

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:

23652-19-20

Child's Name:

R.S.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

Brandi K. Suter, Esquire
Ruder Law
301 Grant Street, Suite 270
Pittsburgh, PA 15219

Local Education Agency:

Sharpsville Area School District
1 Blue Devil Way
Sharpsville, PA 16150

Counsel for LEA:

Andrew Evankovich, Esquire
Andrews & Price
1500 Ardmore Boulevard, Suite 506
Pittsburgh, PA 15221

Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

11/09/2020

INTRODUCTION AND PROCEDURAL HISTORY

The student, R.S. (hereafter Student),¹ is a mid-teenaged student residing in the Sharpsville Area School District (District) but attending a private school out of state. Student has been identified as eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA),² and has a disability entitling Student to protections under Section 504 of the Rehabilitation Act of 1973,³ based on a Specific Learning Disability and Speech/Language Impairment.

In late April 2020, Student's Parents filed a Due Process Complaint against the District asserting that it failed to offer Student a free, appropriate public education (FAPE) under the IDEA and Section 504 as well as the federal and state regulations implementing those statutes for two school years. The case then proceeded to a due process hearing convening remotely over several sessions,⁴ with both parties presenting evidence in support of their respective positions. The Parents sought to establish that the District's

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

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

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

⁴ The hearing was conducted virtually due to the COVID-19 pandemic. References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and the Hearing Officer Exhibit (HO-) followed by the exhibit number. Citations to duplicative exhibits may not be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both, and to the singular Parent to refer to Student's mother who was more actively involved in the educational program during the time period in question.

program offers for the 2018-19 and 2019-20 school years did not amount to FAPE, and they sought reimbursement for tuition and related expenses. The District maintained that its special education program, as offered in the summer of 2018, was appropriate for Student; that it had no obligation to propose a program for the 2019-20 school year; and that no remedy was due.

For the reasons set forth below, the claims of the Parents will be granted in part and denied in part.

ISSUES

1. Whether the District's offer of programming for the 2018-19 school year was appropriate for Student;
2. Whether the District had an obligation to offer a program for the 2019-20 school year and, to the extent that it did, whether such proposal was appropriate for Student;
3. If the District's programming was not appropriate, whether the private school is appropriate for Student's needs; and
4. If the District's programming was not appropriate, whether the equities favor reduction or denial of reimbursement for tuition and related expenses for the private school.

FINDINGS OF FACT

1. Student is mid-teenaged and resides within the boundaries of the District, having attended school there beginning in kindergarten.

Student is eligible for special education based on classifications of Specific Learning Disability and a Speech/Language Impairment. (N.T. 54; S-26.)

Spring 2018

2. An Individualized Education Program (IEP) was developed for Student in February 2018 when Student was in seventh grade. At that time, Student reportedly was at a sixth grade level in reading comprehension and a fourth to fifth grade level in word recognition. However, Student's specific skills in academic areas were not set forth in any objective manner. (S-1.)
3. Needs identified in the February 2018 IEP were for reading, written expression, and mathematics skills; increasing attention to task and maintaining focus; speech/language skills; and visual-spatial processing. (S-1.)
4. Annual goals in the February 2018 IEP addressed speech/language (articulation) weaknesses; written expression; reading comprehension; and mathematics calculation and problem-solving. (S-1 at 24-30.)
5. Program modifications/items of specially designed instruction in the February 2018 IEP included language modeling and reinforcement, clear directions with repetition, encouragement of self-advocacy skills, comprehension checks, wait time, prompts for focus and attention, and accommodations for tests and assignments including writing tasks. (S-1 at 31-33.)
6. Student's program in the February 2018 IEP was one of supplemental learning and speech/language support, as well as consultative occupational therapy services. Student would participate in regular

education except for reading and mathematics classes in addition to speech/language therapy. (S-1.)

