

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 Numbers:

23334-19-20

23394-19-20

Child's Name:

A.O.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

Cathy A. Skidmore, Esquire

Date of Decision:

June 28, 2020

INTRODUCTION AND PROCEDURAL HISTORY

The student, A.O. (Student),¹ is an early-teenaged student residing in the Norristown Area School District (District) who has attended a private school (Private School) since kindergarten. In the spring of 2018, Student was determined by the District to be eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² based on Autism, and it thereafter developed and proposed educational programs at the request of the Parents. Student's Parents rejected both of those programs, and ultimately filed a Due Process Complaint against the District asserting that its proposals for the 2018-19 and 2019-20 school years did not amount to a free, appropriate public education (FAPE) under the IDEA. The Parents sought, among other things, reimbursement for the cost of a privately-obtained evaluation. The District, in turn, filed its own Complaint seeking to defend its evaluation completed in 2018.

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).

The case proceeded to a multi-session hearing³ convening virtually due to the COVID-19 pandemic and resulting closures.⁴ The Parents sought to establish that the District's proposed programs were not appropriate for Student, and that they were entitled to reimbursement and related expenses for the private school for the two school years in question as well as for the private evaluation. The District maintained that its evaluation of Student and resulting special education programs, as offered, were appropriate for Student, and that no remedy was therefore due.

For the reasons set forth below, the claims of the Parents must be granted in part and denied in part, and the claim of the District on its Complaint must be granted.

ISSUES

1. Whether the District's proposed programs for Student for the 2018-19 and 2019-20 school years were appropriate for Student;
2. If the proposed program for either or both school years was not appropriate, whether the private school is appropriate for Student;

³ 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 Hearing Officer Exhibits (HO-) followed by the exhibit number. Exhibits were admitted after the hearing as set forth in HO-2. Citations to duplicative exhibits may not be to all. References to the Parents in the plural will be made where it appears that one was acting on behalf of both, and in the singular to refer to Student's mother who was more actively involved with the District during the time period in question.

⁴ A continuance was granted to provide the parties with the opportunity to be more fully prepared to proceeding remotely, and both parties fully cooperated. (HO-1; N.T. 4, 638.)

3. If the proposed program for either or both school years was not appropriate, whether the equities favor reimbursement for tuition and related expenses;
4. Whether the District's June 2018 evaluation was appropriate for Student; and
5. If the June 2018 evaluation was not appropriate for Student, whether the Parents should be reimbursed for their privately-obtained evaluation?

FINDINGS OF FACT

1. Student is an early teenaged student who resides in the District. Student has been determined to be eligible for special education on the basis of Autism. (S-2; S-15.)
2. Student was diagnosed with a brain tumor in 2010 at the age of [redacted] and underwent surgery and chemotherapy treatment. Student has since undergone regular tests and additional chemotherapy due to changes in the portion of the tumor that was not removed. (N.T. 490-93, 503; P-1.)
3. The history with the brain tumor has impacted Student's cognitive profile and ability to regulate behavior and emotions. (N.T. 61, 65-67, 121; P-1.)

Early Educational History

4. Student attended preschool then transitioned to a private school (Private School) where Student has attended since kindergarten. (N.T. 151, 494-95, 498, 504, 526, 540; S-33.)

5. Student has a history of an Autism diagnosis and a language impairment, and qualified for early intervention services during preschool provided by the local Intermediate Unit. (P-1; S-26 at 59-86.)
6. The District first evaluated Student at the Parents' request in December 2012, and Student was determined to be eligible for special education on the bases of an Other Health Impairment and a Speech/Language Impairment. The Parents did not approve the Notice of Recommended Educational Placement (NOREP) that followed a proposed Individualized Education Program (IEP). (N.T. 499-500, 502-03; P-3; P-5.)
7. Student requires individualized attention in order to complete tasks in addition to small group academic instruction. In those small groups, and even with individualized attention in close proximity, Student exhibits difficulty remaining focused and on task, particularly with non-preferred or challenging demands. (N.T. 78-79, 83, 153-54, 303-07; S-2 S-11 at 7-8, 15; S-30; S-35.)
8. Student has difficulty adjusting to changes in routine and making transitions to new or varied environments, as well as navigating locations. Student would require a structured, gradual transition plan to transfer to a public school. (N.T. 86-87, 502-04, 510, 514, 522-23; P-5 at 29; S-5 at 39, 60; S-13 at 32.)

