sure we were able to deliver a program.” (N.T. pp. 110, 111, 123)

August-September 2013 Placement Proposal/Procedures

32. During the week of August 19, just before the 2013/2014 school year began, the special education teacher for the AS classroom to which Student was assigned learned that she would be teaching kindergarten students. (N.T. pp. 1119, 1142, 1374)
33. The teacher immediately began notifying parents on her list of their children’s school and classroom assignment, knowing that they were waiting to hear where their children

would attend school. In the teacher's experience with kindergarten for the past two school years, the first notice parents receive of their children's class assignment is the teacher's telephone call. (N.T. pp. 1119, 1120, 1278)

34. The teacher called Parents to set up a "kindergarten interview" before the school year began. The purpose of the meeting is to give parents of new students the opportunity to meet the teacher and classroom assistant and to get an overview of the program. The children are also expected to attend the interview to ease the child's transition to a new setting. (N.T. pp. 1122, 1123, 1272)
35. Parents of incoming students are asked to complete a parent survey questionnaire to identify reinforcers, describe successful strategies used at home and generally help the teacher get to know the child. (N.T. pp. 1127)
36. Parents attended the kindergarten interview on September 11, without Student and Sibling, but accompanied by the psychologist who served as Student's behavior specialist. Before the meeting, the AS teacher did not know that Student did not have a completed District IEP, but testified that she would have implemented the last EI IEP until a new IEP was developed. The teacher would also have administered the learning profile assessment for the AS curriculum she provides to see where Student needed instruction and provided it in accordance with those results until there was a formal IEP. (N.T. pp. 1125, 1226, 1265, 1270—1272, 1376, Vol. 7A p. 221)
37. At the time of the September 11 kindergarten interview meeting, the AS teacher had not yet received Student's file and read the last EI IEP. Typically, before the school year begins, the AS teacher knows nothing about the new children entering her classroom. She does not attend an IEP meeting for children assigned to her classroom before the school year begins, or read their IEPs. The kindergarten interview is not concerned with the individual students' "paperwork" but about the classroom generally. (N.T. pp. 1264, 1265, 1375)
38. Before Parents left the September 11 meeting, the AS teacher and the new SEL retrieved the IEP proposal developed in June, including a NOREP, and gave it to Parents to assure that they had a copy. The teacher asked Parents to review the documents and call her the next day to let her know whether they agreed or disagreed with the IEP. (N.T. pp. 1273, Vol. 7A p. 220, 223—225 Vol. 7B p. 286; P-48)
39. The AS teacher offered to schedule an IEP meeting in the days left before the school year began. Had she known that Parents were concerned about the lack of an IEP for Student at the time she called them to schedule the kindergarten interview, she could have acted earlier. (N.T. pp. 1148, 1149, 1280)
40. On September 15, Parents returned the signed NOREP disapproving the District's recommended placement, accompanied by a letter describing Parents' concerns about the proposed IEP. (P-48 pp. 2, 3; P-51)

