

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: 19718 1718

Child's Name: A. S. **Date of Birth:** [redacted]

Dates of Hearing:
11/14/2017, 1/25/2018, 2/15/2018, 2/26/2018, 3/14/2018 and 3/26/2018

Parent:
[redacted]

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Hearing Officer: Charles Jelley Esq. **Date of Decision:** 05/11/18

Background and Scope of the Dispute

The Student is a kindergarten age pupil who the Parties agree is eligible for specially-designed instruction as a Student with autism.¹ The Parents submit that the District's August 2017 offer of a free appropriate public education (FAPE) fails to meet the Student's unique individual circumstances or needs. For this school year and continuing into the future, the Parents are seeking tuition reimbursement for a fully included Itinerant Autistic Support Program at the private school the Student currently attends.² To support the Student in the private school, the Parents also seek an Order directing the District to pay the previous third party intermediate unit contractor to deliver and supervise the Student's specially-designed instruction.

The District counters the Parents' demands, arguing that the District's proposed Individual Education Program (IEP), including Itinerant Autistic Support and a choice between two potential District placements, is appropriate.

After reviewing all of the exhibits, hearing all of the testimony from multiple witnesses and rereading the transcript, I now find in favor of the Parents.

Early Procedural Ruling about the Student's "Stay Put" Placement

After taking testimony at the first session, this hearing officer granted the District's request to have its own staff provide the Student's speech/language (S/L) therapy, occupational therapy (OT), personal care assistant (PCA), and board certified behavior analyst support in place of the intermediate unit provider at the pendent private school placement. The private school regular education teacher continued to provide the in class day-to-day regular education and specially-designed instruction. Once the District began providing the OT, BCBA, S/L and PCA supports, the private provider faded out of the picture.

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The Parents filed the action pursuant to the Individuals with Disabilities Education Act IDEA 20 U.S.C. §§ 1400-1482.

² Student's Parents filed the complaint and both Parents participated throughout the proceedings, with the support of a lay advocate.

Issue

For the 2017-2018 school year, did the District offer the Student a free appropriate public education; if not, should the hearing officer order the District to pay tuition reimbursement?

Findings of Fact

1. At the age of four months, the [local] Intermediate Unit (IU) determined that the Child had a developmental delay and was eligible for IDEA Part C infant services. The IU evaluation team recommended that the Child receive specially-designed instruction provided through an Individual Family Service Plan (ISFP) (S-11 p.1).
2. In June 2012, at the age of 1 year, 5 months, the evaluation team concluded that the Child continued to demonstrate cognitive, communication, personal-social, motor and adaptive behavior delays (S-11 p.1). To remediate the delays noted in the evaluation, the Child's ISFP team agreed to continue to provide the Child with specially-designed instruction, behavioral support, speech therapy and occupational therapy (S-11 pp.1-2).
3. At the age of 3, in October 2013, the Child was diagnosed as a person with autism. The October 2013 evaluation also concluded the Child displayed developmental delays in the following areas: adaptive behavior; communication skills; personal-social skills; fine motor skills; and, a cognitive delay. The evaluator noted that the Child had emerging sensory processing concerns (S-11 p.2).
4. When the Student turned age 3, the Student moved from the IU Birth to Three early intervention program to the IU's preschool program.³ The Student's preschool special education services/supports included a behavior specialist, a one-on-one PCA, speech therapy, occupational therapy and specially-designed academic instruction targeting kindergarten readiness skills (S-11 p.2).

³ At age 3 when children age out of the Birth to Three early intervention program, the IU then takes on the role of providing IDEA Part B services until the Student enrolls in a District. Therefore, from here on out the hearing officer will refer to the "Child" as a "Student."

5. In 2015, the IU team reevaluated the Student's sensory processing and behavioral needs. After completing a functional behavioral assessment (FBA), the team concluded that the Student's individualized program should include a positive behavior support plan (S-11 p.2).
6. From the ages of 3 through 6, the Student received a combination of services from the IU at a private preschool, with specially-designed instruction provided under the supervision of a private nonprofit community based behavioral health care provider (S-11).
7. Although the Parents could have enrolled the Student in the District in the fall of 2016, the Parents decided to keep the Student in the intermediate unit funded preschool program, with specially-designed instruction. At the intermediate unit funded preschool, the Student received a one-on-one PCA, along with support from a board certified behavior analyst (BCBA), a speech therapist, and an occupational therapist in an integrated preschool classroom with ten typical peers and one teacher (S-11).

The Intermediate Unit's 2015 Early Intervention Evaluation Report

8. At the age of 4 years and 4 months, the IU completed a comprehensive evaluation of the Student. The evaluation included a variety of assessment tools that assessed the Student's cognitive, communication, social/emotional development, physical development and adaptive behavior (S-3 p.9).
9. On the 16 different skills assessed by the Verbal Behavior Milestones Assessment and Placement Program (VB MAPP), the Student earned an overall score of 77 ½ out of a possible score of 170 (S-3 p.10).
10. The Student's VB MAPP scores primarily fell at the Level 1 and Level 2 range. Scores at these levels represent a developmental age of 0 to 18 months and 18 to 30 months. The Student also demonstrated some skills at Level 3, which represents the developmental age of 30 to 48 months. On the VB MAPP reading subtest the Student earned a Level 3 score of 2 ½, on the writing subtest the Student earned a Level 3 score of 1, while on the math subtest the Student earned a score of 0. Overall the VB MAPP scores demonstrate that Student displayed emerging play, and had needs in the visual perceptual, social/ behavioral, reading, writing, and math areas (S-3 pp.10-11).

11. To assess the Student's speech and language skills, the therapist administered a variety of speech and language measures. On the Peabody Picture Vocabulary Test Fourth Edition (PPVT-4) the Student earned a Standard Score (SS) of 86 at the 18th percentile. On the Expressive One-Word Picture Vocabulary Test-Fourth Edition (EOWPVT-4), the Student earned a SS of 80 at the 9th percentile (S-3 p.24).
12. On the Preschool Language Scale-Fourth Edition (PLS-4) the Student earned the following subtest scores: Auditory Comprehension SS of 36, at the 68th percentile; Expressive Language SS of 64, at the 1st percentile. Overall the testing revealed a sizable gap between the Student's Total Language Score of 62, in the low average range, compared to a receptive language score of 86. The evaluator cautioned the teachers that while the Student can demonstrate skills in isolation, the staff should not assume that the Student had mastered the earlier-developed skills (S-2 p.13, 24).
13. In the area of fine motor skills, the Student's pre-writing skills were inconsistent; the Student needed physical assistance to trace letters and make a circle (S-3 p.16).

