

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:

23835-1920KE

Child's Name:

K.M.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

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West Chester, PA 19382

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

3/14/21

INTRODUCTION AND PROCEDURAL HISTORY

The Student¹ (hereafter Student) is a [redacted] District resident parentally placed in a private school. Student is eligible for special education under the Individuals with Disabilities Education Act (IDEA)² as a child with specific learning disabilities in basic reading, reading comprehension, reading fluency, and written expression. During the 2017-2018, 2018-2019, and 2019-2020 school years, the Student attended a private school partially funded by the District. By agreement, Parents and the District stipulated that the District would reevaluate Student and offer a special education program and placement to the family before the start of the 2020-2021 school year. In February 2020, the District started the evaluation; however, by mid-March 2020, the Pennsylvania Governor closed the schools because of the COVID-19 pandemic. Although the mandated school closures interfered with the completion of some components of the evaluation, the District still offered an IEP to the family in May and June 2020. The Parents (Parent) rejected both offers. In June 2020, the Parents requested this hearing, alleging that the District failed to offer Student a free appropriate public education (FAPE), pursuant to the IDEA and Section 504 of the Rehabilitation Act of 1973³ (Section 504) as well as the regulations implementing those statutes. As a remedy, Parents sought reimbursement for tuition and related expenses for their private school placement of Student.

In September 2020, the District offered the Parents a third IEP based on recently completed evaluative information. The Parents refused to attend the meeting, and their Counsel filed a *Motion in Limine* to exclude consideration of the IEP from the scheduled September due process hearing. To develop a complete hearing record and resolve all claims efficiently, I denied that Motion.

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

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in §§34 C.F.R. 300.1-300.818. The applicable Pennsylvania implementing regulations are set forth in 22 Pa. Code § 14.010-14.163 (Chapter 14).

³ 29 U.S.C. § 701 et seq., The federal regulation 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 et seq. (Chapter 15).

In response to the Parents' claims, the District contends that the COVID-19 pandemic complicated the completion of the reevaluation report and development of an IEP, that once face to face testing was possible, the Parents intentionally delayed completion of the evaluation, and that all programs offered were appropriate with no relief due. For reasons that follow, the Parents have preponderantly established that the May, June, and September 2020 IEPs did not offer Student FAPE. Parents have established that the private school placement was appropriate. After weighing the equities in this matter, the tuition reimbursement award is reduced.

ISSUES

- 1) Does the District's proposed program for the 2020-2021 school year offer FAPE to student both procedurally and substantively?
- 2) If the District's proposed program for the 2020-2021 school year was not appropriate for student, are Parents entitled to tuition reimbursement for their private placement of student for the 2020-2021 school year?

FINDINGS OF FACT

Preschool through Third Grades

1. As a preschooler and upon the transition to kindergarten in the District, Student received speech and language therapy. (S-5, p. 2)
2. As a first-grader, during the 2012-2013 school year, the District reevaluated Student because of concerns regarding rate of academic progress. On the WISC-IV, Student was determined to have a full-scale IQ of 101, with low average working memory index and high average processing speed. On the WIAT-III, Student received standard scores of 80 in the 9th percentile, below average on the basic reading composite (6th percentile-early reading skills, 6th percentile - word reading, 13th percentile - pseudoword decoding, 9th percentile-spelling, 6th percentile- oral reading fluency). The evaluation determined Student to be a child with a specific learning disability (primary classification) in the areas of basic reading, reading comprehension, reading fluency and written expression and a speech/language impairment (secondary classification). (S-1, p. 3, S-14)
3. Student attended second and third grade in the District and received special education programming. (S-5).

2015-2016 School Year-Fourth Grade

4. During the 2015-2016 school year, Student attended the fourth grade in the District and received special education and programming. (S-1)
5. On April 7, 2016, the District completed a reevaluation of Student. On the WIAT-III, Student received a standard score of 73 in the 4th percentile, below average in basic reading (2nd percentile-word reading, 5th percentile- pseudoword decoding, 9th percentile - reading comprehension, 4th percentile-oral reading fluency). (S-1, p. 13)

2016-2017 School Year-Fifth Grade

6. During the 2016-2017 school year, Student was enrolled in the fifth grade in the District.
7. In the fall of the 2016-2017 school year, Student received a private educational evaluation. The evaluator diagnosed Student with reading/spelling deficits characterized by a combination of phonological, visual, and memory problems indicative of developmental dyslexia. Student also demonstrated deficits in sustained attention and executive regulation which indicated a mild degree of attention deficit hyperactivity disorder: predominately inattentive type. (P-1, p. 19)
8. By the end of fifth grade, Student made inconsistent or little progress toward the oral reading fluency and decoding goals. (S-2, pp.11-12)

2017-2018 School Year – Sixth Grade

9. During the 2017-2018 school year, Student attended a private school, partially funded by the District, enrolled in the sixth grade. (S-3)
10. On April 27, 2018, the District completed a reevaluation of Student in accordance with the terms of a settlement agreement. On the WIAT-III, Student's broad reading ability was determined to be in the 1st percentile (decoding skills in the 2nd percentile, reading fluency in the 1st percentile, text comprehension in the 3rd percentile, written expression in the 39th percentile, and spelling in the 7th percentile (S-5, pp. 37-38)
11. In June 2018, Parents renegotiated the settlement with the District. The District agreed to fund a portion of Student's tuition at a private school for seventh and eighth grades. The parties agreed that the District would complete a reevaluation of Student by May 1, 2020 and make an offer of FAPE within thirty calendar days of the completion of the reevaluation. (S-7)

2018-2019 School Year-Seventh Grade

12. During the 2018-2019 school year, Student attended a private school, partially funded by the District, enrolled in the seventh grade. (S-7)

2019-2020 School Year-Eighth Grade

13. During the 2019-2020 school year, Student attended a private school, partially funded by the District, enrolled in the eighth grade. (S-7)

April 2020 RER

14. On February 5, 2020, the District sent prior written notice (PWN) to the Parents to reevaluate the Student. On February 18, 2020, the Parents signed and returned the PWN to the District. The PWN proposed to conduct a review of records, obtain parent and teacher input, a classroom observation, a student clinical interview, standardized assessments of intellectual abilities and academic achievement, and assessment of social, emotional, and behavioral development (S-8)
15. On March 5, 2020, the District's school psychologist contacted Student's private school to plan for an observation. (S-9; N.T. 321)
16. On March 16, 2020, the Pennsylvania Governor ordered schools to close because of the COVID-19 pandemic. The planned classroom observation of Student at the private school for inclusion in the reevaluation report (RR) did not occur. The mandated COVID-19 restrictions prevented the District from the in-person administration of testing of Student. (S-9; N.T. 321-322)
17. On April 15, 2020, the District issued its reevaluation report (RR). The RR indicated that due to state-mandated school closures in response to COVID-19, a classroom observation, clinical interview, testing observations, cognitive ability, academic achievement, and a transition assessment would be conducted once schools reopened. (S-8, p. 16)
18. The RR contained a summary of previously conducted District evaluations, private school final grades from the 2017-2018 and 2018-2019 school years, 2019-2020 math MAP assessment results from the private school, teacher comments from Student's report card, and the results from current executive functioning assessments. (S-8, p. 6)
19. The April 2020 RER contained executive functioning assessment conclusions based on rating scales from the Behavior Rating Inventory of Executive Functioning (BRIEF): Second Edition and the Behavior Assessment System for Children (BASC), completed by the Parent and four of Student's teachers. A self-report of Student did not occur because of the mandated school closures. The executive functioning assessments determined that in the home setting, Student exhibited average social, emotional, and behavioral functioning. The District determined that direct assessment of Student was needed because of school setting concerns of somatization, and emotional self-control. (S-8, pp. 16-19)
20. The RR determined Student's needs as deficits in basic reading, reading fluency, reading comprehension, and written expression skills, weaknesses in math problem solving,

deficits in maintaining and sustaining attention, executive functioning skills including self-monitoring of behavior, shifting attention, and working memory skills and anxiety within the classroom, (S-8, p. 20)