Evaluation Results, Recommendations 2013/2014 School Year

41. Based on input from Parents and teachers, the District and independent evaluations in the spring of the 2012/2013 school year, Student's was described as having a short attention span, a high interest in gross motor activities and visual-spatial tasks—able to complete a 45 piece puzzle, unusual focus on particular shapes, restrictive and perseverative interests, improved adaptive, self-care and language skills, ability to recall basic information (color, shape). Academically, Student had mastered a number of prepositions and was using a computer program to learn letter sounds and word decoding, and continued to work on skills such as learning to use a calendar, identify two and three dimensional objects and serial counting of objects. (P-31 pp. 6—8, P-35 pp. 2, 4, 5, 8)
42. The standardized assessments administered by the independent evaluator in the spring of 2013 placed Student in the below average range for cognitive ability, average range for gross motor skills, below average range for fine motor skills, and the very delayed range for school readiness skills. During testing, Student was accompanied by a 1:1 ABA-trained aide for support. (P-31 pp. 10—12)
43. Student's scores on the assessments conducted by the District school psychologist were in the deficient range on the OWLS, with an age equivalent of 3 years 2 months on the listening comprehension scale and 2 years, 11 months on the oral expression scale. Student's adaptive functioning remained extremely low in all areas, (P-35 pp. 10, 11)
44. The independent evaluator recommended the following services/interventions in home and school settings: (a) 4 hours/day ABA instruction (2.5 hours in school for focus and to augment language skills, 1.5 hours @ home for generalization of skills); (b) speech/language services, to include articulation and pragmatic language; (c) daily small group academic instruction with an integrated curriculum to provide opportunities for practicing expressive language skills; (d) daily inclusion opportunities within the context of a program designed specifically for children with ASD, including strategic pairing with a friend/ social buddy, to promote appropriate peer interactions and socially mediated learning; (e) assistive technology for communication needs, monitored by trained learning and speech specialists; (f) Extend School Year (ESY) to consolidate newly learned skills and minimize regression. (P-31 pp. 17—19)
45. The District school psychologist included the independent evaluator's recommendations for small group instruction, inclusion opportunities, assistive technology and speech/language intervention in the District's 2013 RR. She omitted recommendations that might not apply to a District "kindergarten classroom for autistic support children" or that the District would not include in an IEP. (N.T. Vol. 6A pp.192, 193, 194, Vol. 6B pp. 239, 240)

District AS Classroom

46. At the beginning of the 2013/2014 school year, the AS special education classroom to which Student was assigned had a roster of 11 children including Student and Sibling. Two of the children assigned to the teacher's caseload are fully included in regular kindergarten classes, and three other children spend part of the day in 1st grade regular education settings. On the occasions when all seven of the children who are fully or partially instructed in the AS classroom are present, there are also 5 or 6 adults, including 1:1 aides and a student teacher. (N.T. pp. 1116, 1117, 1141, 1181, 1182)
47. The AS classroom is guided by the STAR program, which is based upon ABA principles embedded in the curriculum and use of ABA-based interventions such as discrete trial training and pivotal response training. The curriculum focuses on functional routines, receptive, expressive and spontaneous language, pre-academic, play and social interaction concepts, with the flexibility to provide more intensive instruction in areas of greatest need as identified by program assessments (Student Learning Profile). The program emphasizes positive reinforcement and behavior modification. (N.T. pp. 1151—1159, 1195, 1196, 1289, 1352—1354, 1984—1989, 1991; S-70)
48. The STAR program grew out of a university study examining teaching strategies and techniques for students with ASD. The District now contracts with an organization that grew out of the study, []AIMS², to provide training and support to implement the most successful methods in District AS classrooms. (N.T. pp. 1166, 1167, 1176, 1177, 1912, 1913, 1980—1984)
49. Before implementing the STAR program in her AS classroom, the teacher received 10—15 days of training, and was regularly (once a week) observed and coached during the first two years of delivering the program, to assure that she was implementing it properly. As an experienced teacher, she is not observed regularly at this time, but has access to behavior specialists if she has questions or concerns. The teacher continues to participate in trainings through District professional development activities and online courses taken on her own time. (N.T. pp. 1167, 1182, 1183, 1289—1291, 1372)
50. The District's expert witness, Associate Director of the Center for Autism Research at the University of Pennsylvania School of Medicine, supervises the consultants who provide hands-on training and support for the STAR program in the District. Based on the consultants who have observed the AS classroom to which Student was to be assigned give the teacher consistently high ratings for fidelity in implementing the program, including during the 2013/2014 school year. The classroom is used as a model for the STAR program. (N.T. pp. 1168, 1177, 2003—2005)
51. Development of functional and adaptive skills, such as following a routine and identifying common objects, is facilitated by use of classroom and individualized picture schedules and discrete trial training. Pivotal response training is specifically directed