The Student's December 2016 ISFP/IEP

14. The Student's December 2016 ISFP/IEP included multiple measurable goals and challenging objectives addressing: speech/ language deficits; participation in small group activities; sequencing story parts; mastering social questions; sequencing body actions; following the eye gaze of an adult to locate an item; sequencing sensory motor activities; pre-writing skills; copying letters; coloring; increasing postural stability; play; and math skills (S-4 pp. 20-51).
15. The December 2016 ISFP/IEP included a variety of interventions and services: transportation, occupational therapy, speech therapy, BCBA supports, a positive behavior support plan, specialized instruction, and a PCA (S-4 pp.52-54).

16. The ISFP/IEP provided that the Student would participate with typically developing children at the privately provided preschool 6.5 hours a day for 5 days a week. The program also provided services in the summer months (S-4 p.54).

The Student Enrolls in the District and the District's July 2017 Reevaluation

17. On February 5, 2017, the Parents notified the IU of their intention to register the Student for kindergarten in the District (S-5 p.1).

18. On or about April 20, 2017, the District's psychologist provided the Parents with a Notice of Intent to Reevaluate (PTRE), procedural safeguards, a Developmental History Form and an Autism Spectrum Rating Scale (S-7, S-9).

19. The PTRE noted that the then existing data was insufficient to enable the multidisciplinary team to determine the Student's disability status, present levels of academic and functional performance and educational needs in a school – aged program. To resolve the lack of sufficient data, the District proposed to administer a behavior rating scale, a speech and language assessment, an occupational therapy assessment, conduct therapist interviews, and review the existing records, along with parent and teacher interviews/input (S-9 p.1-2).

20. The District's reevaluation report notes that the IU previously completed a Functional Behavior Assessment (FBA) which led to the development of a Positive Behavior Support Plan (PBSP) to address the Student's elopement, running around the room, noncompliance and touching others. After reviewing the FBA, the IU team members had also recommended supports to address social and emotional development (S-11 p.2).

21. The RR summarized the results of the March 2015 VB-MAPP assessment when the Student was 4 years, 4 months old. The scores of the VB-MAPP indicated that linguistic structures, group behavior, reading and writing were emerging skills (S-11 p.3).

22. To gauge the Student's knowledge of general concepts the District psychologist administered the Bracken Basic Concept Scale-Third Edition: Receptive (BBCS-3 R).⁴ The BBCS 3-R measures a child's ability to point to pictures in response to questions regarding basic concepts across ten targeted domains (S-11 p.11).
23. The psychologist reported that for the 10-15 minutes it took to take the BBCS-3 R the Student was attentive. On the BBCS-3 R School Readiness subscale, the Student earned a Standard Score (SS) of 81 at the 10th percentile. A SS of 81 placed the Student at the "Delayed" level. The psychologist did not administer any other standardized cognitive testing (S-11 pp.11-12).
24. The speech therapist administered the Clinical Evaluation of Language Fundamentals-Preschool-2nd Edition (CELF-Preschool-2). The CELF-Preschool-2 is a clinical tool for evaluating language and communication in context to identify language deficits for children ages 3-6 years old. At the time of the testing in July 2017, the Student was 6 years, 6 months and 5 days old. The CELF-Preschool-2 provides a Core Language Score, a Receptive and Expressive Language Index and a Language Structure Index. An average Index Score SS is 100, with a standard deviation of 15. Scores below 85 are considered in the "difficult" range (S-11 pp.1-12).
25. The CELF-Preschool-2 includes five subtests assessing Sentence Comprehension, Word Structure, Expressive Vocabulary, Concepts and Following Directions. The average scaled score for each of the six subtests is 10. The Student's scaled scores ranged from 1 to 7. A scaled score of 1 places the Student at the significantly below average range. The Student

⁴ The [BBCS-3 R](#) is designed to assess a student's ability to receptively comprehend 10 basic domain areas: (1) Colors; (2) Letters; (3) Numbers/Counting; (4) Sizes/Comparisons; (5) Shapes; (6) Direction/Position; (7) Self-/Social Awareness; (8) Texture Material; (9) Quantity; and (10) Times Sequences. The complete tool consists of 282 items distributed unevenly across the 10 assessment domains. The BBCS-3 R includes 6 subscales that can be used to calculate standard scores reflecting a student's School Readiness Composite. (Direction/Position, Social Awareness, Quantity, Time/Sequence and Textual Awareness). Depending on the age of the student, the usual time to administer the entire BBCS-3 R is approximately 40 minutes. If however, the evaluator only administers the School Readiness Composite component, as was done here, the test takes approximately 10 to 15 minutes, as the evaluator does not test the child on the last 5 of the 10 domains.

earned a “Below Average” Index SS of 71, at the 6th percentile. This “Below Average” score indicates the Student is having difficulty with understanding language, processing input, retrieving information and expressively communicating language (S-11 pp.10-11, 13).

26. The Occupational Therapist (OT) observed the Student and included the data and results from the Student’s April 2017 IEP, regarding Fine Motor Skills, Visual Perceptual/Motor Skills, Postural Control/Stability, Sensory and Dressing. The OT input in the reevaluation report noted the following needs: donning and doffing buttons on clothes, grip on a pencil, motor coordination, writing sentences, and maintaining poses in flexion and extension positions. Although the OT reported that a sensory system checklist was completed by the instructional assistant the data was not discussed (S-11 pp.13-16).
27. The OT’s clinical observation notes the Student demonstrated symptoms of under-responsiveness to tactile input, proprioceptive input and vestibular input. The Student displays under-responsiveness in the tactile system including touching others, does not seem to notice messy hand or face, may stuff too much food into the mouth when eating, and is unintentionally rough on pets or other children. The Student has an under responsive vestibular system including the following: is in constant motion, and loves spinning, swinging and being upside down. As for delays in the proprioceptive system, the therapist notes the Student walks on toes, has difficulty with fine motor tasks, thumb sucks, and uses either too much or too little force on objects. To address these unique circumstances the OT recommended a sensory diet (S-11 p.16).
28. The RR recommended that the Student receive autistic support services focusing on language, social skills, academic and OT supports (S-11 p.17).
29. On August 1, 2017, the Parents and the District met to develop an IEP. The IEP notes that although the Student displays behaviors that impede learning, the IEP team omitted a PBSP, goals and present levels of performance in the area of behavior (S-14 p.4).
30. Rather than include behavioral data in the IEP, the IEP states the District will complete a Functional Behavioral Assessment (FBA) by November 2017 to develop a specific behavior plan. Once the FBA is completed the District will schedule another IEP meeting to develop a PBSP. The IEP

provides that the staff will use a motivational behavior plan during academics, frequent prompting and modeling to support the Student's behavioral needs (S-14 p.4).

