

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 Final Decision and Order

Closed Hearing

ODR File Number

22605-19-20

Child's Name

T.R.

Date of Birth

[redacted]

Parents

[redacted]

Counsel for Parents

John Valantassis, Esquire
Ruder Law
429 Forbes Avenue, Suite 450
Pittsburgh, PA 15219

Local Education Agency

Pittsburgh Public School District
341 South Bellefield Avenue
Pittsburgh, PA 15213

Counsel for LEA

Annemarie K. Harr, Esquire
Weiss Burkardt Kramer, LLC
445 Fort Pitt Boulevard, Suite 503
Pittsburgh, PA 15219

Hearing Officer

Cathy A. Skidmore, Esquire

Date of Decision

03/31/2020

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is an early school-aged [redacted] student residing within the boundaries of the Pittsburgh Public School District (District). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² due to multiple disabilities including a vision impairment. Student transitioned from early intervention services to school-aged programming at the start of the 2019-20 school year; however, the parties were not able to agree on a program and placement. Student's Parents then filed a due process complaint against the District asserting that its program proposal amounted to a denial of a free, appropriate public education (FAPE) under the IDEA as well as a violation of Section 504 of the Rehabilitation Act of 1973³ and the Americans with Disabilities Act (ADA).⁴

The case proceeded to a due process hearing with the parties presenting evidence in support of their respective positions.⁵ In the interim, a pendency order directed the District to maintain Student in the program at a private school with the same early intervention services Student received

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with 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 codified 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).

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth 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).

⁴ 42 U.S.C. §§ 12101-12213.

⁵ The record was concluded following a delay in the proceedings resulting from a change in circumstances for the Parents' previous expert witness. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and a Hearing Officer Exhibit (HO-) followed by the exhibit number. There are duplicative exhibits in the record that were admitted because various witnesses referred to one version or another, but citation thereto may not be to all.

prior to the dispute. The Parents sought to establish that the District's proposed program and placement was inadequate to provide Student with FAPE, with their requested relief including a demand for continuation of programming at the private school. They also contended that the District discriminated against Student. The District maintained that its special education program, as offered, was appropriate for Student and did not warrant any remedy. It also denied any discrimination.

Following careful review of the record, and for the reasons set forth below, the claims of the Parents must be granted in part and denied in part.

ISSUES

1. Whether the District's proposed program for Student complied with all procedural obligations in the IDEA;
2. Whether the District's proposed program for Student met all substantive requirements in the IDEA;
3. If the District's proposed program for Student was deficient, should the District be ordered to revise that program and continue Student's placement in the private school;
4. Whether the District discriminated against Student with deliberate indifference in violation of Section 504?

FINDINGS OF FACT

1. Student is an early school-aged child who is a resident of the District and is eligible for special education under the IDEA on the basis of multiple disabilities including a vision impairment. (HO-1 at 2; S-4.)
2. Student's disabilities include ocular visual impairments, and Student also presents with significant medical conditions. (N.T. 581, 592-94; P-21; P-30; S-1; S-4.)
3. Student qualified for infant/toddler early intervention services before transitioning to preschool early intervention at the age of three. At that time, Student was placed in a private school for children with vision impairments (Private School). (N.T. 35-36; HO-1 at 2, 46; P-3; P-9; S-1 at 6, 13.)
4. By the age of three, Student was diagnosed with Cortical Vision Impairment (CVI) that impacts Student's daily life functioning, including communicating and interacting with others and engaging in physical movement. (N.T. 29-31, 34-35, 227-28, 317 325-27; 530-31.)
5. CVI is a neurological impairment that impacts an individual's visual functioning; it is not a disorder of the eye although many individuals have both CVI and ocular impairment(s). CVI is caused by some brain injury or trauma. Individuals with CVI can be expected to improve functional vision. (N.T. 516, 518-19, 522, 529-30, 542-43, 581-82; S-1 at 6.)
6. A single instrument exists for measuring CVI, the CVI Range assessment, which was specifically developed for individuals with CVI. The CVI Range is generally administered at least annually; changes in scores over time should reflect improvement. However, scores can

decrease or stagnate due to factors such as illness and absence from school. (N.T. 320, 522, 529-30, 533-34.)