7. The Parents approved the Notice of Recommended Educational Placement (NOREP) for implementation of the February 2018 IEP. (S-2.)
8. The Parents obtained a private evaluation by a psychologist in May 2018 and provided that report to the District. (N.T. 56-57, 59; S-3.)
9. The private psychologist conducted an assessment of cognitive ability (Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V)), and Student attained a Full Scale IQ within the average range. Student did exhibit weaknesses in some areas of the Verbal Comprehension and Visual Spatial Indices, but earned a high average range score on the Working Memory Index. (S-3.)
10. On assessment of academic achievement for the private evaluation, Student earned below average range scores in the areas of basic reading skills, reading fluency, mathematics calculation, and written expression. (S-3.)
11. The private evaluator concluded that Student met diagnostic criteria⁵ for specific learning disorders (reading and written expression) and a language disorder. (S-3.)
12. The Parents contacted the District in late May following receipt of the private evaluation report and asked about interventions to address Student's language needs. Additional communications between the

⁵ The diagnoses were not made based on IDEA classifications.

parties and a private provider of Orton-Gillingham-based services followed. (S-4; S-5; S-6; S-7; S-8; S-9; S-11.)

Summer 2018

13. In late June 2018, following the private evaluation, Student was determined to be eligible for extended school year (ESY) services that summer. Student was to be provided individual, intensive intervention for reading deficits for forty hours in a private program, as well as speech/language therapy. (S-15 at 42-43.)
14. Student attended the private program in the summer 2018 and was provided Orton-Gillingham-based language interventions. That program was at District expense. (N.T. 62-63, 124; S-23.)
15. The Parents first visited a private school (Private School) in early July 2018. (N.T. 66, 130.)
16. In mid-July 2018, the Parents advised the District that they intended to withdraw Student and seek tuition for the Private School. (S-12.)
17. A meeting convened in late July 2018 to discuss the District's proposed program for the fall that included an Orton-Gillingham-based multisensory intervention appropriate for students of all ages. Different aspects of that program addressed reading fluency, decoding, and comprehension. (N.T. 73, 140, 641-42, 652, 663; S-13; S-14; S-15; S-19 at 2.)
18. Student's IEP was revised at the July 2018 meeting to add information about the Orton-Gillingham-based program to address "phonological and orthographic awareness, word attack, word recognition, spelling, contextual reading" and reading comprehension (S-15 at 10-11). The present levels sections, however, were not

otherwise updated except to reference the ESY program. A new annual goal reflected the addition of the intervention. The document as revised contained numerous blank spaces with respect to the new annual goal and the level of the intervention to be provided, with the latter indicating services for 45 to 240 minutes each week to begin with single syllable words. Also added was an item of specially designed instruction for the multi-sensory intervention. (S-15.)

19. The Parents communicated with a representative of the Orton-Gillingham-based program proposed by the District after the meeting to obtain more information. (P-6.)
20. The District did not seek to conduct necessary Orton-Gillingham-based assessments of Student prior to the July 2018 IEP, but on July 31, 2018 proposed early to mid-August as the time for doing so. The Parents asked that the assessments be conducted sooner, but the District could not do so. (N.T. 81; S-16; S-17; S-21.)
21. District professionals were trained in its Orton-Gillingham-based program in August 2018 over multiple days. They also had access to program consultants on an ongoing basis and planned to determine the level of the Orton-Gillingham-based programming following new assessments of Student. (N.T. 198-99, 225, 531, 535, 536, 554-56, 640-44, 683, 685.)
22. The District issued a NOREP in early August 2018 denying the Parents' request for the Private School tuition and expenses. The Parents did not return the NOREP. (S-21.)
23. The District did not ask to conduct the necessary Orton-Gillingham-based assessments after July 31, 2018 and prior to the start of the 2018-19 school year. (N.T. 81.)

2018-19 School Year

24. In early September 2018, the Parents filed a Due Process Complaint against the District. In that Complaint, the sought compensatory education for the prior two school years, reimbursement for the private evaluation, and reimbursement of tuition for the Private School for the 2018-19 school year and other services they obtained. That Complaint was subsequently amended and then withdrawn. (S-25; S-27; S-28.)
25. The District issued a Reevaluation Report (RR) in November 2018 after assessments were conducted. That RR contained detailed summaries of a previous evaluation report for Student. (P-11; S-26.)
26. Assessment of cognitive ability for the November 2018 RR (Comprehensive Test of Nonverbal Intelligence – Second Edition (CTONI-2)) reflected a full scale composite score of 81, near the lower end of the below average range. That score was consistent with a fall 2015 administration of the WISC-V. (S-26 at 4-5, 15-17.)
27. On an administration of the Test of Written Language – Fourth Edition for the November 2018 RR, Student earned scores that were variable across subtests but overall reflected deficits. (S-26 at 17-18.)
28. Assessments using the District’s Orton-Gillingham-based program were also conducted for the November 2018 RR. Student’s scores (at or below the 5th percentile on many measures) reflected deficits in reading fluency, decoding, and comprehension, as well as spelling. (S-26 at 18-19.)
29. Speech/language assessment for the November 2018 RR indicated a continued need for services for articulation weaknesses. (S-26 at 19-20.)