21. The team concluded that new testing and assessments were needed of Student to determine continued eligibility for special education and to determine complete present levels of academic and functional performance. The team indicated a renewed permission form would be issued, to the Parents, upon the reopening of schools. (S-8, p. 20)
22. The RR concluded that Student continued to meet criteria as a student with a specific learning disability in the areas of basic reading skills, reading fluency, reading comprehension, and written expression. (S-8, p.23)
23. On May 6, 2020, the District invited the Parents to a virtual IEP meeting scheduled for May 18, 2020, to discuss a program and placement for Student's ninth-grade year. (S-10)

May 2020 IEP

24. On May 18, 2020, the team held a virtual IEP meeting to discuss Student's program and placement for the 2020-2021 school year. (S-10)
25. The May 2020 IEP contained present levels of academic achievement and functional performance that included grades from the 2019-2020 school year, proposed District classes for the 2020-2021 school year, a WISC-IV summary from 2013, WIAT-III scores from 2018, input from Student's private school teachers, social-emotional information from the BASC-3 and BRIEF, post-secondary planning information, and the Parents' concerns. No special considerations were presented that the IEP team needed to address. (S-10)
26. The May 2020 IEP indicated Student's needs as deficits in basic reading, reading fluency, reading comprehension, and written expression skills, weaknesses in math problem solving, deficits in maintaining and sustaining attention, executive functioning skills including self-monitoring of behavior, shifting attention, and working memory skills and anxiety within the classroom. (S-10, pp. 21-22)
27. The May IEP included a plan for transition services that outlined post-secondary education and training goals and proposed courses of study. (S-10, pp. 23-26)
28. For participation in state and local assessments, the May IEP offered extended time, a separate setting, and the use of a computer accommodation for completion of the eleventh grade Keystone exam. (S-10, pp. 27-31)
29. The May 2020 IEP proposed goals to address executive functioning, reading comprehension, reading fluency, math concepts, written expression, and emotional support. The goals indicated that the private school did not monitor progress through IEP

goals, did not report any progress monitoring data, and that baseline data would be collected once schools reopened. (S-10)

30. The executive functioning goal expected Student, with verbal prompts faded to the lowest level necessary, to elicit the target response, complete an electronic or paper day planner at the end of the school day, for the following day in which each class or activity is identified, by period, any work, or assignments due, whether any preparation is needed for test or quizzes and any materials or texts are needed for each class. The planner was to be used at the beginning of each day to self-monitor whether work or assignments, preparation of any test or quizzes, and whether Student had required materials or texts in eight of ten consecutive probes. (S-10, p. 32)
31. The reading comprehension goals expected Student, when given a cold reading probe at the “#” grade level, to answer (literal and/or inferential) comprehension questions with at least 80% accuracy on 4 out of 5 consecutive probes. (S-10, p. 34)
32. The fluency goal expected Student when given a “#” grade level oral reading probe to apply learned decoding and word analysis skills to improve fluency from a baseline of ___ words correct per minute to ___ words correct per minute on three out of five consecutive cold probes. (S-10, p. 36)
33. The math concepts and applications goal expected Student to complete a math concepts and applications probe at the “_” grade level and score at the 35th%, increasing from a baseline of “___” points. (S-10, p. 36)
34. The written expression goal expected Student when assigned a multi-paragraph assignment to implement learned skills and strategies to improve written expression in organization, ideas/content, language/style, and conventions/CUPS (capitalization, usage, punctuation, and spelling) to earn a score of “_--/16” on 2 out of 3 writing samples. (S-10, p. 37)
35. The emotional support goal expected Student, when experiencing increased anxiety and/or stress levels are identified to identify the cause, evaluate the intensity of the stress, state one coping strategy, list an alternative strategy if needed, state duration of the anxiety. Student would also actively engage in 15 rating scales (scoring 100% on identification and completion) over the course of 3 marking periods after which the goal would be reevaluated. (S-10, p 38)
36. The May IEP offered specially designed instruction and program modifications that addressed the classroom setting, testing accommodations, written expression, reading, and assignment completion. (S-10, pp. 40-45)
37. Offered related services in the May IEP included social work services, supports for school personnel, consultation between the regular education and special education staff. All staff working with Student would receive a copy of the IEP. The team indicated a decision regarding ESY would occur by February 28, 2021. (S-10, pp. 40-47)

38. The May IEP proposed an educational placement of Student for supplemental learning support at the District's high school. (S-10, p. 49)
39. On May 21, 2020, the Parent indicated their concerns that the offered IEP lacked baseline data with insufficient goals, the evaluative delay until the following school created a lack of stability that could contribute to Student's anxiety and that time spent outside of regular education and transitions would be disruptive. (S-11, p. 31)
40. On May 26, 2020, the District issued a NOREP proposing educational programming through the May IEP. On June 2, 2020, the Parents signed the NOREP, disapproving the offered program and placement. On the NOREP, the Parents indicated that the IEP did not provide FAPE to Student "for all the reasons stated in the 10-day letter, which is attached". (S-10, p. 54)
41. The June 2, 2020, Parents' ten-day notice was sent via email from their attorney to the District's legal counsel. In the ten-day notice, the Parents sought public tuition reimbursement for Student's private school attendance for the 2020-2021 school year and listed their concerns with the May IEP. (S-10, p. 56)

June 2020 IEP

42. On June 2, 2020, the District invited the Parents to a virtual IEP meeting scheduled for June 9, 2020. The Parents agreed to attend the June 9 meeting. (S-11, pp. 1, 8, 13)
43. At the June 9, 2020 IEP meeting, the parties discussed the District's proposed revisions to the present levels of academic and functional performance in the May IEP that included the Parents concerns raised in their ten-day letter as well as District proposed revisions to the IEP. (S-11, p. 20-21)
44. The June 9 revision to the May IEP included the Parents' concerns of an incomplete RR, lack of baseline information in IEP goals, concerns related to Student's transition to a larger school setting, and the scheduling of science in tenth but not the ninth grade. In response, the District offered to administer testing to Student after July 1, 2020, and the lifting of COVID restrictions, but before the start of the school year to collect baseline data, added SDI for daily check-ins with the emotional support teacher and explained that scheduling science in tenth grade would permit focus on Student's emotional and executive functioning needs. (S-11, p. 20)
45. The remainder of the present levels in the revised June IEP remained unchanged from the May 2020 IEP. The revised June 2020 IEP contained the same transitions services, participation in local assessments or goals and objectives as the May 2020 IEP. (S-11, pp. 33-49)