² [] Autism Instructional Methods and Supports

- toward developing social interactions and functional play skills. (N.T. pp. 1183—1185, 1187, 1997, 1998)
52. The amount of time spent on discrete trial training varies according to the needs of the child, but most often the teacher spends 15—20 minutes/day working with each student individually. The AS teacher trains classroom and 1:1 assistants to provide additional discrete trial training to children who need more, based on beginning and ongoing Student Learning Profile assessments and data analysis for each child. (N.T. pp. 1153, 1292, 1351)
 53. The District’s autism expert considers it generally more effective to deliver discrete trial training in three or four 20 minute segments interspersed throughout the day rather than in hours long blocks. Delivery of ABA services for 25—35 hours/week does not mean providing all ABA instruction as discrete trial training. There are other equally or more important ABA-based interventions, such as teaching functional routines, which is more easily generalized to other settings. (N.T. pp. 1989—1994)
 54. Differentiated academic instruction in reading, writing and math is presented during center time, when the students circulate through various activities around the classroom for small group and individualized instruction with the teacher, including discrete trial training. There is also a period each morning when students complete worksheets from individual folders, either independently or supported by their own 1:1 staff, the teacher or a classroom assistant. The worksheets provide practice and reinforcement for the academic skills they are working on and exposure to work aligned with regular curriculum standards (N.T. pp. 1178, 1188, 1189, 1365—1368)
 55. Whole group instruction based on kindergarten or first grade curriculum standards is presented during “circle time” which includes 2 days/week of literacy activities such as shared reading, with discussion of the characters, setting, problems and solutions and 2 days of math activities such as counting money and developing concepts such as more and less. Fridays are reserved for games and other fun activities. (N.T. pp. 1368, 1369)
 56. Students in the AS classroom have access to a “sensory room” with equipment and materials for various kinds of gross and fine motor activities, such as jumping, swinging, Play-doh, sand, fidget toys. The class goes to the sensory room as a group 2—3 times/week. Students can also access the room individually, based on need, at scheduled times or as a chosen reward. (N.T. pp. 1164—1166, 1201, 1371)
 57. Although individual speech/language therapy and OT services are provided based on individual student need, the District considers the “school age model” of related services to be less intensive and to de-emphasize individual pull-out sessions in favor of a push-in “collaborative” model of delivering services in classroom settings. In addition, speech/language development is an all-day focus of the STAR AS classroom, and most students in the classroom have sensory diets implemented throughout the day, which address OT needs. (N.T. pp. 1199—1202)

58. After reviewing the recommendations of Parents' independent evaluator from the spring of 2013, the AS teacher concluded that her classroom generally meets the independent evaluator's recommendations for class size, small group instruction, ABA discrete trial training, opportunities for expressive language practice and inclusion, speech/language intervention directed toward articulation, pragmatic language skills, requesting, and expressing needs and assistive technology. Recommended teaching strategies are also either in use in the AS classroom or could be provided. Social interaction skills are part of the STAR curriculum and taught through pivotal response training and partnership with an outside agency which helps to facilitate appropriate play in the general education setting. (N.T. pp. 1343—1345; P-31 pp. 17—19)
59. In the 2013/2014 school year, the school to which Student was assigned initiated "Include Me from the Start" a program to facilitate including special education students in general education settings. An outside agency provides consultation and staff training in developing and implementing an inclusion plan for each child whose parents consent to participation. (N.T. pp. 1138—1140)
60. Generally, the amount and type of inclusion for children in the AS class varies, depending upon each child's needs. (N.T. pp. 1135, 1136, 1138,)
61. Kindergarten students who transition from EI with 1:1 assistance generally have that service continued in their District IEPs. Otherwise, the IEP team determines the need for 1:1 assistance based upon teacher recommendation. (N.T. pp. 1118, 1119)
62. The 1:1 support staff for students who have it use behavior modification techniques such as prompting, verbal praise and a token board throughout the school day in all activities. (N.T. p. 1346)
63. Based upon an observation at the private school, the AS teacher believes that Student would fit in well with the kindergarten children in her classroom in terms of skill levels, attention and behaviors. (N.T. pp. 1357, 1358)

District IEP Development September—December 2013

64. The District invited Parents to an IEP meeting for Student on October 9. The District also enclosed a PTRE for a review of records from outside sources, to which Parents consented (N.T. Vol. 7A pp. 234, 235; P-53 pp. 3, 4, 9—12)
65. At the October 9 meeting, the District proposed an IEP that included ten annual goals, with short-term objectives in the areas of improving attention, following directions, increasing conceptual language, increasing social interactions, functional skills such as learning full name, address and telephone number, and identifying coins, math, reading/literacy, behavior, reciprocal communication and play skills, goal-specific specially designed instruction (SDI), and several general SDI. The annual goals reflect the curriculum and services provided in the AS classroom proposed for Student, as well as information the AS teacher gathered from documents concerning Student since she had

not had the opportunity to personally observe and assess Student. (N.T. Vol. 7A pp. 239—242, 244—246, Vol. 7B p. 289; P-56 pp. 16—41)