30. Assessment of occupational therapy-related needs for the November 2018 RR yielded below average scores in visual motor integration and visual motor coordination skills, and a need for direct services. (S-26 at 20-21.)
31. The November 2018 RR provided results of the Behavior Assessment System for Children – Third Edition (BASC-3) rating scales completed by one of the Parents and Student. Results indicated no concerns with social/emotional functioning. (S-26 at 13-15.)
32. The conclusion of the November 2018 RR was that Student remained eligible for special education on the bases of Specific Learning Disability (in the areas of reading and written expression) and a Speech/Language Impairment. (S-26 at 22.)
33. The Parents filed a second Due Process Complaint against the District in January 2019. That Complaint demanded compensatory education for a number of school years and reimbursement for services they obtained. They did not seek reimbursement for private school tuition. The parties resolved that dispute and executed a written settlement agreement. (S-29; S-31.)

Summer 2019

34. On August 12, 2019, the Parents sent a letter to the District advising of their intention to retain Student's enrollment in the Private School, and that they sought reimbursement for Private School tuition for the 2019-20 school year and related expenses. (S-32.)
35. The District asked for and convened a meeting with the Parents in late August 2019 following receipt of their letter. The parties generally discussed District programming, but no new IEP was developed and the Parents did not indicate any interest in Student returning to the

District in the fall of 2019, with both the Private School and District scheduled to resume classes within a week's time (a period of time that included a holiday weekend). (N.T. 95-96, 589-90, 592, 608, 700-04, 706-07; P-15; P-16; P-34 at 10; HO-1 at 2.)

36. The Parents did not communicate with the District following the August 2019 meeting until well into the 2019-20 school year. (N.T. 595-96.)

The Private School

37. The Private School is located in a contiguous state and serves children in grades six through twelve with language-based learning disabilities. (N.T. 260-62.)
38. The Private School offers extracurricular activities for its students, most of whom board on campus. (N.T. 261-62, 267-68, 293.)
39. There are approximately four to six students and one teacher in each class at the Private School. Instruction is individualized. Classes are held six days each week, with morning sessions on Saturdays. (N.T. 266-68, 296-97, 360, 366.)
40. Each school day includes a session in the afternoon for tutoring and a two-hour study hall in the evening. Teachers are present to supervise the study halls and provide any help that may be needed. (N.T. 268-70, 361-62, 367.)
41. The Private School provides Orton-Gillingham-based programming that is structured, explicit, and multisensory in addressing language skills. The program's approach focuses on phonics, and is practiced and reinforced throughout the school day. All of its teachers are

trained on that program. (N.T. 262-66, 271-72, 290-91, 353, 355-59, 362, 364, 391-92.)

42. Assistive technology is available for students at the Private School. (N.T. 364-65.)
43. Student has been provided weekly speech/language services at the Private School for the two school years in question. (N.T. 381, 406; P-22.)
44. Student had classes during the 2018-19 school year in English, History, Pre-Algebra, Earth Science, Mathematics, and Language. Student earned final grades in the B to C range with teacher comments identifying areas of strength and weakness. Student made gradual progress on speech/language goals, and Student's effort and participation across classes were overall positive. (P-22 at 1-9; P-23.)
45. Student had classes during the 2019-20 school year in English, Algebra, Language, History/Global Studies, Physical Science, and two electives. Student earned final grades in the A- to C- range with teacher comments identifying areas of strength and weakness. Student made gradual progress on speech/language goals, and Student's effort and participation across classes were overall positive. (P-22 at 10-13; P-24.)
46. At the time of the hearing, Student had exhibited some gains in language skills at the Private School including reading and written expression, but continued to demonstrate deficits as may be expected with Student's learning disability. Student did display some regression as a result of the COVID-19 school closure in the spring of 2020. (N.T. 286-89, 316; P-26.)