7. A CVI Range assessment scores individuals on two different measures: one of observed behaviors, and one of ten specific characteristics of CVI: color preferences; need for movement; visual latency; visual field preferences; visual complexity; light-gazing and non-purposeful gaze; distance viewing; visual reflex; visual novelty; and visually guided reach. The two measures yield two separate ratings that together produce a score within one of three ranges (phases) between zero (no functional vision) and ten (typical or near-typical vision). (N.T. 315, 329-30, 521-24; P-36; S-1 at 6-7.)
8. A CVI Range score in Phase I reflects an individual who is learning that he or she has vision and is developing visual behaviors; a score in Phase II indicates that the individual is pairing vision and function together; and individuals who obtain a score in Phase III are refining abilities and are able to read adapted written materials. Phase II encompasses a large spectrum of ability. (N.T. 231, 239, 329-30, 528-29.)
9. Student's CVI Range scores have progressed from a 2.5-3.5 in January 2017 (Phase I), to a 4.5->5 in January 2018 (Phase II), maintaining a 4.5->5 score in late 2018,⁶ but with some regression to a 4->4.5 in January 2020. (P-3 at 11; P-35; P-36.)
10. Student's February 2017 Individualized Family Service Plan/Individualized Education Program (IFSP/IEP) contained goals addressing visual location of objects, making choices using visual fixation, and fine and gross motor movements. Student was provided specialized instruction, speech therapy, occupational therapy, physical

⁶ The dates of the CVI range assessment in late 2018 were either October or December.

therapy, nursing services, and five hours per week of vision services at the Private School. (P-3.)

11. Student's February 2018 IFSP/IEP contained goals addressing visual location of objects, self-care, unaided communication, and fine and gross motor movements. Student was provided specialized instruction,⁷ speech therapy, occupational therapy, physical therapy, nursing services, and five hours per week of vision services at the Private School. (P-7.)

2018-19 School Year

12. Student was evaluated beginning in late 2018 and a Reevaluation Report (RR) issued in January 2019. (P-9.)
13. The January 2019 RR included teacher and related service provider input that reflected, among other things, needs to increase the duration of visual fixation and improvement in visual attention to pictures in an array. (P-9.)
14. Information about Student's visual strengths and weaknesses in the January 2019 RR contained recommendations including visual therapy at school. Other recommendations included simplified arrays; simple colors; larger sizes; black or dark backgrounds; and additional wait time for acknowledging a visual target. For text, Student reportedly benefitted from increased font size, dark backgrounds, and highlighting or backlighting. Other suggestions helpful for Student were bright, highly saturated colors; use of movement; lighting cues; and presentation of objects within the preferred field. (P-9 at 10-12.)
15. The results of the January 2019 RR indicated that Student continued to demonstrate deficits across developmental domains. Continuation of

⁷ This IEP contains an obvious error on the amount of specialized instruction provided one day each week.

speech/language, occupational, and physical therapy and instruction by a teacher of the visually impaired were recommended. (P-9.)