46. The June 2020 IEP offered the same goals, program modifications, and specially designed instruction as the May IEP but added hand scheduling to plan closer classrooms and daily check-ins with the emotional support teacher. (S-11, p. 55)
47. The June 2020 IEP, as in the May 2020 IEP, offered supplemental learning support. Student would participate in regular education for all classes except reading foundation skills, writing skills lab, math skills lab, emotional support class, and executive functioning and skills lab. (S-11, pp. 58-59)
48. On June 16, through a NOREP, the Parents rejected the District's revised IEP and requested a due process hearing. The due process hearing was originally scheduled to commence on July 22, 2020.⁴ (S-11, p. 64, S-18)
49. In mid to late June, the Parents contacted a private reading evaluator and scheduled an evaluation of Student. The Parents did not disclose their intention to obtain an outside evaluation with the District. (N.T. 77-78, 80)
50. On June 19, 2020, the Parent and the District's school psychologist discussed the need for additional assessments of Student. That same day, the District emailed an electronic copy of a permission to the reevaluate the Student to the Parent and indicated the District would mail a hardcopy. (S-12, p.5; N.T. 253)
51. On or about June 29, 2020, the Parents re-enrolled Student in the private school. (Parents *Motion in Limine*, HO-1)
52. On July 3, 2020, the Parent contacted the District and indicated the reevaluation paperwork had not been received. On July 4, 2020, the District's school psychologist advised the Parent that the PWN was mailed on June 25 or June 26. (S-12, p. 4)
53. On July 8, 2020, the school psychologist emailed the Parent about the status of the evaluation paperwork, whether it had been received and offered to discuss the District's in-person testing safety guidelines. (S-12, p. 8)
54. On July 9, 2020, the Parent confirmed receipt of the reevaluation packet and requested the COVID safety procedures for in-person testing. The school psychologist agreed to forward the safety procedures once he received the finalized letter outlining the District's protocols. (S-12, p.9; N.T. 276-277)
55. The District's COVID safety protocols were finalized the second week of July. On July 13, 2020, the school psychologist provided the District's safety measures to the Parent and indicated availability to begin testing of Student. (S-12, p. 12; N.T. 277)
56. On July 15, 2020, the Student began a private reading evaluation with an educational diagnostician. (P-2; N.T. 77-78, 110, 545)

⁴ After requests for continuances were granted, the due process hearing commenced on September 15, 2020. The decision due date was extended upon request of counsel, for good cause shown.

57. On July 16, 2020, the Parent contacted the District and expressed concern about the COVID-19 safety protocols (mask, temperature taking) that would be in place during testing. The school psychologist offered to telephone Parent to address the raised concerns. The Parent requested to communicate with the school psychologist through email. The school psychologist emailed the Parent answers to the questions raised. (S-12, pp. 13-17)
58. On July 17, 2020, the Parent advised the District that the completed reevaluation paperwork would be mailed the following week. (S-12, p. 21; N.T. 84)
59. On July 19, 2020, the school psychologist asked Parent for availability to discuss the options for the testing session. The Parent replied to the school psychologist with availability. (S-2, pp. 21, 28)
60. On July 20, 2020, the school psychologist provided the Parent with his availability to discuss the District's COVID-19 evaluation safety protocols. (S-12, pp. 27, 34)
61. On July 21, 2021, the Parent gave consent to the proposed reevaluation. (S-12)
62. On July 24, 2020, the school psychologist acknowledged receipt of the consent for reevaluation. (S-12, p. 43)

September RR

63. On August 4, 2020, the District commenced its reevaluation of Student. (S-14, p. 16)
64. On August 13, 2020, the District requested the Parents' signature to obtain information from Student's private school. On August 16, 2020, the Parents returned releases to the District for Student's private school records. (S-12, pp. 57, 61)
65. On the District administered WIAT-III, in receptive and expressive oral language skills, Student received scores that indicated skills within the high average to average range. In basic reading (decoding) and spelling (encoding skills), Student received scores of <1 percentile in word reading, 7th percentile in pseudoword decoding, and the 3rd percentile in spelling (encoding). In oral reading fluency and reading comprehension, Student received scores in the 2nd percentile in fluency and the 9th percentile in reading comprehension. In written expression, Student received scores in the 3rd percentile in spelling, the 19th percentile in sentence composition, and the 55th percentile in essay composition. (S-14, pp. 22-27)
66. For inclusion in the RER, a District reading specialist conducted a Word Identification and Spelling (WIST) reading assessment, a Test of Silent Word Reading Fluency (TOSWRF), and a Reading Inventory of Student. On the word identification subtest,

Student's standard score was <40 with a percentile score of <1%. On the spelling subtest, Student's standard score was 63, with a percentile score of <1%. On the fundamental literacy ability index, Student received a standard score of <40 with a percentile score of <1%. On the sound symbol knowledge subtest, Student received a standard score of 69 with a percentile of 2%. Student received a Lexile score of 534, equivalent to a third-grade level. As a result of Student's extremely low scores in all areas of reading, the reading specialist suggested that Student receive instruction through the Wilson Reading Program for decoding and encoding instruction and Reading Foundations for comprehension strategies. (S-13; N.T. 784-788)

67. For assessment of attention and executive functioning, Student's parents and teacher completed the ADHD-V rating scale. Collective ratings of Student were not clearly indicative of an ADHD profile in the home but suggested ADHD tendencies in some settings that might co-occur with the history of learning disabilities. (S-14, p.28)
68. The September RR included BRIEF-2 and BASC-3 assessments completed by Student. On the BRIEF-2, Student self-reported difficulties with working memory and a milder awareness of areas of executive dysfunction. On the BASC-3, Student self-reported overall mild anxiety (both generalized and test anxiety). (S-14, p. 30)
69. For inclusion in the RER, the District conducted a speech and language evaluation of Student. Based on below-average scores in grammar and sentence structure, the District recommended further assessment to determine the possible impact on receptive and expressive language in reading and writing. The District attempted to schedule additional testing but was unable to confirm additional dates with the Parent. (S-14, pp. 32-36; N.T. 334)
70. The September RR determined Student's needs as pronounced deficits in basic reading and oral reading fluency skills; mild deficit in reading comprehension skills, especially for interpreting information explicitly stated in text; mild deficit in overall written expression skills, including inconsistencies across various writing skills; deficit in some areas of executive functioning skills including: functional working memory in classroom settings (especially for multi-step directions or tasks), attention regulation, self-monitoring of behavior, and shifting flexibly (e.g., emotional and/or cognitive flexibility in reactions or adjustments); mild elevations in anxiety within the classroom setting, including self-reports of test anxiety and generalized anxiety/worry; speech sound errors in voiced and voiceless "th" in all positions of words in conversation. (S-14, p. 37)
71. The September RR concluded that Student continued to remain eligible for special education services, including specially designed instruction and associated accommodations, under the classification of specific learning disability. Student demonstrated deficits in achievement that are well below the expectations predicted by [Student's] higher intellectual functioning (and not accounted for by other obvious factors such as sensory impairments, lack of instruction, limited English proficiency, etc.) in the following areas: basic reading, oral reading fluency, reading comprehension, and written expression. The RR concluded that Student's deficits in the foundational reading

areas of basic reading and oral reading fluency are more pronounced or significant than [Student's] deficits in reading comprehension and written expression. (S-14, p. 37)

72. The September RR recommended that Student receive direct instruction in basic reading, oral reading fluency, reading comprehension skills, written expression skills (including organization of ideas and theme development in longer compositions), executive functioning skills, including: self-monitoring of behavior and cognitive/emotional shifting, supportive accommodations to maintain attention, alertness, and active engagement in instruction, strategies to decrease test anxiety and cope with generalized worry/anxiety, preferential seating near the locus of instruction to allow for redirection of attention and numerous accommodations to address deficits in functional working memory skills. (S-14, pp. 37-38)