Preparation for 2018-19 School Year

9. In the spring of 2018, with Student soon to be preparing for middle school in the fall, the Parents asked the District to again evaluate Student. The District responded with a request for consent that the Parents provided in mid-March. (N.T. 511-12; S-1; S-38 at 9-11.)

10. The Parents provided notice of their intention to maintain Student at the Private School for the 2018-19 school year and sought reimbursement for tuition and related expenses in May 2018, more than sixty days after the consent to evaluate was signed. (S-3.)
11. The Parents signed an enrollment contract with the Private School for the 2018-19 school year in early June 2018. They received financial assistance. (S-40; S-50.)
12. The District conducted an evaluation of Student in the spring of 2018 and issued a final Evaluation Report (ER) in June of that year. (N.T. 296-97; S-2.)
13. Parent input into the June 2018 ER was limited to completion of rating scales and a form for the speech/language pathologist. There was significant input from teachers and a speech/language pathologist at the Private School, including progress monitoring in reading, mathematics, and written expression; Student was also observed in the classroom. (N.T. 307; S-2 at 1-2, 13-17.)
14. Assessment of aptitude (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) for the June 2018 ER yielded a Full Scale IQ score of 77 (very low range) with some variability among composites and subtests. Composite scores ranged from the extremely low range (Working Memory Index) to the Average range (Visual Spatial Index), with low average range scores on the Visual Comprehension, Fluid Reasoning, and Processing Speed Indices. (S-2 at 6-7.)

15. Scores on an assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) for the June 2018 ER were also variable, with scores in the low range on the Oral Language and Mathematics Composites and in the average range on the Basic Reading Composite. These results were commensurate with the WISC-V scores. (S-2 at 7.)
16. On the rating scales for the Behavior Assessment System for Children – Third Edition (BASC-3) by the Private School special education teacher for the June 2018 RR, scores were reported in the at-risk range in the areas of learning problems, withdrawal, adaptability, social skills, leadership, and on the Adaptive Skills Composite. By contrast, the Parents’ scales reflected scores in the clinically significant range in the areas of social skills, functional communication, and on the Adaptive Skills Composite, with at-risk range scores in the areas of attention problems, withdrawal, adaptability, and leadership. (S-2 at 7-8.)
17. Both the special education teacher and Parent completed rating scales on executive functioning skills for the June 2018 ER, with results noting concerns with many areas assessed by that instrument: inhibit, shift, emotional control, working memory (teacher); self-monitor, shift, initiate, working memory, and plan/organize (Parent). (S-2 at 8-9.)
18. The Autism Spectrum Rating Scales (ASRS) completed by the Parent and teacher for the June 2018 ER both supported a conclusion that Autism was an appropriate category of eligibility, with each rater indicating concerns with socialization, social/emotional reciprocity, and atypical language. (S-2 at 9-10.)