66. The October 9 IEP proposal provided for a 1:1 aide for the entire school day, and offered 600 minutes of group pull-out speech/language services per annual IEP term. The IEP did not provide for OT services. (P-56 p. 41)
67. The IEP also offered ESY services for the summer of 2014 for 20 hours/week over 8 weeks in July and August, during which Student would work on selected short term objectives associated with each of the annual goals. The IEP also provided for autistic support services, 1:1 support and 30 minute/week of speech/language therapy. (P-56, pp. 43—48)
68. At the October 9 meeting, the District issued a PTRE for a number of reviews and assessments, including assistive technology and OT evaluations to which Parents consented. The evaluations were completed in November 2013. (P-67, P-57)
69. Another IEP meeting was held on October 22, at which Parents were given an IEP draft that had been updated based on the discussion at the October 9 meeting and Parent requests for changes. The October 22 IEP proposal was not substantially different from the October 9 draft. (N.T. Vol. 7B p. 293; P-67)
70. The District's final IEP offer was dated December 13, 2013, the date the District proposed for an IEP meeting, but Parents were not available to meet in December. The District sent the revised IEP to Parents in early December and Parents provided a written response. (N.T. Vol. 7B p. 295; P-68 p. 4, P-73, S-8 pp. 7, 8, 12, 20—37³)
71. Parents' primary concerns were with the level of ABA services, including lack of a home-based ABA program; lack of consistent access to a BCBA⁴ which Parents contend is necessary to provide appropriate supervision for an intense behavioral program; insufficient staff training; insufficient speech/language services, overall, with no provision for individual services and a speech/language goal that does not promote independence and underestimate Student's abilities; insufficient OT services, no offer of OT during ESY; no goal addressing sensory needs; insufficient/non-specific social skills intervention program; lack of positive behavior support plan. (N.T. Vol. 7A pp. 295; P-73 pp. 3—5)
72. Parents raised a general concern that the proposed AS classroom is too noisy and would be too distracting for Student. Parents also noted that the present educational levels in the IEP did not accurately reflect Student's abilities, and that Student has already mastered the personal care life skills goals in the proposed IEP. Parents were dissatisfied with the SDI based upon no reference to intensive 1:1 instruction for four hours each school day, which Parents believe Student needs, and with the absence of a provision for a daily communication system. Finally, Parent objected to placement within the regular

³ The exhibit was incorrectly paginated, going from p.8 to p. 12 to p. 20, where sequential numbers resumed.

⁴ Board Certified Behavior Analyst

education classroom for 40—79% of the school day, as indicated by the “supplemental” level of support designation in the IEP. (P-73 p. 6)

73. According to District policy, the highest level of special education services that appears in any eligible student’s IEP is “supplemental,” since all children are included in the regular education setting for some portion of the day. Although the supplemental level of special education is defined as being in the regular classroom for 40—79% of the day, and the District’s latest IEP offer places Student outside of the special education classroom for 29% of the day, the level of special education support in the proposed IEP is designated “supplemental.” (N.T. pp. 169, 170, 1286, 1364; S-8 p. 49)
74. The December 2013 proposed IEP generally provided for the same type of academic goals as that were offered in the October IEPs, with some alteration of details. Noting the similarity of the academic goals to those in the private school IEP, Parent raised no objection to those portions of the proposed IEP. Parent also raised no objection to the amount and duration of ESY services. (P-73 p. 6)
75. After an observation of the District AS classroom and review of the proposed IEP, the psychologist who provided the independent evaluation noted concerns with only the noisy school environment and the levels of socialization skills, speech/language and OT services offered by the District. She specifically noted her positive impression of the regular education kindergarten teacher whose class she also observed. She did not have the opportunity to observe the instructional aspects of the STAR program. (N.T. pp. 1913—1919, 1960, 1961)