73. The District's RR concluded that updated cognitive and academic assessment indicated that Student continued to exhibit a profile of severe discrepancies between level of achievement predicted by stronger intellectual functioning and below-average academic achievement in the areas of basic reading skills, oral reading fluency, reading comprehension, and written expression. (S-14)

74. On August 18, 2020, the District contacted the Parents to schedule follow-up assessments with the Student and the District's reading specialist to determine if Wilson reading instruction would be appropriate. On August 24, 2020, the Parent replied with Student's availability. (S-12, p. 67, 72; N.T. 91)

75. On August 26, 2020, the Parents received an invitation to an IEP meeting scheduled for September 3, 2020. Parents indicated unavailability for the IEP meeting until their Counsel was available. (P-14, pp. 5-6)

76. The District's first day of school for the 2020-2021 school year was August 27, 2020. (P-14, p.3)

77. On August 28, 2020, through email, the Parent indicated surprise at receiving an invitation to an IEP meeting and indicated, Student would not be returning to the District and would attend the private school. (P-14, p. 4)

78. On September 1, 2020, the District proposed an alternate date and time for the IEP meeting. In response, the Parent advised the District that their attorney was unavailable until the following week and would be unable to respond to the IEP invitation. (P-14, p. 3-4, 6)

79. On September 8, 2020, (10:06 p.m.) Parents' counsel indicated unavailability to attend an IEP meeting before the due process hearing, scheduled for September 15, and that the District's September RR had not been received. (P-14, p. 3; N.T. 297)

80. On September 9, 2020, (2:05 a.m.), the District's counsel indicated the District would proceed to an IEP meeting without the Parents. (P-14, p.2)

81. On September 9, 2020, (10:21 a.m.), the Parents' counsel indicated unavailability to attend a September 11 meeting, was unclear about the purpose, and expressed concern that the September RR was not issued. (P-14, p. 2)
82. On September 9, 2020 (10:47 a.m.), the District's counsel indicated the IEP team would convene to review the RER (not yet issued) and revise the IEP. The District's counsel reiterated that the IEP team would convene without the Parents if they chose not to participate. (P-14, p.1)
83. On September 9, 2020, (1:24 p.m.), the Parents' counsel advised the District's counsel that the RR was not received. (P-14, p. 1)
84. On September 9, 2020, the District's finalized RR was issued to the Parents. That same day, the Parents provided the District with the private reading evaluation of Student. (P-14, S-14)
85. After the District received the private evaluation, the school psychologist noted that he and the private evaluator both administered the WISC and WIAT to the Student raising concerns of a "practice effect" with respect to the scores. The District's school psychologist testified that some of [Student's] results were invalid due to the practice effect, and the results on verbal comprehension (89 v. 95), fluent reasoning (103 v. 106), and working memory (82 v. 88) reflected an invalid result. (N.T. 335-340, 365-367, 394-398, 402, 472, 638-640)

September IEP

86. On September 11, 2020, the District held an IEP meeting without the Parents. The meeting participants reviewed the recently completed RR and revisions to the IEP and discussed placement of Student in a developmental reading course utilizing the Wilson program. (S-15; N.T. 392, 417-418, 730-731)
87. The September 2020 revised IEP documented the District's efforts from August 26, 2020, onward to encourage Parents to attend the IEP meeting. The revision indicated that in addition to present levels of academic achievement, the transition grid, specially designed instruction, and special education placement were updated. (S-15, p. 7)
88. The revised September 2020 IEP contained the results from the recently completed RR that included Student's updated cognitive scores from the WISC-V and WIAT III, math assessment, written expression, oral language, basic reading (decoding) and spelling (encoding), oral reading fluency & reading comprehension scores and the testing conclusions from the reading specialist, and the results of the speech and language assessment. (S-15, pp. 10-26)

89. The revised September 2020 IEP contained proposed transition services through courses of study that recommended that Student participate in the developmental literacy class to receive encoding and decoding instead of the math skills lab. (S-15, p. 32)
90. The revised September IEP offered goals designed to address executive functioning, reading comprehension, oral reading fluency, written expression, emotional support, decoding, and encoding. The IEP offered the same goals as the June IEP but proposed removal of the math goal, updated the emotional support goal, and added decoding and encoding goals. (S-15, pp. 43, 45, 47-48)
91. The emotional support goal expected Student when experiencing increased anxiety and/or stress levels to identify the cause, evaluate the intensity of the stress, state one coping strategy, list an alternative strategy if needed, state duration of the anxiety. Student would also actively engage in 15 rating scales (scoring 100% on identification and completion) over the course of three marking periods, after which the goal would be reevaluated.) (S-15, p. 45)
92. The decoding goal expected Student when given multi-sensory instruction to develop word analysis skills to improve decoding. Student would decode 14 out of 15 phonetic words for each skill deficit on curriculum-based assessments with a baseline of step 1. (S-15, p. 47)
93. The encoding goal expected Student, when given multisensory instruction, to develop word analysis skills to improve encoding. Student would encode 12 out of 15 phonetic words for each skill deficit. “Baseline – step 1?”. (S-15, p. 47)
94. The revised September IEP offered the same goals as the previous IEPs with program modification and specially designed instruction (SDI) that proposed, additional speech-language assessments. (S-15)
95. The revised September IEP continued to offer Student, supplemental learning support, with participation in the regular education classroom for all classes except for instruction in reading foundation skills (6x cycle), writing skills lab (3x cycle), developmental literacy (3x cycle, emotional support class (3x cycle) and executive functioning and skills lab (3x cycle). (S-15, p. 30, 57)
96. On September 15, 2020, the first due process hearing session occurred.

Parent Obtained Private Reading Evaluation

97. In June 2020, the Parents arranged for a private reading evaluation of Student and discussed the COVID-19 safety protocols that would be utilized. All testing occurred face to face. (N.T. 78, 136, 536, 538, 544)

98. The evaluation testing sessions occurred on July 15, July 22, July 29, and August 3, 2020. The Parents did not advise the private evaluator that District testing of Student was also underway. (P-3; N.T. 545)
99. An educational diagnostician is a diagnostician that provides clinical testing for educational components such as – specifically reading. (N.T. 427)
100. The evaluator has an undergraduate degree in elementary education, a Master’s degree in diagnostic reading, Pennsylvania certification as a reading specialist and clinician, elementary principal certification for K-8, supervisor of curriculum instruction K-12, certification through the Commonwealth of Pennsylvania, and a Doctorate in educational leadership and innovation. The evaluator serves as a supervisor at a Commonwealth University for special education teacher candidates and has testified at public hearings, presented at national and international conferences. She is certified in Level 1 and 2 of the Wilson reading program. (N.T. 430-440, 570-573)⁵
101. The private evaluator diagnosed Student with severe dysidectic and moderate dysphonetic dyslexia. (P-3)
102. The private evaluator administered multiple assessments, including the WIAT-III, WISC, Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI), the Test of Information Processing (TIPS), and the Gray Oral Reading Tests (GORT-5). (P-3)
103. On the WIAT III subtest, in pseudoword decoding, Student received a standard score of 68, in the 2nd percentile, in word reading, the Student received a standard score of 59 in the 0.3 percentile, in spelling, a standard score of 74 in the 4th percentile. ⁶ (P-3, pp. 3, 11)
104. On the GORT-5, Student received scores in the 2nd percentile for rate, 5th percentile for accuracy, 2nd percentile for fluency, and the 9th percentile for comprehension. (P-3, p. 11)
105. The private evaluator made educational recommendations for instructional support and the modification of educational materials. (P-3)

The Private School

⁵ Parents’ requested qualification of their private evaluator as an expert witness in educational diagnostics, with regard to reading and dyslexia. The District objected to that designation but accepted her expertise as a reading specialist. (N.T. 455) I decline to qualify the Parent’s witness as an expert in educational diagnostics but agree that her credentials do merit qualification as an expert reading specialist.