16. A meeting convened in February 2019 to plan for Student's transition to school-aged programming. The Parents did not elect to maintain Student in another year of early intervention services. (N.T. 48-49, 103-04; S-10 at 3; HO-1 at 2 ¶ 9.)
17. Student's Individualized Family Service Plan/Individualized Education Program (IFSP/IEP) was reviewed in February 2019. Assessments of Student's learning preferences identified vision as Student's primary modality and auditory as the secondary modality. Student was using [redacted]. (P-11; S-1 at 7-8.)
18. Annual outcomes/goals in the February 2019 IEP addressed making choices; occupational therapy needs (reaching for and sustaining contact with items); and physical therapy needs (use of a [redacted], transferring to a different physical position, and walking with support). (S-1 at 16-20.)
19. The services specified by the February 2019 IEP were specialized instruction;⁸ transportation; occupational, physical, and speech therapy; and vision services. This IEP provided for very limited and not scheduled opportunities for interacting with typically developing peers. (S-1.)
20. The Parents toured the District's proposed school building in approximately March 2019. (N.T. 53-54,180, 228-29.)
21. In late March and April 2019, the District sought and obtained consent of the Parents to conduct a reevaluation of Student. A Reevaluation Report (RR) issued in May 2019 that incorporated previous evaluation information. (S-2; S-3; S-4; S-10 at 4.)

⁸ This IEP contained the same error in the amount of specialized instruction.

22. The May 2019 RR included a school observation by the District school psychologist and an orientation and mobility assessment. Results of the latter did not suggest a need for individual orientation and mobility services at the time. (S-4 at 7-8.)
23. Student's teacher at the Private School completed the Adaptive Behavior Assessment System – Third Edition for the May 2019 RR. Those results revealed deficits across all domains (communication, functional pre-academics, school living, health and safety, leisure, self-care, self-direction, social, and motor skills). (S-4 at 8-9.)
24. The May 2019 RR identified Student as eligible on the bases of a Visual Impairment and Multiple Disabilities. Team recommendations were for vision services to access functional academic content; gross and fine motor skill development and support; and speech/language therapy. (S-4 at 20-21.)
25. Another meeting convened in May 2019 to plan for Student's transition into District programming. A draft IEP was developed for purposes of that meeting by the Private School staff. (N.T. 63, 126, 129, 394-95; S-5.)
26. The May 2019 IEP contained goals with short-term objectives addressing reaching and sustaining contact with a presented item to use it functionally; walking with support; [redacted], and finding and choosing items/activities [redacted]. Program modifications/items of specially designed instruction (SDI) addressed physical and gross motor needs; sensory and fine motor skill needs; feeding and daily care needs; and adapted toys and materials; goal-specific SDI expanded on those with a few relating to visual needs (positioning of items and equipment features; noise reduction; adapted software; motivating materials; size of arrays). There was also a health plan. (S-5 at 30-39, 48-51.)

27. The May 2019 IEP provided for a number of related services including individual vision support embedded in the daily program; individual occupational therapy (one hour per week direct and indirect); individual physical therapy (one hour per week direct and indirect); and individual speech/language therapy (one hour per week direct and indirect). (S-5 at 39-40.)
28. The location of services in the May 2019 IEP identified the Private School. Full time Blind or Visually Impaired and Multiple Disabilities Support were proposed. (S-5.)
29. Another meeting convened in June 2019 at the District's proposed building to review the proposed IEP in detail and address concerns that the Parents had. (N.T. 71-72, 233-34, 266-68, 288, 396, 399, 623-24, 662-63, 697, 727; P-25; S-7; S-8.)
30. The IEP dated June 2019 added input from the Parents that reflected concerns if a teacher of the visually impaired was not Student's primary teacher. They also were reluctant to have major changes or disruptions to Student's programming at that time. (S-8 at 23.)
31. The June 2019 IEP added a number of non-goal specific SDI: presentation of materials within specified field with reduced clutter, a minimal number of colors, and increased contrast; lighting adjustment; type and manner of materials presented for visual attention; presentation of instructional materials within specified distance; and use of three-dimensional objects and pictures of the objects together. The SDI apply across settings in the building. (S-8 at 43.)
32. The related services section of the June 2019 IEP added to the amount of individual occupational, physical, and speech/language therapy, and added group speech/language therapy, although there are inaccuracies in the document. Also, the amount of vision services was changed to

540 minutes per month. (N.T. 687-89, 743-46; S-8 at 44-45; S-10 at 10.)