31. The present levels of academic achievement and functional performance include the anecdotal statements from the private school kindergarten teacher and the pre-school OT describing the Student's fine motor, visual perceptual motor and sensory needs. The IEP's present levels omitted the BBCS Readiness data. The present levels omit objective data about the Student's present levels in academics, (such as letter formation, copying numbers), social development related to self-regulation, play skills, cognitive ability, attention, auditory comprehension, and pragmatic language skills with peers during play (S-14).
32. The first IEP goal states the Student will earn one point for performing the following tasks - using a 3 or 4 point grasp when holding a writing tool, and writing first name, last name and classroom number in proper orientation - earning 4 out of 4 points for 3 consecutive monthly samples. The goal is not linked to any baseline data in the RR or the present levels. (S-14 p.20)
33. The second goal calls for the Student to follow directions 80% of the time over three consecutive weeks. The goal is not linked to any baseline data in the RR or the present levels (S-14 p.21).
34. The third goal calls for the Student to demonstrate improved vocabulary organization by identifying items under three different conditions. The goal statement notes that baseline will be determined after the first session (S-14 p.21).
35. The fourth goal calls for the Student to correctly respond to what, who, and where questions. The goal statement notes that baseline will be determined after the first session (S-14 p.22).
36. The fifth goal calls for the Student to place a series of up to four pictures in a sequence. The goal statement notes that baseline will be determined after the first session. The goal is not linked to any baseline data in the RR or the present levels (S-14 p.23).

37. The sixth and final goal calls for the Student to respond to one and two step directions using manipulatives and pictures. The goal is not linked to any baseline data in the RR or the present levels (S-14 p.21).
38. The IEP includes 23 different forms of specially-designed instruction, such as modeling, prompting, using visual cues, and small group instruction (S-14 pp.25-27).
39. The IEP includes 30-minutes of direct OT a month and 60 minutes of consultative OT a month. The IEP includes 30-minutes a week of individual speech therapy, 30-minutes a week in a small group of 2-3 students, and 15 minutes a month of indirect support/consultative time (S-14 p.27).
40. After reviewing all of the then existing data, taking into account the Student's level and the rate at which the Student will learn new skills and content from the general education Kindergarten curriculum, the District members of the IEP team concluded that the Student would need supplemental instruction outside of the regular education classroom. The IEP explains that the Student will participate with peers for lunch, recess, specials, assemblies and field trips. The IEP goes on to state that the Student will receive all academic instruction for Language Arts, Writing, and Math in the special education classroom (S-14 p.30).
41. On August 7, 2017, the District sent the Parents a final revised IEP and a Notice of Recommended Educational Placement (NOREP). The NOREP described the Student's proposed placement as a push in Itinerant Autistic Support program with Speech and Occupational Therapy in the Student's neighborhood school. The NOREP further provided that the Student could attend a different school and receive pull out Itinerant Autistic Support. Both locations offered one-on-one support in the regular classroom, along with social skills group and other interventions the Student should need after the District collects additional baseline. In both settings, the IEP and NOREP provided that the Student would receive the support of a Board Certified Behavior Analyst (BCBA) and a PCA (S-21 pp.1-2).
42. The revised IEP attached to the NOREP contained the same goals, objectives, specially-designed instruction, and frequency of speech therapy and OT support as discussed at the IEP meeting. The revised IEP changed the Student's language arts, writing, and math from pull out special

education, to push in Autistic Support in the regular education setting with a one-on-one aide (S-14, S-17).

43. On August 18, 2017, the Parents rejected the NOREP and requested mediation. Once the Parents requested mediation, the IU program and placement became the stay put placement (S-21 p.5).

The Private Program and Placement are Appropriate

44. At the current time, the Student is in a kindergarten class with 14 other typical children. The class is staffed by two regular education teachers and a one-on-one PCA (N.T. pp.20-22).
45. When academic instruction is provided, the class is split into one group of eight and a second group of seven (N.T. pp. 20-21). The two groups are combined for lunch, recess and other non-academic activities (N.T. p.21). The IEP calls for the PCA to support the Student for four and a half hours per day (N.T. pp.52-53).
46. After the school year began, but before the District took over the implementation of the IEP, the Parent and the provider agreed that the PCA support should be increased from four and half hours per day to six and a half hours per day (N.T. pp.49-54). The change in the number of hours of PCA support per day was never communicated to the District or the IEP team.
47. At the current time, the Student's receives a combination of push-in and pull-out OT and speech/language services (N.T. pp.39-40).
48. While the supervisor/private provider BCBA is not on site at the private school all day, every day, she is on site two and one half days a week (N.T. 29). Another BCBA, from the same private provider, is on site four additional hours a month to provide additional supervision to the PCA (N.T. pp.40-41, N.T. p. 41, N.T. p.58, N.T. p. 68).
49. The private provider has a certified special education teacher on site, at the private school all day every day, five days a week. The special education teacher operates a learning center for other students with disabilities. (N.T. 26-N.T. pp.430-437, N.T. pp.458-461). The BCBAs and the special education teacher supervise the PCA (N.T. pp.38-40). The onsite special

education teacher works with the PCA to modify the Student's activities (N.T. pp.29-30).