⁶ In their disclosure of evidence, the Parents originally identified P-13 as the detailed score summary compatible with the private evaluator’s report at P-3. However, P-13, was inadvertently provided to the Parents, and it contained some conflicting information that did not support the conclusions in the full report at P-3. During testimony, the District objected to the introduction of the corrected summary, at P-15 because their school psychologist had already testified regarding the discrepancies between the full report and the score summary. The Hearing Officer deferred a ruling on the objection, permitted the introduction of the correct report, P-15, and offered the District the opportunity to re-call the school psychologist. The school psychologist was not re-called. P-15 is admitted.

107. The private school is religious-affiliated, accredited by the National Association of Schools and the PA Association of Independent Schools, recognized by the International Dyslexia Association, and serves students in first through twelfth grades with learning differences. (P-4; N.T. 150)

108. The private school provides literacy instruction using Orton-Gillingham principles, regarded as a structured, research-based, explicit, multi-sensory, diagnostic teaching approach. (N.T. 152-153, 155, 174-175)

109. At the private school, Student receives instruction in language arts (decoding/spelling, fluency, writing), math, science, physical education, social studies, and art. (P-9, P-12)

110. The private school uses the Read Naturally program to provide instruction in reading fluency and reading comprehension. (N.T. 209, 211)

111. Executive functioning skill work is based on the work of Russell Barkley and Sarah Ward, and others recognized as national experts on classroom setup and the delivery of instruction. (N.T. 152)

112. In Reading, writing, and language remediation is taught by every faculty member. The reading and language arts teachers are certified and credentialed academic language instructors. (N.T. 155-159, 215)

113. The private school does not use IEPs but compiles a learning profile to inform instruction of a Student. Student progress is monitored through teacher assessment, reported two times a year during the school year to the Parents. (P-6, P-8; N.T. 161-163, 209, 212, 231)

114. The private school utilizes a diagnostic and prescriptive curriculum for students with dyslexia and attention deficits. Executive functioning instruction and emotional support are embedded throughout the school day. (N.T. 177-179, 184-185)

115. The private school has small class sizes with typically no more than ten to twelve students in content areas such as English, social studies, and science. Language arts classes have between four to eight students, and math classes have six to ten students. (N.T. 151)

116. At the private school, students have three classes a day for 90 minutes a period. Each class meets three times during a seven-day cycle for a total of 255 minutes per cycle. The private school is in session 171 days a school year. Each day begins with an advisory period to help navigate the school day, followed by a later, second check with the Student to ensure that materials are organized and homework is initiated. (P-12; N.T. 176-178, 228)

117. In the upper school, the private school offers a college preparatory curriculum within an environment designed for students with reading comprehension, fluency, and executive functioning deficits. Academic supports are embedded to enable skill development.

118. Student's profile from the private school indicated some growth in reading and math skills. (P-6; N.T. 167-169)

APPLICABLE LEGAL PRINCIPLES

WITNESS CREDIBILITY

Hearing officers, as factfinders, are 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). All testimony was reviewed and weighed considering the witnesses' participation in the hearing during their testimony and in light of the documentary evidence specifically reviewed by them and, where applicable, in general. Considering the testimony in light of the documentary evidence, I find that most of the witnesses, including Parent, were credible and reliable witnesses. In most cases, the witnesses' testimony was consistent with the documentary evidence and other testimony.

BURDEN OF PROOF

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parents, as the party seeking relief, bore the burden of persuasion.

IDEA FAPE PRINCIPLES

Parents who believe that a local education agency (LEA) has failed to comply with its obligations under the IDEA may “present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to [a] child.” 20 U.S.C. § 1415(b)(6)(A). An administrative hearing will be held on the issues presented. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.511, 30.512, 300.515; 22 Pa. Code § 14.162. In this matter, the Parents filed a Complaint and challenged the District’s proposed program for the latter half of 2017-2018, 2018-2019, and 2019-2020 school years. In reviewing the record, every witness's testimony and each exhibit's content was thoroughly considered in issuing this decision, as were the parties’ comprehensive closing arguments.

The IDEA requires 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. In 1982, our U.S. Supreme Court addressed these statutory requirements, concluding that FAPE mandates are met by providing personalized instruction and support services designed to permit the child to benefit educationally from the program and comply with the procedural obligations in the Act. *Board of Education of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)

Local education agencies (LEA), including school districts, meet the obligation of providing a FAPE to eligible students through the development and implementation of an IEP, which must be “reasonably calculated to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. In 2017, the U.S. Supreme Court determined that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for

growth.” *Andrew F. v. Douglas County School District* RE-1, 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).

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). Instead, the law demands an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Andrew F.*; *see also, Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989) A program’s appropriateness must be based on the evidence known to the school district at the time at which the offer was made and not in hindsight. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010). *Andrew F.*, makes clear that the “IDEA... requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be “appropriately ambitious in light of [the child’s] circumstances.” *Id.* at 1000.

The IEP is the center of the statute's education delivery system for disabled children. *Andrew F.* (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative, and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). A FAPE, as the IDEA defines it, includes both "special education" and "related services." *Id.* § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities, special education, and related services "in conformity with the [child's]

individualized education program" or "IEP." *Id.* § 1401(9)(D). Further, the law does not demand that an LEA provide a goal for, or particularized data on, “every single recognized need of a disabled student. “FAPE is a threshold guarantee of services that provide a meaningful educational benefit, not a perfect education.” *Coleman v. Pottstown School District*, 983 F. Supp. 2d 543, 572-573 (E.D. Pa. 2013), *aff’d*, 581 Fed. App’x 141 (2014).

A school district could violate the IDEA in two different ways. "First, a school district, in creating and implementing an IEP, can run afoul of the Act's procedural requirements." *Rowley*, 458 U.S. at 176. "Second, a school district can be liable for a substantive violation by drafting an IEP that is not reasonably calculated to enable the child to receive educational benefits." *J. W. v. Fresno Unified School District*, 626 F.3d 431 (9th Cir. 2010) (citing *Rowley*, 458 U.S. at 206-207). A procedural violation occurs when a district fails to abide by the IDEA’s procedural requirements. Procedural violations do not necessarily amount to a denial of a FAPE. *See, e.g., L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2009). A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010). A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F.* 137 S.Ct. 1001. At a minimum, an IEP must include, in part, a statement of the child’s present levels of academic and functional performance, a statement of measurable annual goals designed to meet the child’s needs to enable him or her to be involved in and make progress in the general education curriculum, a statement of how progress on the goals will be measured, and a statement of the special education and related services and supplementary aids and services, based upon peer reviewed research, to be provided to the child. 34 C.F.R. §300.320.

Evaluation and Reevaluation Criteria

The IDEA establishes requirements for evaluations. Substantively, those requirements are the same for initial evaluations and reevaluations. 20 U.S.C. § 1414. Evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and

academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and, if so, what must be provided through the child’s IEP in order for the child to receive FAPE. 20 U.S.C. § 1414(b)(2)(A). Further, the evaluation must “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child” and must “use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors”. 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, a District is obligated to ensure that: assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments. 20 U.S.C. § 1414(b)(3)(A). Finally, evaluations must assess “all areas of suspected disability”. 20 U.S.C. § 1414(b)(3)(B).