Private School Placement

76. Parents signed an irrevocable tuition contract for Student’s enrollment in the private school early in September 2013. (P-45, P-47)
77. Although founded by Student’s Mother, the school is registered as a non-profit corporation with a governing board of directors. Parents pay tuition for Student and derive no financial compensation from the school. (N.T. pp. 467, 558, 575,643, 904, 917, 1720-1723, 1725, 1731; P-47)
78. The private school provides individual and small group instruction and behavior support based on ABA principles, along with academic instruction, individual and group speech/language therapy and OT services in accordance with an IEP. (P-70)
79. Tuition at the private school covers one 30 minute individual and three 30 minute group sessions of speech/language therapy each week, as well as one 30 minute individual session of OT and three 30 minute group sessions of OT. (P-44 p. 1)
80. Student receives an additional 150 minutes/week of individual speech therapy and an additional 30 minute session of individual OT each week at an extra cost to Parents. A 1:1 instructional aide is also provided at an extra cost. (P-44 p. 1)

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Legal Standards

The legal obligation of to provide for the educational needs of children with disabilities has been summarized by the Court of Appeals for the 3rd Circuit as follows:

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “free appropriate public education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP “must be ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)).

Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Roard of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, however, an LEA is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 251 (3rd Cir. 2009); *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

Procedural Safeguards/ Burden of Proof

The substantive protections of the IDEA statute and regulations are enforced via procedural safeguards available to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of proof. In this case, since Parents filed the complaint, it was their obligation to prove each of their claims. As is also usual in civil cases, Pennsylvania federal courts have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. See *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

Tuition Reimbursement

With respect to tuition reimbursement, the IDEA provides as follows:

- (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 private school or facility.
- (ii) Reimbursement for private school placement. 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 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 has not made a free appropriate

public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. §1412(a)(10)(C)(ii).

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court first established the principle that parents do not forfeit an eligible student's right to FAPE, to due process protections or to any other remedies provided by the federal statute and regulations by unilaterally changing the child's placement, although they certainly place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE or otherwise acted appropriately.

In *Burlington and Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993) , the Court developed a three part test for determining whether parents are entitled to reimbursement from a school district for a unilaterally selected private school.

The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof.

Appropriateness of the District's Proposed Placement

In this case there are two distinct periods to consider with respect to whether the District offered an appropriate program and placement for Student *i.e.*, spring and summer 2013, from the time Parents began the process of Student's transition from EI to school age services, through the first part of the 2013/2014 school year, and the winter/spring of 2014, after the District's final offer of an IEP for the 2013/2014 school year.

The record in this case established that prior to the start of the 2013/2014 school year, the District ignored a fundamental IDEA principle:

The centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir.2003). The IEP consists of a detailed written statement developed for each child summarizing the child's abilities, how the disability affects performance, and measurable annual goals. *Id.* The IEP specifies the special education services and supplementary aids the school will provide the child, explaining how these will allow the child to progress. *Id.*

Damian J. v. School District of Philadelphia, 2008 WL 191176 (E.D.Pa. Jan. 22, 2008) at *1, FN.2. *See also, C.U. v. New York City Dept. of Education*, 63 IDELR 126 (S.D.N.Y. May 27, 2014).

Here, not only did the District fail to complete an IEP for a Student severely affected by ASD who was transitioning into the District from EI, District staff unilaterally selected a placement and school location, but not until August 2013, and did not notify the teacher to whose classroom Student was to be assigned that there was no completed IEP. As noted by the court in the recent New York City decision, such procedure denies Parents a meaningful right to participate in placement decisions for their child.

The District's actions in not completing an IEP and unilaterally and belatedly deciding on a placement, school and classroom location made it impossible for Parents to determine whether the placement and services to be provided would meet Student's needs. However effective the teacher may be at delivering instruction in accordance with the STAR program the District has adopted for the classroom to which Student was assigned, an effective teacher and program does not relieve the District of the obligation to assure an appropriate IEP, a meaningful opportunity for Parent to participate in placement and program decisions, and to have an IEP in place at the beginning of the school year. The District cannot unilaterally make essential decisions for an eligible child and worry about technical compliance with IDEA procedures at

some later date. It is stunning that the District staff seems to treat the obligation of offering an appropriate IEP, developed with Parent input, so cavalierly.