50. The Student's current pendent program and placement includes an active Parent, teacher and provider communication plan to ensure the IEP, SDIs and the behavior plan were implemented throughout the day and across settings. (N.T. pp. 16-21, N.T. pp.47-51, N.T. pp. 427-428,
51. The private provider's onsite special education teacher assisted in and coordinated the Student's overall program with the classroom teacher and the one-on-one aide. (N.T. pp.458-461).
52. The onsite special education teacher is also readily available to provide supports to the regular education teacher and the Student when needed (N.T. pp.395-397, N.T. 458-461).
53. The private provider's special education teacher also supervises the Student's one-on-one PCA, for two hours a day, when the District's PCA leaves the school before the end of the school day (N.T. p.29, N.T. pp.434-437, N.T. pp.458-461).
54. The private provider issued progress monitoring reports three times a year which were then sent to the intermediate unit and the Parents (P##5, 6, 7, 8, N.T. pp.26-29, N.T. pp 425-426, N.T. pp.458-461). The progress monitoring data was reviewed at each preschool IEP meeting and supported the development of new goals, objectives and therapies.
55. The private provider's progress monitoring tracks the Student's acquisition of the December 2016 and the April/May 2017 IEP goals, objectives, behavior plan, OT and speech therapy services (P##5, 6, 7, 8). To track the Student's progress, the private provider administered the VB MAPP every six months (N.T. pp.484-486).
56. The Student's progress monitoring beginning in May 2016 through the present indicates that the Student, with the support of the regular education staff and the private provider, is making steady, consistent progress (P#3, P#6, P#6, P#7, P#8).

57. In May 2016 the Student mastered 24 out of 40 pronoun targets with 100% accuracy (P#6 p.1). Six months later the data indicates that although the Student did not master all 40 of the pronouns, the rate of accuracy across settings, persons and conditions was steadily improving (P#6, P#7).

58. In April 2017 the Student mastered thirteen new receptive language prepositions (P#8 p.1).

59. On September 15, 2017, the Parents filed a due process complaint (S-25).

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion, in this case, rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.⁵ Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

This hearing officer found each of the witnesses to be generally credible with respect to the factual matters important to deciding the issues, testifying to the best of his or her recollection; discrepancies may be attributable to a lack of precise memory and differing perspectives. In reviewing the record, the testimony of every witness, and the content of each exhibit were carefully considered in issuing this decision, as were the parties’ extremely thorough closing arguments which judiciously struck a balance between advocacy, openness and fairness.

⁵ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

IDEA Principles

The IDEA and state and federal regulations obligate local education agencies (LEAs/districts) to provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed.

The Third Circuit has interpreted the IDEA phrase “free appropriate public education” to require “significant learning” and “meaningful benefit.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE to eligible students through 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.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the Supreme Court considered the application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, 580 U.S., 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017).

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA [.] * * *

A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. * * * As we observed in *Rowley*, the IDEA “requires participating States to educate a wide spectrum of handicapped children,” and “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.” *Endrew F*, 580 U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(italics in original)(citing *Rowley* at 206-09) (other citations omitted).

The *Endrew* Court explained that “an educational program must be appropriately ambitious in light of [the child's] circumstances... [and] every child should have the chance to meet challenging objectives.” *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not “fully integrated into the regular classroom.” *Id.* The Court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. The *Endrew* standard is not inconsistent with the long held interpretations of *Rowley* by the Third Circuit.

As *Endrew*, *Rowley*, and the IDEA make clear, the IEP must be responsive to the child's identified educational needs as set forth in the district's evaluation. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, the district 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); *Endrew, supra*. Critically, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); see also *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same).

The IEP is developed by a team and a child's educational placement must be determined by the IEP team based upon the child's IEP, as well as other relevant factors. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §300.116. Parents play “a significant role in the IEP process.” *Schaffer, supra*, at 53. Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

Tuition Reimbursement

Parents who believe that a public school is not providing or offering FAPE to their child may unilaterally place him or her in a private school and after that seek reimbursement for tuition. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. §300.148(c).

To determine whether parents are entitled to tuition reimbursement, a three-part test is applied. The tuition reimbursement test is based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). The first step is to determine whether the program and placement offered by the LEA are appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Id.* The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). Equitable principles are also relevant in deciding whether reimbursement for tuition is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009) (explaining that a tuition reimbursement award may be reduced on an equitable basis such as where parents fail to provide the requisite notice); *Carter, supra*. The steps are taken in sequence, and the analysis ends if any step is not satisfied.

Federal IDEA and State Reevaluation Requirements

The 2006 IDEA regulations dramatically changed the evaluation, reevaluation, and the review of existing data (REED) requirements.⁶ The standards for an appropriate evaluation are found at 34 C.F.R. §§300.304-300.306. In short, the regulations surrounding a reevaluation require a district to (1) “use a variety of assessment tools;” that (2) “gather relevant functional, developmental and academic information about the child, including information from the parent.” The regulations provide that the evaluator must (3) “Use technically sound

⁶ (1) Initial evaluations, 34 CFR §300.301, (2) Evaluation procedures, 34 CFR §300.304, (3) Determination of needed evaluation data, 34 CFR 300.305, (4) Determination of eligibility, 34 CFR §300.306 (a)-(b), (5) Procedures for determining eligibility and placement, 34 CFR §300.306 (c), and (6) Reevaluations 34 CFR §300.303 and 34 CFR §300.305 all apply. At times, these regulations also require analysis and application of the informed consent requirements at 34 CFR §300.300 (a)(1)(i) and the notice of procedural safeguards provisions at 34 CFR §300.500 *et seq.* See also, *Questions and Answers on Individualized Educ. Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11) and 22 Pa Code Chapter §14.121-124.

instruments” to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; and, (4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or the need for or the type of specially designed instruction necessary to receive an appropriate education. 34 C.F.R. §300.304(b)(1-3).

Furthermore, the measurement or assessment tools used for the reevaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments. *Id.* The assessment tools must assess the child in all areas related to the suspected disability and must be “sufficiently comprehensive to identify all of the child’s special education and related service needs.” Ultimately the evaluation data must provide “relevant information that directly assists” the team in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7).

Once an evaluation is completed, a group of qualified professionals including the student’s parents must determine whether the student is a “child with a disability” and if the answer is yes, does the disability adversely affect the Student’s education. 34 C.F.R. §300.306(a). In making such determinations, the district is required to “Draw upon information from a variety of sources” and assure that all such information is “documented and carefully considered.” 34 C.F.R. §300.306 (c)(1). In short, an evaluation must assess the child in all areas related to the suspected disability. The evaluation must be “sufficiently comprehensive to identify all of the child’s special education, and related service needs,” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii-iv), (2), (4), (6), (7).