In Pennsylvania, pursuant to 22 Pa. Code §§ 14.123 and 14.124, evaluations and reevaluations must be completed, and the evaluation report presented to parents or guardians no later than 60 calendar days after receiving written parental consent for the evaluation. Summer calendar days do not count. Furthermore, copies of the reevaluation report must be provided to the parents at least 10 school days prior to the meeting of the IEP team, unless this requirement is waived in writing.

In March 2020, the federal and state governments issued guidance with respect to the uncertainty around the return to school and the FAPE responsibilities of Districts while in person instruction was suspended. Recognizing the below as guidance only, without the force of statute

or regulation, considering the scarcity of judicial guidance, it was the best direction available at that time.⁷

Tuition Reimbursement

The Individuals with Disabilities Education Act (“IDEA”) permits, under certain circumstances, the parents of an eligible child with disabilities to seek reimbursement for the costs associated with a private school placement unilaterally made by the parents. More specifically, federal regulations to the IDEA state:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not

⁷ May a LEA abandon a 60-day timeline it was unable to meet due to the COVID-19 school closures and restart a new 60-day timeline when school resumes?

No. According to USDE March 16 guidance, “[i]f an evaluation of a student with a disability requires a face-to-face assessment or observation, the evaluation would need to be *delayed until school reopens (for in-person instruction)*. Evaluations and re-evaluations that do not require face-to-face assessments or observations *may take place while schools are closed*, so long as a student's parent or legal guardian consents.” LEAs may conduct a review of existing evaluation data and use virtual evaluation tools.

LEAs and parents should continue to work together to meet IDEA requirements, including evaluation and reevaluation timelines, as best as possible. According to USDE March 21 guidance LEAs “are encouraged to work with parents and guardians to reach mutually agreeable extensions of time, as appropriate.” LEAs may obtain informed consent from parents and guardians to *extend* the 60-day timeline. LEAs and parents should make every effort to complete evaluations and reevaluations with as little delay as possible. <https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/Guidance-on-Evaluations-and-Reevaluations.aspx#:~:text=Pursuant%20to%202022%20Pa.,parental%20consent%20for%20the%20evaluation>.

Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities: Reevaluations A reevaluation of each child with a disability must be conducted at least every three years, unless the parents and the public agency agree that a reevaluation is unnecessary 34 C.F.R. § 300.303(b)(2). However, when appropriate, any reevaluation may be conducted through a review of existing evaluation data, and this review may occur without a meeting and without obtaining parental consent, unless it is determined that additional assessments are needed. 34 C.F.R. §300.305(a). <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/tr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs. 34 C.F.R. § 300.148 (c).

A three-part test is used to determine whether parents are entitled to reimbursement for special education services. The test flows from *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). This is referred to as the “*Burlington-Carter*” test. The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that merit a reduction or elimination of a reimbursement award. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

SECTION 504 PRINCIPLES

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). In the context of education, Section 504, and its implementing regulations “require that school districts provide a free appropriate public education to each qualified handicapped person in its jurisdiction.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citation and quotation marks omitted); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005); 34 C.F.R. § 104.33(a).

Under Section 504, “an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of” the related subsections of that chapter, 34 C.F.R. §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). The obligation

to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood, supra*, 172 F.3d at 253; *see also, Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Further, the standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District. v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Significantly, “[t]here are no bright line rules to determine when a school district has provided an appropriate education required by § 504 and when it has not.” *Molly L. ex rel B.L. v. Lower Merion School District*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002).

To establish a violation of § 504 of the Rehabilitation Act, the filing party must prove that:

1. [Student] is “disabled” as defined by the Act;
2. [Student] is “otherwise qualified” to participate in school activities;
3. The school or the board of education receives federal financial assistance; and
4. [Student] 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.

DISCUSSION AND CONCLUSIONS OF LAW

Through successive settlement agreements, the Student spent the sixth through eighth grades in a private school, partially funded by the District. In anticipation of Student’s enrollment in the ninth grade for the 2020-2021 school year, the agreement stipulated that the District would conduct a reevaluation of Student and offer an IEP to the family. After a reevaluation attempt, interrupted by the COVID-19 school closures, the District offered IEPs to

the family in May and June of 2020. The Parents rejected both IEPs and requested a due process hearing.

Parents' Claims

In their complaint, the Parents contend the District failed to complete the evaluative process of Student and timely offer a final IEP to the family. As a result, the Parents argue, they had no choice but to proceed with the reenrollment of Student in the private school for the 2020-2021 school year, for which, they argue, the District has responsibility to fund. After the Complaint was filed and notice of private school attendance occurred, the District continued with evaluative efforts and offered a final IEP to the family in September. The May, June, and September offers of FAPE are discussed below. Based on the totality of the evidence in this matter, the Parents have sustained their burden of proof that the IEPs, offered in May, June, and September 2020 did not offer Student a FAPE.

April Reevaluation

Although the District started the evaluation process in earnest in February 2020 and undoubtedly had every intention of conducting a comprehensive process, events of the pandemic interrupted that plan. For inclusion in the April RR, the team incorporated previous aptitude, achievement, executive functioning, and behavioral assessment data. New information included Student's 2019-2020, first trimester grades, math aptitude testing results, teacher observations, and teacher and Parent completed rating scale information from the BRIEF and BASC. Admittedly missing from the April reevaluation report were a clinical interview, updated aptitude, and achievement testing, Student completed BRIEF and BASC rating scales, and a transition assessment. Although the RER outlined areas of strength and need and provided recommendations for development of an IEP, the team readily admitted that the report was incomplete, and that necessary tests and assessments would occur once schools reopened. From a procedural standpoint, the Parents gave permission for the reevaluation on February 18, 2020, which should have resulted in a completed report in April 2020. Although the report was issued in a timely manner, it failed to meet the requirements of the IDEA as it was not sufficiently comprehensive and failed to assess Student in "all areas of suspected disability".

It is undisputed that the Governor of Pennsylvania closed schools in mid-March 2020. At this point, the District understandably relied on the test publishers' guidance that remote administration of certain evaluative instruments was unacceptable. The concurrent advice, adopted by the Pennsylvania Department of Education, from the Office for Civil Rights, Office of Special Education and Rehabilitative Services was that even in the face of an unprecedented national emergency, school districts were mandated to continue to provide a free and appropriate public education (FAPE) consistent with the need to protect the health and safety of students with disabilities. and those individuals providing education, specialized instruction, and related services. Although the need for flexibility under the circumstances was acknowledged, no adjustments to procedural or substantive requirements, without mutual consent, was suggested. In this case, no waiver or agreement occurred between the parties to extend, adjust, or modify any of the timelines or requirements associated with completion of the District's reevaluation and subsequent IEPs. The District's April reevaluation and completed report were insufficient under the law.