DISCUSSION AND APPLICABLE LAW

General Legal Principles

In general, the burden of proof may be viewed as consisting of two elements: the burden of production and the burden of persuasion. 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). Thus, the burden of persuasion in this case must rest with the Parents. Application of this principle, however, determines which party prevails only in those rare cases where the evidence is evenly balanced or in " equipoise." *Schaffer, supra*, 546 U.S. at 58. The outcome is much more frequently determined by the preponderance of the evidence.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found most of the witnesses who testified to be credible as to the facts. The testimony was essentially quite consistent overall and there was no indication of any intent to deceive. One exception to that general statement is that the testimony of the District Superintendent was more persuasive than that of other witnesses with respect to the Parents' lack of expressed interest in returning Student to the District in the fall of 2019, due to the demeanor of all of the witnesses, their knowledge of the circumstances, and the fact that the Superintendent's characterization is wholly consistent with the August 12, 2019 letter from the Parents.

In addition, the witness who previously worked at the Private School (N.T. 416-508) did not conduct any assessments of Student, and his perspective was largely not based on first-hand knowledge; his testimony did not contribute meaningfully to the evidentiary record, was cumulative in many respects, contradicted that of the knowledgeable and persuasive representative of the Orton-Gillingham-based program used by the District (N.T. 635-64) and, at times, went beyond his qualifications. For these reasons, that testimony lacked persuasive value and accordingly was not credited.

The testimony of the remaining witnesses was not otherwise discounted, but the documentary evidence was most helpful in deciding the issues. The findings of fact were made only as necessary to resolve the issues; thus, not all of the testimony and exhibits were explicitly cited. However, in reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered, as were the parties' closing statements.

General IDEA Principles: Substantive FAPE

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Many years ago, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding that the FAPE mandates are met by providing personalized instruction and support services that are designed to permit the child to benefit educationally from the program, and also comply with the procedural obligations in the Act.

The state, through its local educational agencies (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.’ ” *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). Fairly recently, the U.S. Supreme Court again observed that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). “A focus on the particular child is at the core of the IDEA.” *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted).

Individualization is the central consideration for purposes of the IDEA. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, 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). And, a proper assessment of whether a proposed IEP meets the above standards must be based on information “as of the time it was made.” *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family including parents have “a significant role in the IEP process.” *Schaffer, supra*, at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies may warrant a remedy if they resulted in such “significant impediment” to parental participation, or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

General IDEA Principles: Reimbursement for Tuition

Parents who believe that an LEA is not providing or offering FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Such is an available remedy for parents to receive the costs associated with their child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009). 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 under 20 U.S.C. § 1412 (a)(10)(C)(iii)); *see also C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010); *Carter, supra*. A private placement need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

General IDEA Principles: LEA Obligation for Students Not Enrolled

In a case where an eligible child is not currently enrolled in the school district of residence, but the parents ask that school district to develop a special education program for him or her, it is incumbent upon the district to comply. *A. B. v. Abington School District*, 440 F. Supp. 3d 428, 435 (E.D. Pa. 2020); *see also James v. Upper Arlington City School District*, 228 F.3d 764 (6th Cir. 2000)(holding that a school district's obligation toward a child

with a disability arises from his or her residence within the district and not on enrollment); *Moorestown Township Board of Directors v. S.D.*, 811 F.Supp.2d 1057 (D.N.J. 2011)(concluding that a parent's request for an evaluation by a public school prior to enrollment triggers the duty to conduct an evaluation and develop an IEP); *I.H. v. Cumberland Valley School District*, 842 F. Supp.2d 762 (E.D. Pa. 2012)(denying the school district's motion to dismiss claims relating to its obligations to develop an IEP for a resident student no longer enrolled in the district where the parent had requested that it propose a special education program for her to consider for the student); *L.T. v. North. Penn School District*, 2018 U.S. Dist. LEXIS 211781 (E.D. Pa. Dec. 14, 2018)(applying *I.H.* to resident school district when the student was in a residential placement in another district but was expected to be discharged). "Because the IDEA imposes no obligation on school districts to *sua sponte* evaluate and develop IEPs for students unilaterally placed in private schools, 'the first question' a court must answer in determining whether a district violated its FAPE obligations by failing to propose a special education program for such a student is whether the parent made a 'request' pursuant to the IDEA." *A.B., supra*, 440 F. Supp. 3d at 435 (citations omitted). In other words, the trigger is that the "parents either re-enroll their child in public school or request evaluations so they can re-enroll him, [and then the] district must evaluate and develop an IEP for that child for purposes of proposing a FAPE." *I.H., supra*, 842 F.Supp.2d at 772 (quoting *Moorestown*, 811 F.Supp.2d at 1073).