Hearing Officer’s Authority to Order an Independent Education Evaluation

Hearing officers may order an Independent Education Evaluation (IEE) at public expense if the district’s evaluation is incomplete, insufficient or inappropriate. *Penn-Delco Sch. Dist.*, 11 ECLPR 7 (SEA PA 2013). When a hearing officer orders an IEE as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense. 34 CFR 300.502 (d). See *Pennridge Sch. Dist.*, 12 ECLPR 45 (SEA PA 2014); *Columbia Borough Sch. Dist.*, 115 LRP 10010 (SEA PA 2015); and *Bellflower Unified Sch. Dist.*, 69 IDELR 196 (SEA CA 2017) (district to pay for IEE).

Application of IDEA Principles to the Facts

The Scope of the Evidence: The Missing Records and the Proposed Placement

The IDEA welcomes parental and district input, but specifically charges the evaluation of the student and the framing of an adequate IEP to the school. The district's evaluation does not always require a school to conduct additional testing. When "existing ... evaluations and information provided by the parents" and "observations by teachers" and other professionals provide the IEP Team with a reasonable picture of the student's skills and needs, the school may finalize an IEP without any further testing unless requested by the child's parents. *Id.* 20 U.S.C. §§ 1414(c)(1)(A)-(B), (c)(4). In this instance, the District's psychologist, reflected in the permission to reevaluate, noted that the District did not have sufficient data to discern the Student's circumstances, needs or disability status.

Applying the IDEA as interpreted in *Endrew F.*, I must ask whether, in developing the 2017 IEP, the District adequately evaluated the Student's particular needs and offered an IEP tailored to what it knew or reasonably should have known of about the Student's circumstances, needs and disability at the time. *See Endrew F.*, 137 S. Ct. at 999. Without the requisite assessment of Student's needs as of the time the 2017 IEP was drafted, neither the IEP team nor Parents could determine what services were needed to provide an appropriate education. As the Second Circuit has explained, for example, the failure to conduct an adequate functional behavioral assessment is a procedural violation that can have substantive effects, "because it may prevent the [IEP team] from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all. ... [S]uch a failure seriously impairs substantive review of the IEP because courts cannot determine exactly what information [a functional behavioral assessment] would have yielded and whether that information would be consistent with the student's IEP." *R.E. v. N.Y.C. Dep't of Educ.* 694 F.3d 167, 190 (2d Cir. 2012).

The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP a district offered was reasonably calculated to enable the specific student's progress. *See Endrew F.*, 137 S. Ct. at 999. The *Rowley/Endrew* standard calls for evaluating an IEP as of "the time each IEP was created" rather than with the benefit of hindsight. 202 F. Supp. 3d at 75-76. At the same time, evidence that "post-dates" the creation of an IEP is relevant to the inquiry to

whatever extent it sheds light “on whether the IEP was objectively reasonable at the time it was promulgated”. *Id.* at 76 n.23.

Taking as the statutory baseline that the District had an affirmative obligation to adequately assess the Student’s needs and that the object of these proceedings is to review the evidence known at the time the IEP was offered, I highlight several shortfalls in the District’s evaluation and offer of FAPE. The following substantive and procedural analysis calls for a finding that the District did not meet its statutory obligation.

At the center of the dispute is an argument about what records the District reviewed in preparing its evaluation and the IEP at issue. The District argues that based on the Student’s December 2016 IEP and its RR, the August 2017 IEP and placement are appropriate. The Parents contend, on the other hand, that the District should have used the then current April/May 2017 IEP to develop its program. The District candidly admitted it first learned of the April/May IEP when it received the Parents’ 5-day disclosure packet.

Intertwined with the ‘IEP in effect’ dispute, is a second ‘then existing record’ dispute about the Student’s then current present levels as assessed in the VB MAPP data. The private provider administered VB MAPP assessment every six months. The District acknowledged, on the record, that it was unaware of the then current VB MAPP testing. Like the April/May 2017 IEP, the VB MAPP data was not reviewed by the District’s evaluation team or the IEP team.

The Parents contend that to understand the Student’s needs, strengths and individual circumstances the District should have reviewed the Student’s then current VB MAPP testing data and the then current IEP.

The District counters the Parent’s contentions, arguing in essence, harmless error. The District contends since the VB MAPP data and IEP was never provided by the intermediate unit or the parent, it should be excused from any alleged substantive or procedural violations.

As for the placement dispute, the District argues that the Parents were given two options, either location the District contends could deliver the requisite specially - designed instruction. Curiously, these contentions conflict with the review of the Student’s then existing data at the preschool and the intermediate unit, at the time the August 2017 IEP was offered.

The District's Reevaluation is Fundamentally Flawed

When the District's first psychologist issued the permission to evaluate, she concluded that the then existing intermediate unit data was insufficient to determine the Student's disability status, the present level of academic/functional performance, behavioral and/or educational needs in its school age program (S-9 p.1). To resolve the lack of sufficient behavioral data, the District proposed to administer a series of assessments including a behavioral rating scale, a speech/language assessment, and an occupational therapy assessment, along with interviews of the Student's then current BCBA, OT, speech therapist and collection of parent/teacher input (S-9 p.2).

The second psychologist who evaluated the Student administered the BBCS. The BBCS for all practical purposes is a measure of language development/school readiness. For some unexplained reason, rather than administer the entire BBCS test battery, the psychologist omitted 5 of the 10 assessment domains. In reducing the number of assessments to 5, the abbreviated BBCS school readiness assessment took about 15 minutes to complete.

The BBCS did not provide the team with a measure of the Student's cognitive/intellectual ability or present levels of functional academic or educational levels. The BBCS did not provide the team with relevant information about the Student's social, adaptive or behavioral needs. This constellation of facts discounts the utility of BBCS data as a comprehensive assessment in all areas of suspected disability, not the least of which being cognitive ability. Simply stated the BBCS does not provide the team with adequate data on how the Student might function in the kindergarten curriculum. The BBCS was insufficient. The single standard score of 81 derived from the BBCS places the Student in the Below Average range. This single score is a dark pink flag that should have led to additional intelligence, adaptive functioning and academic assessments.