19. In the speech/language evaluation for the June 2018 ER, Student presented with deficits, and attained below average range scores, in a number of areas assessed, including receptive and expressive language as well as pragmatic language. The assessment instruments were valid and reliable. (N.T. 934-35; S-2 at 13-16.)
20. Occupational therapy assessment for the June 2018 ER yielded identified needs with fine motor, visual motor, organizational, and self-advocacy skills, in addition to accessibility to a keyboard, attention, and self-regulation. (S-2 at 10-13.)
21. The cognitive, achievement, and visual motor integration assessments for the June 2018 ER were technically sound, reliable, and used for valid purposes. The school psychologist who administered them has been trained in administering those assessments and did so in accordance with the publishers' instructions. (N.T. 309, 334-35.)
22. The June 2018 ER reached the conclusion that Student was eligible for special education on the basis of Autism. A number of recommendations were provided to address social skills, adaptive skills, executive functioning, and working memory, in addition to reading, written expression, and mathematics. (S-2 at 16-20.)
23. An Individualized Education Program (IEP) meeting convened in June 2018. (N.T. 568; S-4; S-5.)
24. Parent input into the June 2018 IEP reflected questions about Student's schedule, instruction in coping and social skills, inclusion in general education, instructional approaches, and administration of a Qualitative Reading Inventory. (S-5 at 18.)

25. Needs identified in the June 2018 IEP were for reading comprehension, mathematics problem solving and computation, written expression, social skills, self-advocacy/coping skills, and occupational and speech/language therapy. (S-5 at 19.)
26. Annual goals in the June 2018 IEP were directed toward reading comprehension at a third grade level with identified accuracy from a baseline; written expression in paragraphs at a score identified by a rubric from a baseline; mathematics problem solving with identified accuracy on probes from a baseline; mathematics computation with identified accuracy on probes (no baseline); pragmatic language (increased comprehension and use of words and word relationships with identified accuracy (no baseline)); improvement in reciprocal discussions with increased word retrieval skills with identified accuracy (no baseline)); social skills (improved reciprocal conversational skills with identified accuracy on a checklist (no baseline)); use of self-advocacy/coping skill strategies with identified accuracy (no baseline); occupational therapy skills (improved organizational skills with identified accuracy; improved keyboarding skills to an identified level; improved fine motor and visual motor skills through copying with specified accuracy (no baselines)). (S-5 at 25-36.)
27. Program modifications and items of specially designed instruction (SDI) in the June 2018 IEP addressed direct instruction in reading comprehension; direct instruction in written expression; direct instruction in mathematics problem solving; writing supports and strategies; multisensory presentation; strategies for organizing materials with direct instruction in organizational skills and tools; direct instruction in social/emotional skills; strategies for working memory deficits; graphic organizers; options for coping strategies; test and assignment accommodations (chunking of tasks, word banks,

access to a calculator); positive reinforcement and a structured schedule with varied instructional tasks throughout the day; copies of or guided notes; a morning and afternoon check-in; a visual schedule; frequent check-ins and teacher monitoring during instruction and independent work; reminders and prompts; speech/language strategies and supports; occupational therapy strategies and supports; a peer buddy during transitions and lunch; procedures for obtaining baselines at the start of the school year; a preference assessment and a functional behavior assessment at the start of the school year; an IEP meeting approximately one month after the start of school to make any necessary revisions; and a tour of the middle school building prior to the start of the school year. (S-5 at 37-44.)

28. The June 2018 IEP included a Positive Behavior Support Plan (PBSP) targeting Student's tendency to shut down when presented with tasks that were challenging or non-preferred. The PBSP incorporated the social skills and self-advocacy/coping skills goals. Antecedent strategies included a number of the items of SDI, with positive reinforcement as well as procedures when the problem behavior occurred. (S-5 at 52-61.)
29. The June 2018 IEP provided for group occupational and speech/language therapy one time per week in addition to transportation. Student would not participate in regular education for homeroom, reading, mathematics, social skills instruction, speech/language therapy, and occupational therapy. Student's program was for learning support at a supplemental level. (S-5 at 44-45, 47-48.)