33. The June 2019 IEP proposed full time multiple disabilities support and the location was identified as a District school building. However, the educational placement section references the Private School so the IEP itself is not wholly consistent. (S-8.)
34. The Parents did not approve the Notice of Recommended Educational Placement (NOREP) that followed the June 2019 meeting, expressly stating the reasons therefore as the level of visual therapy and services of a teacher of the visually impaired. (HO-1 at 3 ¶ 13; S-9.)

The Private School

35. The Private School serves children with visual impairments in thirty-two classrooms in three buildings that comprise primary, middle, and secondary programs for children between preschool age and age twenty-one. (N.T. 462-63, 484-85.)
36. The Private School assesses its students with CVI using the CVI Range. (N.T. 320.)
37. The Private School has a CVI project leader who is a teacher of the visually impaired, and has a specific certification for administering a CVI range assessment that required significant training with the nationally renowned school for blind children. That specific certification is not required in order to assess an individual's CVI range. (N.T. 313-14, 337-39, 525-27, 587-89, 618-19.)
38. All of the teachers at the Private School are teachers of the visually impaired. The professionals at the Private School use an integrated model with related services provided within the classroom environment rather than in pull-out sessions. Visual support is incorporated into activities throughout the school day. (N.T. 319, 353-54, 365, 462-63.)

39. Students in the Private School are provided with individualized plans based on needs, including functional and academic ability. (N.T. 411.)
40. Student has had significant absences from school for medical reasons over the 2017-18 and 2018-19 school years. (N.T. 357-58.)

The District's Proposed Placement

41. The proposed District school building serves children with multiple disabilities of all ages on a campus with two other buildings, one an elementary school and one a middle school; the space offers significant opportunity for orientation and mobility training. Students' educational programs are individualized based on needs and there are regular opportunities for interaction with typical peers. The building is accessible to individuals with disabilities, and a variety of forms of technology are available for them. (N.T. 197-202, 290, 624-25.)
42. The proposed vision support would have been direct service in a combination of pull-out and push-in to various school environments, in addition to consultative service as needed. (N.T. 236, 240-41.)
43. The District conducts Educational Functional Vision Evaluations (EFVE) of students who have a vision impairment that, for students with CVI includes the CVI Range as a component of any comprehensive evaluation. The EFVE assesses a number of areas including visual acuity, visual motor skills, motility, color vision, and orientation and mobility, in addition to any available medical information. (N.T. 250-51, 588-92, 594, 596-97, 599-600, 628, 651-52.)
44. The proposed District school building has on staff a number of physical, occupational, and speech/language therapists, in addition to special education teachers that include two teachers of children with vision impairments who are in the building on a regular basis so that at least one is present at all times. An orientation and mobility specialist is also

always present. (N.T. 208-09, 211, 221-22, 615-16, 619, 646-47, 661, 666-67, 695-96, 705, 731.)

45. Both of the teachers of children with vision impairments assigned to the proposed District building have a certification from a nationally renowned school for blind children in administering a CVI range assessment, one of whom also has the specific certification for administering a CVI range assessment that required significant training with the nationally renowned school for blind children. (N.T. 220-22, 249, 350, 615-16; S-12.)
46. Student would have been in one of three elementary classrooms in the proposed District building with up to eight students. The classrooms have two paraprofessionals in addition to the special education teacher. (N.T. 256, 259, 269-71.)
47. The District has an Assistive Technology Consultant who previously served as a teacher of the visually impaired and an orientation and mobility specialist. He has had specific training in individuals with CVI as part of a master's degree program and through professional development. (N.T. 577-81; S-13.)
48. The Parents' concerns with the District's proposed program are that it does not provide adequate vision support. (N.T. 55, 61, 82; S-10 at 7.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. In evaluating the evidence, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly,

the burden of persuasion in this case must rest with the Parents who filed the administrative complaint. Application of this principle, however determines which party prevails only in those rare cases where the evidence is evenly balanced or in " equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible, and the accounts of all were relatively consistent, revealing that the dispute was not a factual one but rather each party's interpretation of the circumstances. In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in this decision, as were the parties' closing statements. Not all evidence was accorded equal weight, however. For example, the testimony of each of the parties' expert witnesses was not wholly accepted as persuasive and convincing, nor wholly rejected as not. Both are qualified in their respective areas of concentration and provided insight into the programming that Student needs.