When the District's RR is compared and contrasted with the Student's May 2015 intermediate unit evaluation, the District's evaluation, unlike the intermediate unit's evaluation, omits any assessment of the Student's cognitive, social, emotional, physical or adaptive behavior/development. The above areas were all identified as needs in the intermediate unit testing. When the District's psychologist was asked why she did not assess the Student's intellectual potential, she opined that the Student's age and attention could affect the validity of such testing (N.T. pp.239-241). Curiously, she did not explain why those same behaviors did not affect the BBCS data. The District's psychologist then went on

to discount the 2015 VB MAPP testing as merely demonstrating only “Some delays” (N.T. p. 233). This opinion is implausible in light of the psychologist’s statement that she and the special education teacher were not familiar with the VB MAPP assessment (N.T. pp. 233, N.T. p 384). When the VB MAPP was administered, the Student was 4 years and 4 months old. As a 4 year old about to be eligible to enter kindergarten in under a year, the Student’s VB MAPP scores ranged from 0 to 36 months. The Student earned a 2 ½, on the reading subtest, a score of 1 on the writing subtest and a score of 0 on the math subtest (S-3 pp.10-11). Taking the BBCS at face value and accepting the psychologist’s ability testing reservations as true, the psychologist’s terse “Some delay” answer, in light of the Student’s consistently low scores, after several years in the intermediate unit program, is bewildering. These low scores coupled with the Below Average SS of 81, on the BBCS, created not one but a series of dark pink to red flags calling for additional assessments. Absent a measure of the Student’s cognitive potential the team failed to establish an anchor point upon which they could plot the Student’s path to progress. Absent a measure of adaptive behavior the team lacked a starting point to address the Student’s self-help skills (S-11 p.15).

Reviewing the District’s two assessments, juxtaposed against the then existing data set in the Student’s progress reports, points to an obvious need to dig in and confirm the Student’s cognitive capability, adaptive behavior, communication skills, behavioral and functional academic skills.

Relying on the BBCS as the single measure of school readiness, the District ran afoul of the black letter requirement that the RR include “a variety of assessments.” By following a single assessment path, the RR by design was not “sufficiently comprehensive to identify all of the child’s special education and related service needs.” 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7).

While the RR did include a CELF-Preschool-2 assessment of the Student’s language skills, at the time this assessment was administered, the Student’s chronological age was at the upper age limits of the assessment protocol. This concern, while not fatal, does, however, raise serious concerns if this single assessment is truly a comprehensive assessment in all areas of suspected speech/language disability. When the CELF-Preschool-2 results are compared to previous PPVT-4, EOWPVT-4 and PLS-4 language assessments, the single CELF-Preschool-2 data set may not accurately represent the extent of the Student’s speech/language deficits. In light of the assessment age limits, the CELF-Preschool-2 data lacks clarity, when compared to the other preexisting speech measures and raises doubts whether this single speech/language assessment

provided sufficient data, necessary to plan ambitious goals and challenging objectives.

The RR by design did not assist the team in determining the Student's educational needs across the regular education curriculum. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). The RR failed to “draw upon information from a variety of sources,” including an assessment of the Student's reading, writing and math skills. The RR lacks a critical review of the current April/May IEP and the VB MAPP data. Therefore, I find the evidence is preponderant that the IEP team did not “carefully consider” the Student's then current existing present levels of achievement, disability, and potential for growth. *Andrew F.* at 999; 34 C.F.R. §300.306 (c)(1). As it stands now neither the District nor the Parents have sufficient relevant information that will directly assist the team in determining the Student's present and near future educational needs or individual circumstances. *Id.*, 34 C.F.R. §§300.304(c)(1)(ii-iv), (2), (4), (6), (7). Accordingly, I will Order the District to fund an independent educational evaluation at public expense.

The District's August IEP is fundamentally flawed

The District contends that it did not have access to the Student's then current April/May 2017 IEP. Nevertheless it suggests, even absent a review of the centerpiece April/May 2017 IEP document, that its August 2017 IEP is appropriate. Sadly, the District is mistaken. The District's own OT's input beginning on page 14 of the RR states, “This information provided by [redacted], OTR/L from [the Student's] most recent IEP in April 2017.” (S-11). Later the District's OT input goes on for almost one and a quarter pages, of the RR, to recite verbatim the data summaries found in Parents' Exhibit #9, the missing April/May 2017 IEP (Compare Parent Exhibit #9, pp.9-10 to SD#14 pp.14-15). The District's OT's input also includes the Student's April/May 2017 IEP OT goal statement (Parents' Exhibit #9, page 16 vs. SD#11 pp. 14-16). Later on, the District's OT, with slight modifications, adopted and inserted the Student's April/May IEP OT writing goal into the District's August 2017 IEP (Compare SD#14, p.20 with P#9 p.16 and p.20). Therefore, the District's harmless error argument, that the April/May 2017 IEP was not provided, is without merit. The April/May 2017 IEP was provided to the District, yet somehow the District did not share the document with each one of the District's evaluators, IEP team members, or counsel.

Absent a review of the data from the April/May 2017 pendent IEP, the District's August 2017 IEP lacks ambitious measurable present levels and goals linked to challenging objectives (SD#9 pp.6-9). For example, the District's August 2017

IEP fails to note and build upon the Student's then current and known present levels as established in the VB MAPP data and reported in the ongoing progress monitoring reports (See Parent Exhibits ## 5, 6, 7, 8).

The District concedes that absent the FBA data, it did not have sufficient expertise, at the time the IEP was offered, to provide the Student an agreed upon goal-directed positive behavior support plan. To address the lack of an individual behavioral goal, the District points to several SDIs suggesting that the staff would cobble together the working elements of a behavioral support program, while at the same time, collecting the FBA data. The suggestion that the broadly worded SDIs referencing a motivational behavior plan can substitute for a data based goal driven positive support plan, under these circumstances, falls far short of the *Rowley - Andrew* FAPE standard. SDIs support goals, goals support needs; here the District's August IEP lacks a cogent explanation of the Student's behavioral needs and circumstances and therefore, by design the IEP is flawed.