May 2020 IEP

On May 29, 2020, the District offered an IEP that proposed programming for the 2020-2021 school year. That IEP was based on an inadequate RR. As offered, the May 2020 IEP offered to the family was not calculated to yield meaningful educational benefit. As already determined, the April RR was incomplete and far from comprehensive. It openly declared that additional assessments were needed, and a more thorough evaluation of Student would occur, once schools re-opened, at some point in the future. Although the IEP referenced summarized information from the April reevaluation, it fell far short of responding to Student's needs, which were only generally described. Because of the incomplete RR, necessary detail regarding Student's specific literacy deficits was missing from the offered IEP. As a result, the May IEP lacked responsive, objective, measurable goals responsive to Student's needs. Based on the prevailing COVID educational advice, from both the federal and state government, in place at the time decisions were made, the District endeavored to utilize the information at its disposal and craft an IEP that would address some of Student's needs. The result was the May 2020 IEP with goals proposed to address executive functioning, reading comprehension, reading fluency, math concepts, written expression, and emotional support. The academic goals were devoid of

baseline data and the District provided explanation for the missing information, was that the private school did not monitor progress through IEP goals, did not report any progress monitoring data and that baseline data would be collected once schools reopened. Despite the District's reasons for the inadequacies, the May 2020 IEP was legally insufficient and not calculated to afford Student with meaningful educational progress.

The May IEP was based on incomplete evaluative information and contained goals, without baseline data. What was known was that Student continued to meet criteria as a student with a specific learning disability in the areas of basic reading skills, reading fluency, reading comprehension and written expression. If implemented, it would be exceedingly difficult to determine a starting point for Student's instruction and whether correct and adequate programmatic decisions were in place. Student had profound reading needs, but this IEP, without a defined strategy to provide the robust and aggressive programming needed for a student entering high school, was deficient.

June 2020 IEP

In early June, the Parents rejected the May IEP and requested District tuition reimbursement for Student's enrollment in the private school for the 2020-2021 school year. The Parents' concerns included the incomplete evaluation, the lack of baseline data with the IEP goals, Student's adjustment to a larger school setting, and the scheduling of science in tenth but not ninth grade. The District immediately scheduled a meeting to address the Parents' concerns and offered a revised IEP (June IEP). During the meeting, the District conveyed that face-to-face testing for purposes of the evaluation of Student could now occur after July 1 and before the start of the school year to collect the missing baseline data and update the IEP.

The June 2020 IEP did not offer Student FAPE. Although the District attempted to respond to the Parents' concerns, the offered June IEP did not incorporate any new evaluative information, offered the same goals without baseline data, with content largely unchanged from its May predecessor. Days after the June IEP meeting, the Parents rejected the District's offered program and placement and requested a due process hearing. However, for the remainder of June

and into July, the Parents and the school psychologist communicated ostensibly for purposes of moving forward with assessments of Student for development of another IEP.

September 2020 Reevaluation and IEP

Throughout August, the District, in cooperation with the Parents, conducted its reevaluation of Student administering the needed achievement and aptitude testing, a clinical interview, and a speech-language assessment. In mid-August, the Parent made Student available for an assessment from a District reading specialist. In September, although the testing was concluded and the RR incomplete, the District attempted repeatedly to schedule an IEP meeting with the Parents. On September 9, the RR was finalized, days before the scheduled due process hearing, and provided to the Parents⁸. That same day, the Parents provided the private reading evaluation report to the District. On September 11, 2020, the District held an IEP meeting without the Parents.

The Parents contend that revised September IEP is not relevant to Parents' claims and not a legally adequate offer of FAPE. Parents also contend that the RR was not provided to the Parents' at least ten school days before the IEP team met. The Parents have established by a preponderance of evidence that the September IEP was not an adequate offer of FAPE and that the District violated their procedural rights.

The District's September evaluation was notably more thorough and incorporated the March evaluation findings but also contained recently conducted assessments of cognitive and intellectual abilities, academic achievement, attention and executive functions, self-report assessments, a Student clinical interview, a speech and language evaluation, and information from the reading specialist. As a result, the needs identified in the updated RR were refined and now indicated that Student had "pronounced" deficits in basic reading and oral reading fluency skills but "mild" deficits in overall written expression, mild elevations in anxiety, and now

⁸ On September 12, 2020, the Parents filed a *Motion in Limine* to preclude consideration of the post-Complaint IEP. On September 14, 2020, the District submitted its response. On September 15, 2020, the Motion was denied permitting development and resolution of all outstanding issues. (HO-1)

speech sound errors. No math needs were identified. The September evaluation was greatly improved and is legally compliant with the requirements of the IDEA. The updated aptitude and achievement testing confirmed Student's ability but also served to reaffirm the profound reading needs warranting intervention. As a rising ninth-grader, intensive, focused reading instruction is critical to Student's development and success.

In its third and final offer of FAPE, through the September IEP, the District again indicated that the private school did not monitor progress through IEP goals or report any progress monitoring data, seemingly as an explanation for the missing baseline data in the proffered goals. Again, the intention was expressed that baseline data would be collected once schools reopened. This District funded, at least in part, Student's placement at the private school for three school years and surely had some insight into its documentation procedures of student academic progress. To blame the private school for the District's lack of information about Student academic functioning was unreasonable. On two separate occasions the Parent consented to evaluations of Student. Three IEPs were offered, each with the same excuse, as to their incompleteness. Understandably, this process was complicated by the COVID-19 pandemic; however, by the time the September IEP was offered, and made a subject of this hearing, it was done so under the auspices that more time was needed to collect academic information from Student. This was done but the goals still lacked sufficient information for responsible implementation. Although the September IEP now offered decoding and encoding goals, acutely missing was the necessary baseline data to determine an actual starting point for instruction and to gauge whether the introduced reading interventions were effective. In first, fourth, and sixth grades, Student's reading development was measured using the WIAT-III standardized assessment. In the eighth grade both the District and the private evaluator administered the WIAT, with the District challenging the private evaluator's conclusions and determining its own testing to be invalid because of a practice effect. Even if Student's scores on the WIAT-III are disregarded, the other administered assessments along with an analysis of historical performance leads to but one conclusion. This Student, a rising ninth grader at the time this Complaint was filed, with aspirations for higher education, has significant reading needs. A robust, aggressive plan was needed but not offered to this family.

The IEP also included inadequate and inappropriate SDI -- including, but not limited to, the provision of inappropriate supports for Student's known reading needs. The offered specially designed instruction was largely unchanged from the June revised IEP, still indicated that math instruction would occur in the special education classroom and contained no revisions that addressed how the critical decoding and encoding instruction would occur. The IEP appeared to be missing an actual plan to transition Student from the small private school setting to a much larger high school environment. Although a single visit and meet and greet was proposed, this Student had known anxiety needs exacerbated in a classroom setting. Although a relatively minor point, the omission of a solid plan to orient Student, many grade levels behind in reading, to a school never attended, with new teachers and peers in a dynamic and changing environment would require an adjustment. To give this child, the best opportunity to succeed, a more thoughtful transition plan to the high school should have been offered.

Additionally, it was improper for the District to schedule an IEP meeting less than ten days before the RR was finalized. Understandably, the District was trying to make up the time lost when in person testing could not occur. However, the District's development of an IEP, mere days before the due process hearing and the pressure exerted on the family to participate, was improper. Additionally, the September evaluation was not even completed when then the District started strong-arming the family to attend the meeting. Ultimately this meeting was held without the Parents. Overall, the September IEP, like its predecessors, was not individualized or designed to confer either "significant learning" or "meaningful benefit" and was certainly not "appropriately ambitious" in light of Student's circumstances. The Parents have proven by a preponderance of the evidence that the District violated the Parent's procedural rights and that the September IEP did not offer Student a FAPE for the 2020-2021 school year.

To the extent there was a suggestion from the District during the hearing as to what the School District **may** have done regarding the implementation of the September IEP, if Student had returned to the District, the correct analysis for determining the appropriateness of the IEP at issue is restricted to the IEP as written rather than predicting what services the District **might** provide. *Susan N. v. Wilson School District*, 70 F.3d 751, 762 (3d Cir. 1995) ("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.") (internal quotations omitted); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir.1993) (same); *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 187 (2d Cir. 2012) ("The appropriate inquiry is into the nature of the program *actually offered in the written plan.*") (emphasis added).