Since the District did not offer an appropriate IEP—indeed, any fully developed IEP, at the beginning of the 2013/2014 school year, Parents met the first criterion for tuition reimbursement, at least until the District’s offer of an IEP and NOREP in December 2013.

In October 2013, however, the parties met twice for IEP meetings, which ultimately resulted in the District offering an appropriate IEP, accompanied by a NOREP, in December 2013. Although the final proposed IEP did not provide every service Parents requested and in the manner Parents believe is best for Student, the record establishes that the AS program and classroom the District proposed are reasonably likely to result in meaningful progress, overall.

In all but two respects, Parents’ disagreement with the District’s final IEP proposal is a methodology dispute: Parents and their witnesses believe it is absolutely essential for Student to have the level and type of services they request, while the District believes Student can make meaningful progress in its very well-developed and well-implemented AS program. Parents did not present sufficient persuasive evidence that Student cannot make meaningful progress without the level and type of services they requested.

The exceptions are the District’s offers of speech/language services and OT services. The services offered by the District are minimal and are based on the District’s model of services, not on a reasoned consideration of Student’s needs. The insufficiency of the related services, however, does not make the entire IEP inappropriate. Parents, therefore have not met the first criterion for tuition reimbursement from December 9, when the District made a final IEP offer.

Appropriateness of the Private School

Although the District argued that the private school placement was not appropriate for Student, the record establishes that the program provided by the private school is similar to the District program. Moreover, under the tuition reimbursement legal standards,

A parent's decision to unilaterally place a child in a private placement is proper if the placement “is appropriate, i.e., it provides significant learning and confers meaningful benefit...” *DeFlaminis*, 480 F.3d at 276 (internal quotation marks and citation omitted). That said, the “parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA.” *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir.1999). In fact, the Supreme Court has ruled that a private school placement may be proper and confer meaningful benefit despite the private school's failure to provide an IEP or meet state educational standards. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 14-15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993)

Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 242 (3rd Cir. 2009). The Parents’ private placement meets the criteria for an appropriate placement.

Equities

The theme of the District’s examination of Parents’ witnesses at the hearing, as well as of its closing argument, was that Parents’ actions in seeking a public school placement while attempting to start the private school Student currently attends were so pervasively inequitable as to relieve the District of all obligations to Student from the time Parents contacted the District in the winter of 2013. There is no authoritative basis for that position, and the record in this case does not support a conclusion that Parents’ actions were deceptive or otherwise unethical.

It is not uncommon for parents dissatisfied with their school district’s past or proposed placement or services to explore other public school and/or private school options before rejecting—or accepting—a school district IEP. It would, in fact, be more unreasonable for concerned parents not to do so for a child with a severe disability, due to the risk of valuable time potentially lost in an inappropriate placement. In the end, of course, Parents may be wrong in

their assessment that a District proposal is inappropriate, and there is no need to reach the question whether parents' actions in looking at private school placement options could be considered inequitable, since parents are not entitled to tuition reimbursement when the district offers an appropriate placement.

On the other hand, in order to resolve a full-blown or incipient dispute, or because of a fresh look at the child's needs, a school district may decide to provide additional or different services satisfactory to parents. In that situation, there is also, of course, no need to assess the equities of the parents' conduct in looking at other options. Certainly, a school district could not refuse to provide an appropriate placement and/or services within the district's schools because it learned that parents were exploring a potential private school placement during a period of dissatisfaction, suggesting that parents did not have an unwavering commitment to educating their child in the public school district. Nevertheless, in many cases in which a school district program is determined to be inappropriate, and the parent-selected private school appropriate, school districts argue that the equities favor denial or reduction of private school tuition because parents explored one or more private placement options before the school district's final IEP offer was made, and outcome of the dispute was known *i.e.*, amicable resolution or full due process hearing.