Nevertheless, "it is not the parent's obligation to clearly request an IEP or FAPE; instead, it is the school's obligation to offer a FAPE *unless the parent makes clear his or her intent to keep the student enrolled in the private school.*" *Shane T. v. Carbondale Area School District*, 2017 U.S. Dist. LEXIS 163683 at *41 (M.D. Pa. Sep. 28, 2017)(emphasis added). That Court also explained that, "it is not the secret desire of the parent that matters, but the

objective manifestation of those desires that dictate whether or not the public school must offer a FAPE.” *Id.* at *41; *accord, A.B., supra*, 440 F. Supp. 3d at 437-38.

The Parents’ Claims

The Program Proposed for the 2018-19 School Year

The first issue is whether the District’s July 2018 IEP was reasonably calculated to provide FAPE to Student. Before turning to the merits of this issue, however, it appears to be necessary to observe that grade-level equivalency scores are a type of developmental score that must be interpreted cautiously and carefully, because they can be misleading for many reasons.⁶ For example, grade equivalents tend to exaggerate minor variations in performance; and, grade equivalents vary from instrument to instrument, and even from subtest to subtest, and are therefore quite difficult to compare.⁷ It is unfortunate that the private psychologist did not mention such caution in his report, particularly since other District measures of Student’s reading levels at around the same time were markedly different. Substantively, the District’s proposal in July 2018 did not sufficiently specify the extent of the recommended Orton-Gillingham-based services to be provided to Student, but merely indicated a very broad range that would be determined at a later date. The annual goal that was added similarly failed to provide adequate information from which to gauge whether it addressed specific deficits, or whether it was appropriately ambitious, for Student. These omissions render the July IEP far from individualized, and are therefore fatal. Procedurally, in light of the critical omissions, the Parents also could not be expected to make an informed decision on whether to agree with the proposal or reject it. In sum, the proposed Orton-Gillingham-

⁶ Sattler, J. M., *Assessment of Children: Cognitive Applications* (6th ed. 2018) at 107-08.

⁷ *Id.*

based aspects of the IEP simply did not constitute an offer of FAPE for Student.

The District posits that, had it been given the opportunity to conduct relevant assessments in mid-August 2018, the IEP could have been revised to include missing information. The latest IEP in this record is what must be considered, however. Although the District professionals may have surmised that asking the Parents again to conduct those tests would have been futile prior to the start of the 2018-19 school year, the omissions in the July 2018 IEP are significant, were not rectified, and cannot be ignored.

Programming for the 2019-20 School Year

With respect to the 2019-20 school year, the same conclusion cannot be drawn. In the summer of 2019, the District was aware that Student was not enrolled but was instead attending the Private School. The Parents never expressed any interest in having the District evaluate Student or develop an IEP in 2019. Indeed, their notice in mid-August 2019 explicitly stated their intent to retain Student at the Private School, and the persuasive testimony supported that predetermination on their part.⁸ Thus, there was no objective manifestation that would trigger the District to undertake any action. Absent an obligation on the part of the District to engage in the evaluation and/or IEP process, there cannot be any liability for its failure to do so.

The facts that the District completed a reevaluation in the fall of 2018 and later convened a meeting in late August 2019 do not change this result. As of September 2018, Student was no longer enrolled in the District. It was not until the middle of August 2019, a mere three weeks prior to the start of

⁸ This is not to suggest that the Parents' intentions cannot be understandable, particularly given the parties' less than optimal relationship at that time.

the school year,⁹ that the District had any knowledge that the Parents intended to seek reimbursement for tuition for the 2019-20 school year. Moreover, the very same claim for the 2018-19 school year had been withdrawn months prior. There is simply no basis to consider the claims for the 2019-20 school year further.

Finally, with the limited exception of potential remedy below, there also need be no additional discussion regarding Section 504 because all of the claims have been fully addressed under the IDEA.

Remedies

Having found that the July 2018 IEP did not offer FAPE, the appropriateness of the Private School must be assessed. Here, that prong has been met by the Parents for the 2018-19 school year.