30. At the June 2018 IEP meeting, the team discussed supports provided to all [redacted] grade students, including an orientation, adults present for transitions in the building, the size of the classes and the cafeteria. The members also discussed Student's proposed schedule and what classes would be outside of the regular education classroom. (N.T. 570-73, 575-76.)
31. Student would have been in the special education classroom for reading/language arts and mathematics in the 2018-19 school year, with approximately eight students. (N.T. 572, 579-82.)
32. Student would have been in co-taught science and social studies classes with both a regular and special education teacher for the 2018-19 school year and approximately twenty five or thirty students. (N.T. 576-77.)
33. Student would have been in regular education for special classes (two each day), as well as lunch with at least 200 students. (N.T. 599, 608.)
34. The District middle school building that Student would attend has two floors, with each grade level having one or sometimes two hallways for the majority of the classrooms. Special classes, the cafeteria, and the gymnasium are not in the same hallways. Adults are in the hallways with the students during transitions. (N.T. 256, 276, 558, 573-74.)
35. There are approximately 225 students in each grade at the middle school building Student would have attended. (N.T. 597, 599.)
36. A peer buddy at the middle school is chosen by the team based on his or her reliability, knowledge of the school building, and ability to accept the expectations of mentoring and assisting the peer needing that support. (NT. 277-78.)

37. Any District student who will be transitioning to middle school (grades five through eight) has the opportunity at the end of the prior school year to tour the building he or she will attend and meet the teachers. Other arrangements can be made for an individual child as may be necessary. (N.T. 279-80, 290.)
38. In July 2018, the Parents requested an Independent Educational Evaluation (IEE) at public expense. The District denied that request. (N.T. 516; S-8; S-9.)
39. The District did not file a Complaint to defend its evaluation at the time of the IEE request because the parties were engaged in discussions to explore potential resolution. (N.T. 284.)

Private Evaluation

40. Student was privately evaluated by a team of neuropsychologists who issued a report of that evaluation in January 2019. (N.T. 38, 48-49, 517; S-11.)
41. A neuropsychological report (IEE)⁵ was completed that included an observation of Student at the Private School and the results of a number of assessments. (S-11.)
42. The private evaluator adopted the results of the District's WISC-V and also re-administered two subtests yielding very low scores (Matrix Reasoning and Digit Span). (S-11 at 9, 19, 25.)

⁵ Though not styled as or necessarily strictly an Independent Educational Evaluation (IEE) as that term is typically used in special education, this report will be referred to as an IEE for simplicity given its common and familiar meaning.

43. The private evaluator accepted the results of the District's WIAT-III administration and supplemented those with a few additional subtests. The results were consistent with those by the District. (S-11 at 12, 21, 25.)
44. Assessment of Student's memory for the IEE (select subtests on the Wide Range Assessment of Memory and Learning - Second Edition) reflected significant deficits in those areas. (S-11 at 10-11, 19.)
45. On assessments of executive functioning for the IEE (Delis-Kaplan Executive Function System, NEPSY-2), Student attained scores reflecting significant deficits in many areas. (S-11 at 12, 19-20.)
46. Social, behavioral, and emotional functioning instruments (BASC-3, ASRS, Children's Depression Inventory, and Adaptive Behavior Assessment System Parent Form) reflected mild concerns of the raters with social skills and language, with the need for prompting notable. (S-19 at 12-13, 22-24.)
47. Rating were completed by both Parents and two teachers for the IEE to assess attention/self-regulation (Conners 3rd Edition) yielded results that were disparate between home and school with the exception of learning problems that were identified by raters in both environments. (S-11 at 11.)
48. The IEE identified needs in occupational therapy and speech/language similar to those by the District. (S-11.)
49. The private evaluator made a number of recommendations in the IEE including a school placement in a specialized setting with structure and explicit instruction, particularly in light of Student's memory and language weaknesses, in addition to coping skills. (S-11 at 15-18.)
50. A meeting of the Parents and District convened to discuss the IEE. (N.T. 274, 519, 613-14, 627; S-12; S-38 at 15.)