General IDEA Principles: Substantive FAPE

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Some years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates

are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program and also comply with the procedural obligations in the Act.

The Third Circuit has long held that the FAPE standard requires development and implementation of an IEP which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). Fairly recently, the U.S. Supreme Court observed that an IEP “‘is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). “A focus on the particular child is at the core of the IDEA.” *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted).

Accordingly, individualization is a central component in an LEA’s obligation to respond appropriately to identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nonetheless, an LEA is not obligated to “provide ‘the optimal level of services,’ or incorporate every program requested by the child’s parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands that services are reasonable and appropriate in light of a child’s unique circumstances, and not necessarily those that his or her “loving parents” might desire. *Endrew F., supra*; *Ridley, supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). It is also necessary to recognize that a proper assessment of whether a proposed IEP meets the above standard must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same). Finally, a child’s educational placement must be determined

by the IEP team based upon the child's IEP, as well as other relevant factors.
34 C.F.R. § 300.116.

Least Restrictive Environment

A critical and rather paramount premise in the IDEA is the obligation that eligible students be educated in the "least restrictive environment" (LRE) that also satisfies that meaningful educational benefit standards:

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 not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.S. § 1412(a)(5)(A); *see T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993). In order to ensure compliance with LRE obligations, LEAs must have available a "continuum of alternative placements" to meet the service needs of children with disabilities. 34 C.F.R. § 300.115(a); *see also* 22 Pa. Code § 14.145. And, the "continuum" of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115; *see also* 22 Pa. Code § 171.16(c)(specifying an order of priority for educational placements from the regular classroom in a public school when a private school is recommended).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b); *see also Letter to Veazey*, 37 IDELR 10 OSEP 2001) (confirming the position of OSEP that LEAs cannot unilaterally make placement decisions about eligible children to the exclusion of their parents). Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E). And, procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

Full participation in the IEP process does not mean, however, that LEAs must defer to parents’ wishes. *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,” and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D. Md. 2002)(explaining that “parents who seek public funding for their child's special education possess no automatic veto over” an LEA’s decision). If the parties are not able to reach a consensus, it is the LEA that must make a determination, with parents afforded procedural safeguards if they do not agree. *Letter to Richards*, 55 IDELR 107 (OSEP 2010); *see also* 64 Fed. Reg. 12406, 12597 (1999)(same).

General Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap

if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). In order to establish a violation of § 504 of the Rehabilitation Act, the filing party must prove that (1) he is “disabled” as defined by the Act; (2) he is “otherwise qualified” to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. By contrast, intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met only by establishing “both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge.” *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). However, “deliberate choice, rather than negligence or bureaucratic inaction” is necessary to support such a claim. *Id.* at 263.

The Parents’ Claims

The Parents first challenge the District’s proposed program on both procedural and substantive grounds. They will be addressed in that order.

Procedural Appropriateness - District’s Proposed Program

The Parents contend that the District predetermined Student’s placement for one of its buildings and thus improperly excluded them from meaningfully participating in the IEP process. This hearing officer cannot agree. Here, both parties engaged in collaborative IEP development in the spring of 2019 with each having a perspective on how Student’s needs could appropriately

be met. Having a viewpoint is not the same as refusing to consider options, nor is holding planning meetings or otherwise discussing program possibilities outside of the IEP team meeting inappropriate. In this case, the evidence is not preponderant that the District predetermined Student's placement and deprived the Parents of the opportunity to participate in the process of attempting to reach a consensus on where Student's program would be implemented.