For this young Student, who was about to transition to a new school, with new teachers, a new PCA, and new therapists, at this critical stage of learning, a carefully written behavior plan is a must. Even assuming *arguendo*, the staff could cobble together a behavior intervention from the overly broad SDIs, the lack of an agreed upon intervention in and of itself would be a new variable that would have more likely than not confounded the FBA data collection. The District's wait and see approach would more likely than not contribute to a burst in behaviors that would impede learning.

The statute is abundantly clear; the IDEA requires that: "[a]t the beginning of each school year, each local educational agency . . . shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program. . . ." 20 U.S.C. §1414(d)(2)(A). To determine if the District is liable for violating the IDEA, the hearing officer must conduct a two-part inquiry: "(1) Has the school district complied with the procedures set forth in IDEA?; and (2) Has the school district fulfilled its obligation to provide the student with a FAPE?" *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir. 2010) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690(1982)). Here the District's IEP fails on both prongs.

Substantive harm exists when a school district's violation of the IDEA "significantly imped[es] the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child" or "cause a deprivation of educational benefits" *C.H. 606F.3d at 66-67* (quoting *Knable ex*

rel. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir. 2001) Id. at 67 (quoting 34 C.F.R. §300.513(a)(2)).

Absent the necessary data the Parents, as well as the District members of the team, could not effectively participate. Absent the necessary data the IEP team did not fulfill its statutory responsibility to construct an IEP that could provide a meaningful benefit. As designed, the District's August 2017 IEP was not sufficiently ambitious and failed to include challenging objectives.

The Student's FAPE offer should have, at a minimum, included academic, social, and behavioral goals, a positive behavior support plan, and multiple related services all connected to up to date present levels, goals, objectives and SDIs. Here the failure to collect, review and discuss the then existing data led to the development of a flawed IEP. Therefore, applying *Rowley* and *Endrew*, I now find that the District's August IEP is not appropriate. This finding, however, does not end the analysis, since here the Parents are seeking tuition reimbursement.

The Private School with specially-designed instruction is appropriate

A parent who alleges a denial of a FAPE may seek compensatory relief in the form of tuition reimbursement for an appropriate placement in a private school. Although the Parents established that the District failed to offer a FAPE, they must now meet their burden that the private placement is appropriate. Two different private entities joined together to provide the private placement and program. The private school provided the regular education academic instruction and another separate, unrelated private provider provided the IEP/specially-designed instruction. The testimony from the private provider about the total program, as a whole, is convincing, credible and compelling.

The witness from the private provider is the BCBA who was regularly in and out of the Student's classroom. In addition to her role as the BCBA, the witness also supervised the private provider's special education teachers at the provider's multiple locations. The witness has both worked with the Student and directly supervised the Student's teachers, aides and therapists for several years. Therefore, I am giving her testimony due weight.

Although the private provider BCBA is not on site at the private school all day, every day, the BCBA/provider does have a certified special education teacher on site, at the private school, who operates a learning center for other students with disabilities. (N.T. pp.430-434). The Parents and the witness described an active

Parent, teacher and provider communication plan to ensure the SDIs and the behavior plan were implemented throughout the day and across settings. Before the stay put ruling, the private provider's onsite special education teacher assisted in and coordinated the Student's overall program with the classroom teacher and the one-on-one aide. The onsite special education teacher is also readily available to provide supports for the regular education teacher and the Student when needed. The private provider's special education teacher also supervised the Student's one-on-one PCA, for two hours a day, when the District's PCA would leave the school before the end of the school day (N.T. p.435). The private provider issued progress monitoring reports three times a year which were then sent to the intermediate unit and the Parents (P##5, 6, 7, 8). The progress monitoring data was reviewed at each preschool IEP meeting and supported the development of new goals, objectives and therapies.

The private provider's progress monitoring tracks the Student's acquisition of the December 2016 and the April/May 2017 IEP goals, objectives, behavior plan, OT and speech therapy services. A review of the Student's progress monitoring beginning in May 2016 through the present indicates that the Student, with the support of the regular education staff and the private provider, is making steady, consistent progress. For example, in May 2016 the Student mastered 24 out of 40 pronoun targets with 100% accuracy (P#6 p.1). Six months later the data indicates that although the Student did not master all 40 of the pronouns, the rate of accuracy across settings, persons and conditions was steadily improving. By April 2017 the Student had mastered thirteen new receptive language prepositions (P#8 p.1). The progress reports also track the Student's progress in OT. The OT progress reports note that after participating in various sensory diet activities, during OT and throughout the school day, the Student is developing the ability to focus for up to 20 minutes (P#8 p.2).

The November 2017 progress report states that the Student has made connections with classmates (P#8). In reading, the Student can now identify 22/26 letter sounds and reads 8 sight words (P##5, 6, 7, 8). The November 2017, data in math class, reports that the Student can now identify 26 out of 30 numbers from 1 to 30 and can count to over 50 (P#5). The November 2017 behavioral progress monitoring states that over a 22 day period the Student required 18.5 redirection prompts per day for behaviors like shouting, 8.4 prompts per day for protesting and 16 prompts per day to follow through on academic directions (P#5 p.1). The evidence is preponderant that the private school regular education classroom, with the specially-designed instruction, is appropriate. The evidence is also preponderant that the private placement is meeting the Student's social and

behavioral needs/circumstances. Accordingly, the evidence is also preponderant that the placement is appropriate.

The Equities Favor Tuition Reimbursement

Where, like here, a school district has proposed an inappropriate program, and parents' unilateral placement in a private setting provides an appropriate program, the third step of the *Burlington-Carter* analysis involves a balancing of the equities inquiry between the parties.

After carefully considering the individual circumstances I conclude that there is no equitable reason to deny Parents' tuition reimbursement claim for the 2017-2018 school year. The record is preponderant that the District failed to prepare a comprehensive evaluation, which in turn led to a flawed offer of a FAPE.

The record is preponderant that the Parents, for the most part, cooperated with the District throughout the process, never obstructed the District's efforts to address Student's needs, and they gave the District ample time to evaluate the Student and propose a FAPE. Granted, just before the the school year began, the Parents equivocated about what path to take; however, that time frame was short lived.