The overall circumstances here were not substantively different from the usual situation of dissatisfied, or potentially dissatisfied, parents exploring potential private placements. Notwithstanding the innuendo and argument filled cross examinations of Parents, the private school director, the private school lead teacher and every other witness who provided services to Student, there was no evidence that Parents were committed to sending Student to the private school between February and June 2013, when Parents first contacted the District, the District

was reevaluating Student and developing a draft IEP. Such commitment at that time was, in fact, impossible, since Parents could not be certain that the private school would be available. The circumstances of this case are analogous to situations in which parents cannot be certain that their child will be accepted in a private school, even if their exploration of potential alternatives to a public school placement extends to applying for their child's admission to one or more private schools.

In this case, although between January and May 2013 Parents were working toward establishing the private school and completing both the state private school license application and registration as a non-profit corporation, and continued throughout the summer to work on finding and preparing a location for the school, they could not be certain by the date of the June 20, 2013 IEP meeting that they would succeed in getting the school established, or in obtaining a license, by the beginning of the 2013/2014 school year. Just as the appropriateness of an IEP must be judged as of the time it was offered, the equities of Parents' conduct must be judged at the time it occurred, not in retrospect, after knowing that the private school did open in the fall of 2013.

The record establishes no equitable basis for denying or reducing tuition reimbursement based on Parents' actions between February 2013, when they contacted the District to begin the process of developing a kindergarten program for Student, and June 20, 2013, when the parties met for an IEP meeting but did not discuss a proposed IEP for Student, or through the date in August 2013 when Parents were finally notified of Student's classroom assignment.

Moreover, it is disingenuous for the District to take such umbrage at Parents' efforts to establish a private school that would provide an appropriate program for Student when the District had identified no specific location for Student's placement until nearly the end of August

2013. The special education teacher, to whose AS classroom Student was ultimately assigned, was unaware that her 2013/2014 class would include kindergarten students transitioning from EI until August. If the classroom teacher did not know that her AS class would include kindergarten students until virtually the last minute before school began, it is not surprising that the District had not identified a location for Student's AS class placement until even later.

The District cites Parents' commitment to paying the private school tuition as of the time the tuition contract was signed, and the fact that they did not tell the teacher at the mid-September kindergarten interview that Student was already attending the private school program as examples of their inequitable conduct at the time the school year began. Moreover, although Parents permitted several other evaluations by the District and participated in several IEP meetings between October 2013 and January 2014, just before the due process hearing began, the District cites Parents' testimony that they were doing so "to preserve their legal rights" and because of the possibility of an effect on the program for the next school year as evidence of Parents' lack of real commitment to working with the District to develop an appropriate IEP for Student.

In attempting to "preserve their legal rights" by allowing additional District evaluations and participating in IEP meetings through the fall of 2013, Parents were doing nothing different from what the District was also doing in proposing the evaluations and the IEP meetings and revising its proposed IEP for Student during the same period. Unless parents indicate that they no longer want to consider an appropriate public school placement—or seek tuition reimbursement for an inappropriate proposed or actual placement—both parties have a continuing obligation to engage in the cooperative and collaborative IDEA process of developing

an appropriate IEP. The District was likewise preserving its' legal rights by continuing to convene IEP meetings and work toward developing an appropriate IEP.

Remedy

Parents will be awarded tuition reimbursement and transportation costs for the first part of the 2013/204 school year, until the District offered an appropriate IEP in December 2013.

There is insufficient evidence, however, to support Student's need for occupational and speech/language therapies beyond the services included in the basic tuition for the private school program, or for home-based ABA therapy in order for Student to make appropriate educational progress, however valuable and important the additional services are to Student's overall development and ability to overcome the effects of the autistic spectrum disorder by facilitating the transfer of skills from school to other settings.

In addition, if Student needed a 1:1 aide in order to make meaningful progress, that was a service that should have been provided by the private school program. Had an aide been required to meet Student's educational needs, but not provided, the private school would have been inappropriate. Regardless of need, the private school evidently provides a 1:1 aide only to students whose parents are willing/able to pay for that assistance. It is not the District's responsibility to pay extra costs that Parents had to incur to make the private school appropriate. It is sufficient that Parents were reimbursed for the educational program and the related services it included.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to reimburse Parents for the basic costs of tuition and transportation at the private school from September to December 2013.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

July 3, 2014