Substantive Appropriateness - District's Proposed Program

The District's proposed IEP as of June 2019 is appropriate for Student in many respects, but not all. Specifically, the program contains annual goals, short term objectives, and related services targeting Student's identified needs, together with a number of responsive items of SDI that apply throughout the educational environment. Indeed, the goals are very similar to those in the most recent IEP for the Private School with some increased expectations. The District's proposal is not substantively inappropriate merely because of disability categories and types of support, or even the certification of the teacher; on the contrary, a special education program must be evaluated as a whole. The June 2019 IEP offers an increase of vision support compared to that in the February 2019 IEP at the Private School. Not insignificantly, the proposed program and placement offer opportunities for regular interaction with typically-developing peers, something that Student has not had the benefit of experiencing to any real degree at the Private School. Thus, it is less restrictive along the continuum.

However, the June 2019 IEP does contain errors in the related service and placement sections. In addition, it lacks a plan for transitioning Student from the only educational environment Student has experienced. Accordingly, it does contain substantive flaws. That is not to say, however,

that the District is not able to provide an appropriate program for Student.⁹ The District has a number of qualified professionals to engage in the process of refining the IEP and thereafter implement its provisions. The IEP team will be directed in the attached order to reconvene and revise the IEP to correct the errors and add a transition plan. The team may also agree to further revisions.

Section 504 and Deliberate Indifference

All of the Parents' coextensive programming claims under Section 504 and the ADA have been addressed above and need not be discussed further. Their claim for deliberate indifference, however, requires an examination of whether the District had knowledge that Student's federally protected rights were "substantially likely to be violated" and still failed to act. The evidence is more than preponderant that the parties disagreed over certain aspects of Student' educational needs and programming, but that evidence falls far short of establishing that the District did so in any manner that amounted to deliberate indifference under Section 504. This claim must be denied.

⁹ Hearing officers do enjoy broad discretion to fashion an appropriate remedy under the IDEA. See, e.g., *Forest Grove v. T.A.*, 557 U.S. 230, 240 n. 11 (2009); *Ferren C.*, *supra*, at 718. In a case such as this, there is no reason to forgo application of this discretion to an order for continuation of the private school placement. See, e.g., *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 370 (1985); *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1285-86 (11th Cir. 2008); *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 248-49 (3d Cir. 1999). However, the record must, in this hearing officer's estimation, support a conclusion that the LEA is not in a position to make timely and reasonable revisions to its special education program in order to offer and provide FAPE. See, e.g., *Burlington*, *supra*, at 369 (explaining that private placement at public expense is warranted where an appropriate public school program is not possible). The Parents' request for maintenance of the Private School as the location of services must therefore be denied.

ORDER

AND NOW, this 31st day of March, 2020 in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Within fifteen calendar days of the date of this order, or as soon as reasonably practical,¹⁰ Student's IEP team shall meet to revise the June 2019 IEP to correct the errors contained in the related service and placement sections of the document and add a plan for transitioning Student to the new environment. The meeting may take place with remote participation of the team members.
2. The team may agree to any other appropriate revisions to the IEP. The Parents' expert may, at the option of the Parents and subject to her ability to participate, provide input in writing or through remote meeting attendance to accomplish the above revision. If the expert attends the ordered IEP meeting(s), her participation of up to two hours' time shall be at her usual rate at District expense.
3. The pendency order of shall remain in effect until the parties meet and revise the IEP as directed above in ¶ 1.
4. The District is not ordered to maintain Student's placement at the Private School following the ordered revision of the IEP.
5. The District did not act with deliberate indifference or otherwise engage in disability-related discrimination.
6. Nothing in this Order should be read to prevent the parties from mutually agreeing to alter any of its terms.

¹⁰ The world is currently facing the COVID-19 pandemic with resulting school closures and specific health and safety directives that have no end date. The District is currently planning on remote learning for its students as of April 16, 2020.

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

Cathy A. Skidmore

Cathy A. Skidmore, M.Ed., J.D.
HEARING OFFICER
ODR File No. 22605-19-20