The Supreme Court has long recognized that the IDEA allows parents to reject an IEP they feel is inadequate, place their child in an appropriate private school, and seek tuition reimbursement from the school district. See *Burlington*, 471 U.S. at 369–70, 105 S.Ct. 1996 (construing IDEA's authorization for courts to award "appropriate" relief); see also, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 242–43, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009) (finding that amendments to the IDEA do not abrogate the *Burlington* decision). In order for this system to function properly, parents must have sufficient information about the IEP to make an informed decision as to its adequacy prior to making a placement decision. At the time, the parents must choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents. *R.E.*, 694 F.3d at 186. Thus, "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision. *Id.* (citing *Fuhrmann*, 993 F.2d at 1039-40). Accordingly, an IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible. This rule recognizes the critical nature of the IEP as the centerpiece of the system, ensures that parents will have sufficient information on which to base a decision about unilateral placement, and puts school districts on notice that they must include all the services they intend to provide in the written plan.

Having concluded that the District did not offer Student an appropriate program for the 2020-2021 school year, the next question in the tuition reimbursement analysis is a consideration of the private school program. The Parents have proven by a preponderance of the evidence that the private school was an appropriate placement. The private school is religious-affiliated, accredited by the PA Association of Independent Schools, recognized by the International Dyslexia Association, and serves students in first through twelfth grades with learning differences. For the

last three school years, Student attended the private school, funded in part by the District. The private school provides all literacy instruction using a structured, explicit, multi-sensory, diagnostic method consistent with an Orton-Gillingham program. At the private school, Student receives instruction in language arts (decoding/spelling, fluency, writing), math, science, physical education, social studies, and art. Reading, writing, and language remediation is taught by every faculty member. The reading and language arts teachers are certified and credentialed instructors.

At the private school, Student received, a diagnostic and prescriptive curriculum for students with dyslexia and attention deficits with executive functioning instruction and emotional support embedded throughout the school day. The private school has small class sizes with typically no more than ten to twelve students in content areas such as English, social studies, and science, Language Arts classes with four to eight students, and math classes have six to ten students. Student attends three classes a day for 90 minutes a period. Each class meets three times during a seven-day cycle for a total of 255 minutes per cycle. The private school is in session 171 days a school year. Each day begins with an advisory period to help navigate the school day, followed by a later, second check with the Student to ensure that materials are organized and homework is initiated. The private school does not use IEPs but compiles a learning profile to inform instruction of a Student. Student progress is monitored through teacher assessment, reported two times a year during the school year to the Parents. In the upper school, the private school offers a college preparatory curriculum within an environment designed for students with reading comprehension, fluency, and executive functioning deficits. Based on a review of the evidence, this Student continues to have significant reading deficits, despite the interventions in place at the private school. However, Student has experienced some academic and social gains while attending the private school. The record contains reliable evidence of the programming, specialized instruction, educational benefit Student received at the private school. As such, the private school meets the appropriateness prong of the *Burlington-Carter* test.

Equitable Considerations

The third prong of the Burlington tuition reimbursement analysis requires this Hearing Officer to consider the equities in this case and determine whether they weigh in favor of

reimbursement. As such, a Hearing Officer *may* reduce or deny tuition reimbursement in one of three circumstances: (1) where the parents failed to provide the District with written notice of their intent to withdraw their child from the public schools and seek reimbursement for private placement; (2) where the public school expressed its intent to evaluate the student at the time of withdraw (through the issuance of a permission to evaluate) and the parents failed to cooperate in the evaluation; and (3) where the parents acted unreasonably. 34 C.F.R. § 300.148(d).

The equities of this case do favor a reduction in tuition reimbursement. While simultaneously evincing a cooperative spirit to make up for lost time and update Student's evaluative profile, their conduct in one respect was unreasonable. While in the middle of the discussion to schedule testing for Student with the District, the Parents retained a private evaluator to assess Student without sharing this information with the District. During this time, they appeared to delay in responding to the District's efforts to schedule testing dates with the Student, while simultaneously cooperating with the private evaluation they arranged. The Parents are likely to assert that they had no obligation to cooperate with District efforts to reevaluate the Student because a due process hearing was requested and reenrollment in the private school had already occurred. Although both of those events did occur, throughout July, the Parents continued to communicate and cooperate with the District, without counsel, they discussed the needed remaining assessments and Student's availability, COVID safety protocols for the testing, as well as receipt and return to the District of the signed consent.

The evidence has established that the Parents retained the private evaluator while amid negotiating dates of availability for Student's updated testing and receipt of the COVID safety protocols with the District. As a result, weeks went by before the Parents made a commitment to present Student for the needed testing, yet the private evaluation went forward and was completed. To further complicate matters, the Parents did not disclose their acquisition of the private reading evaluation to the District, which resulted in the administration of duplicative testing, compromising the validity of some of the results obtained by the District. Although the evidence has established that the Parents largely cooperated with efforts of the District, after their request for due process was filed and even through the original date of the due process hearing, perhaps with no clear legal obligation to do so, their conduct as described created confusion and in my view was unreasonable. The District must reimburse the Parent for Student's cost of tuition at the private

school during the 2020-2021 school year. Such payments are limited to the tuition fee written in the enrollment contract (less any scholarship, financial assistance, or other fee reduction that the Student or Parent receive or would be eligible to receive in the absence of this order). Because of the determination of the Parent's conduct, the reimbursement shall be reduced by 15% (fifteen percent). That reduction shall occur after the calculation of any scholarship, financial assistance, or other fee reduction that the Student or Parent receive or would be eligible to receive in the absence of this order.

Section 504

I conclude that the District failed to offer Student a FAPE as defined by section 504, which requires a district to provide appropriate services and accommodations to meet Student's individual needs as adequately as the needs of non-handicapped children in the District are met. 34 C.F.R. §104.33(b)(1). On this record, noncompliance with the IDEA is preponderant evidence that the District also failed to comply with section 504. 34 C.F.R. §104.33(b)(2).

ORDER

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

1. The District did not offer Student a free appropriate public education for the 2020-2021 school year.
2. The Parents are entitled to reimbursement for tuition, transportation, and related expenses for Student's attendance at the private school for the 2020-2021 school year, less any scholarship, financial assistance, or other fee reduction that the Student or Parent received or would be eligible to receive in the absence of this order.
3. Because of the determination of the Parent's conduct, the reimbursement shall be reduced by 15% (fifteen percent).

4. Upon presentation to the District by the Parents of proof(s) of payment, or outstanding balance due, reimbursement shall be made to Parents within 45 calendar days the documentation is presented.
5. If the District did not provide transportation to and from the private school, the District shall reimburse Parents for transportation expenses, either by a receipt showing the Parents' out-of-pocket transportation costs and/or by using mileage reimbursement as allowable under Internal Revenue Service mileage reimbursement rates. The District will reimburse Parents for mileage expenses for every day the student attended the private school during the 2020-2021 school year. The reimbursement for transportation shall be only for the days the student attended the private school.
6. Nothing in this decision and order shall be read to interfere with the parties' ability to modify any provision of this decision and order to the extent the parties agree in writing.

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

Joy Waters Fleming, Esquire
Joy Waters Fleming, Esquire
Special Education Hearing Officer

March 14, 2021