As the school year approached, the Parents took unilateral action only after they could not get a cogent explanation from the District about why, how and what made each placement and/or program appropriate. I find no merit in the argument that the Parents delayed the development of the District's 2017 August IEP. I also find the Parents did not contribute to the failure by the District to secure the intermediate unit or the private school's existing records.

Likewise, I find the evidence is preponderant that the Parents did not pre-determine the Student's placement. I find no fault with the Parents' being reluctant to pull the Student from the pendent private school placement when confronted with an offer that did not include a positive behavior support program. Such a move would make little sense from an educational standpoint in light of the Student's then current needs, circumstances and present levels.

Conclusion

I find that the District failed to offer the Student FAPE. The evidence is preponderant that the District's August 2017 IEP is premised upon a fundamentally flawed insufficient initial evaluation. I also find the Parents' proposed program is appropriate. The equities favor the Parents. Therefore tuition reimbursement will be awarded.

Specifically, the Parents will be awarded reimbursement of their out of pocket costs, charged, pending or incurred to educate the Student in the 2017-2018 school year. This tuition reimbursement is valued at the cost of the out of pocket expenses, either paid or due and owing, for tuition at the private school, including but not limited to the cost of services provided by the private special education provider, for the BCBA, the OT, the speech therapist, the one-on-one PCA and the costs for any meetings attended by the private provider's staff or the private school staff, to implement, review or revise the Student's pendent program.

Additionally, pursuant to my equitable authority to remedy substantive and procedural IDEA evaluation errors, the District will also be Ordered to fund an Independent Educational Evaluation (IEE) of the Student in all areas of suspected disability.

In the interim, while the Parties are awaiting the results of the IEE, I will vacate my December 2017 pendent placement Order. The Student shall remain in the current private school placement, at public expense, with all specially-designed instruction and related services provided by and supervised by the previous intermediate unit provider. Within five school days of the date of this decision, the private school staff and the private special education provider must meet with the District staff and take over the implementation of all specially-designed instruction supports and services. The District will be ordered to continue to provide transportation to and from the Student's program for each day the Student is expected to attend the current program.

Order

And now, this May 11, 2018, it is **ORDERED** that:

1. The District must reimburse the Parents for tuition payment(s) to the private school and the private provider of specially-designed instruction, either paid or due and owing for the 2017-2018 school year with 45 days of receipt of an invoice.
2. The Interim Order, of December 6, 2017, authorizing the District staff to implement the pendent IEP, is hereby vacated.
3. The previous private provider will supervise and provide the specially-designed instruction. Within five school days of this Order, the private

school staff and the private special education provider must meet with the District staff and take over the implementation of all regular education and specially-designed instruction supports, accommodations, and/or services.

4. The District must continue to provide transportation to and from the Student's program for each day the Student is expected to attend.
5. The private school is the pendent placement.
6. Pursuant to the authority of a hearing officer, as granted in 34 C.F.R. §300.502(d)/22 PA Code §14.102(a)(2)(xxix), the District must, at public expense, fund an independent educational evaluation of the Student. The independent assesement should include all areas of suspected disability including, but not limited to, an assessment of the Student's cognitive ability, academic achievement, adaptive behavior, speech/language, OT, social, emotional and behavioral needs.
7. Within two school days from the date of this Order, pursuant to 34 C.F.R. §300.502(e)(1), the District is directed to provide the Parents with the criteria under which the comprehensive IEE evaluation is to be obtained, including the cost limits and the qualifications of the evaluators.
8. Once the District presents the Parents with the list of the evaluators, the Parents are directed to select the evaluator(s) within 5 business days. Once the evaluator(s) has/have agreed to conduct the evaluation(s), the Parents shall notify the District of the date and time of the evaluation(s). The input, assessments, scope, details, findings and recommendations of the independent evaluation report(s) shall be determined solely by the IEE evaluator(s).
9. The Parents are directed to sign a release of information to allow the District to discuss, receive and release any necessary personally identifiable information and make any and all necessary arrangements to comply with this Order.
10. If none of the evaluators listed by the District are willing or available to conduct the evaluation, the Parents must notify the District, within two (2) business days of receiving such notice; after that, the Parents can select the evaluator(s) of their choice. Within 24 hours of selecting the evaluator(s) of their choice, the Parents must notify the District and provide the District with all relevant contact information.

11. The IEE evaluator(s), in their sole discretion, shall select the assessment(s) protocols and the scope of the evaluation(s). The IEE evaluator(s) shall prepare a written report detailing the findings, results, conclusions, and recommendations from the independent evaluation(s). If any of the evaluators determines that the Student needs any further evaluation(s), not described herein, the IEE evaluator(s) should immediately inform the Parents and the District, at the same time, about the need for further evaluations by other providers. Upon receipt of such notice, the District will notify the Parents of its list of evaluators as referenced above.

12. Any observation by the IEE evaluator(s) may, in the sole discretion of the IEE evaluator(s), take place in the home and/or the private school. After the IEE evaluator(s) has/have issued the independent evaluation report(s), the District shall within five (5) school days hold a meeting to review the report(s).

13. The District is directed to pay the costs for the IEE evaluator(s) to participate by phone, video conference or in person in any meeting(s) to review the report. The evaluator(s)' decision to participate and the manner of participation, in either the IEE review meeting, the development of the new evaluation report or the IEP meeting, is left to the sole discretion of the IEE evaluator(s).

14. The terms of this Order regarding the involvement of the IEE evaluator(s) shall continue until such time as the IEE evaluator(s) has/have participated in the meeting to review the District RR and the subsequent IEP team meeting.

15. The terms of this Order regarding the involvement of and payment for the IEE evaluator(s)' services will terminate once the District presents the Parents with a new Notice of Recommended Educational Placement and a new Individualized Education Program.

16. In the event the Parents are required to transport the Student to and from the evaluation(s), the District is directed to reimburse the Parents for any out-of-pocket costs they incur for travel and parking.

17. Nothing in this order should be read to limit, or interfere with, the continued involvement of the IEE evaluator(s) as one party, or both parties, see(s) value in such continued involvement and might make arrangements at that party's own expense. Accordingly, nothing in this order should be read to limit or interfere with the ability of the IEP team, by agreement to extend the length of the IEE evaluator(s)' involvement.

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

May 11, 2018

s/ Charles W. Jelley, Esq. LL.M.
Special Education Hearing Officer