Student has been identified as having specific learning disabilities in reading and written expression, in addition to a speech/language impairment. The Private School has provided language-based programming to address such deficits as well as speech/language therapy. Student has had individualized instruction in small classes for all content areas, assistive technology, specific blocks of time for studying and obtaining any needed assistance, and opportunities for extracurricular activities. Student has shown gains in areas of deficit since enrollment in the Private School but, unfortunately, progress was interrupted by the COVID-19 pandemic and resulting closures of schools across the nation, and caused some understandable regression.¹⁰ All of

⁹ Even assuming *arguendo* that such an obligation could be imputed to the District, the timing of the Parents' notice did not provide the District with an opportunity to develop and offer a program for Student, and would favor denial of reimbursement for the 2019-20 school year based on equitable considerations discussed *infra*.

¹⁰ Regression due to the pandemic is to be expected and has prompted educational agencies such as the Pennsylvania Department of Education to issue guidance to LEAs to determine how to address loss of skills. See, e.g., <https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx> (last visited November 8, 2020). Thus, the mere fact that Student exhibited some regression in skills is not reflective of the Private School program itself.

these factors lead to the conclusion that the Private School was reasonably calculated to provide educational benefit for Student.

The final step in a tuition reimbursement analysis is to consider whether the equities warrant a reduction or denial of the remedy. The timing of the Parents' notice of their intention to enroll Student in the Private School was relatively near in time to the private evaluation, allowing time for them to explore options and visit the institution with Student. The District likewise cannot be faulted for arranging for its teachers to be trained in its Orton-Gillingham-based program well before the start of the fall 2018 semester.

The District points out that this decision follows a third Complaint against it by the Parents over a two year time period. But either party has the opportunity under the IDEA to file such a complaint with respect to a child's special education program. *See generally* 20 U.S.C. §§ 1415(b) – (d); 34 C.F.R. § 300.507. It would be wholly untenable in this case to find that a party availing itself of this permitted process should be penalized on equitable grounds for doing so.

On balance, this hearing officer cannot conclude that equitable considerations operate to favor one party over the other. Accordingly, there will be no reduction for reimbursement for tuition and related expenses for the Private School for the 2018-19 school year.

A final issue raised by the Parents is a request for reimbursement for the fees incurred by them for their expert witness to testify at the hearing. However, the basis for this requested remedy is Section 504, which provides in relevant part that, "*the court*, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k)(emphasis added). Similar language in the IDEA has been construed as not applying to administrative hearing officers. *B. ex rel. M.B. v. East Granby Board of Education*, 201 Fed. Appx. 834, 837,

2006 U.S. App. LEXIS 27014, *6 (2d Cir. 2006)(concluding that an attorney fee award “is a district court function” under 20 U.S.C. § 1415(i)(3)(B), which provides district courts with discretion to “award reasonable attorneys’ fees as part of the costs to the parents of a child with a disability who is the prevailing party”). Moreover, this witness’ testimony as discussed *supra* was not accorded evidentiary value. For these reasons, this hearing officer declines to order that remedy.

CONCLUSIONS OF LAW

1. The District’s proposed program in July 2018 was not appropriate under IDEA standards.
2. The District did not have an obligation to propose a new IEP following Student’s enrollment in the Private School.
3. The Parents are entitled to reimbursement for tuition and related expenses for the 2018-19 school year.
4. The Parents are not entitled to reimbursement for tuition and related expenses for the 2019-20 school year.
5. Student’s Section 504 claims have been fully encompassed and addressed by the IDEA claims.
6. The Parents may not be awarded reimbursement for fees for their expert witness.

ORDER

AND NOW, this 9th day of November, 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The program proposed by the District for Student for the 2018-19 school year was not substantively or procedurally appropriate under the applicable law.
2. The District did not have an obligation to develop and offer a program for Student for the 2019-20 school year under the applicable law.
3. The Parents are entitled to reimbursement for actual tuition and related expenses, exclusive of room, board, and travel, that they incurred for the Private School for the 2018-19 school year.
4. Within fifteen calendar days of the date of this decision, the Parents shall provide documentation to the District of all current invoices and receipts for tuition and related expenses for Student for the 2018-19 school year.
5. Within thirty calendar days of the date of receipt of such documentation, the District shall reimburse the Parents for the full amount of invoices and receipts provided pursuant to ¶¶ 3 and 4 herein.
6. No other remedy is due.
7. Nothing in this decision and order should be read to preclude the parties from mutually agreeing to alter any of its terms.

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

/s/ Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
ODR File No. 23652-19-20