51. The Parents provided notice of their intention to maintain Student at the Private School for the 2019-20 school year in June 2019 and sought reimbursement for tuition and related expenses. (S-3.)
52. A meeting convened with the Parents in July 2019 to discuss the IEE. (N.T. 274, 613, 627.)
53. The Parents signed an enrollment contract with the Private School for the 2019-20 school year in mid-July 2019. They received financial assistance. (S-41; S-51.)

Preparation for 2019-20 School Year

54. The District conducted additional assessments of Student in the summer of 2019, including the Kaufman Test of Educational Achievement – Third Edition and probes for baselines. (N.T. 519-20, 614-19; S-13 at 6; S-38 at 18.)
55. An IEP meeting convened in late September 2019 to discuss the program proposed for the 2019-20 school year. The District offered a date earlier in the month that did not accommodate all schedules. (N.T. 521, 553-55, 619; P-14; S-13.)
56. Parent input into the September 2019 IEP reflected concerns that Student would not be successful outside of small classes and without an available paraprofessional. The team discussed the Parents' concerns and the availability of adults to assist Student during transitions. The meeting was brief, however, since the Parents did not wish to review the document in detail at the meeting. (N.T. 554-55; S-13 at 14.)

57. Needs identified in the September 2019 IEP were for reading comprehension, mathematics problem solving and computation, written expression, social skills, self-advocacy/coping skills, and occupational and speech/language therapy. (S-13 at 14.)
58. Annual goals in the September 2019 IEP addressed reading comprehension at a fourth grade level with identified accuracy with baseline information; written expression in writing paragraphs at a score identified by a rubric from a baseline; mathematics concepts and applications with identified accuracy on probes (no baseline); mathematics computation at a fourth grade level with identified accuracy on probes from a baseline; speech/language (listening comprehension with identified accuracy from a baseline; social skills (improved discussion skills with eye contact with identified accuracy on a checklist (no baseline); improvement in reciprocal discussions with increased word retrieval skills with identified accuracy from a baseline); use of self-advocacy/coping skill strategies with identified accuracy (no baseline); occupational therapy skills (improved organizational skills with identified accuracy; improved keyboarding skills to an identified level; improved fine motor and visual motor skills through copying on a rubric with specified accuracy (no baselines)). (S-13 at 18-30.)
59. Program modifications and SDI in the September 2019 IEP, with minor limited exceptions, mirrored those in the June 2018 IEP. (S-13 at 31-34.)

60. The September 2019 IEP provided for group occupational and speech/language therapy one time per week in addition to transportation. Student would participate in regular education with the exception of reading, writing, mathematics, as well as speech/language therapy and occupational therapy. Student's program was for learning support at a supplemental level. (S-13.)
61. Student would have had mathematics and English/language arts classes in a special education classroom with approximately ten students in the 2019-20 school year. (N.T. 555.)
62. Student would have had science and social studies classes in classrooms with a regular teacher and either a special education teacher or a paraprofessional. The class size would have been large during the 2019-20 school year. (N.T. 555-56.)
63. The Parents did not provide the District with any new medical records for Student for purposes of evaluating Student and proposing programs during the time period at issue. (N.T. 273, 541.)

Preparation for 2020-21 School Year

64. The District developed a proposed IEP for the 2020-21 school year and convened a virtual IEP meeting in April 2020. The Parents did not approve the accompanying NOREP for that IEP. (N.T. 594; S-15; S-16.)
65. The Parents do not intend to withdraw Student from the Private School for the 2020-21 school year. (N.T. 540.)
66. The Parents did not approve the NOREP accompanying any District IEP. (N.T. 529-31.)

The Private School

67. The Private School⁶ currently serves students from kindergarten through ninth grade, with plans to expand to later school years. Approximately 75 students attended during the 2019-20 school year. (N.T. 144.)
68. In addition to regular education teachers, the Private School employs a special education teacher, a Board Certified Behavior Analyst, a behavior specialist, occupational and speech/language therapists, a school counselor, and social workers. (N.T. 144-45, 149.)
69. The Private School is in a small building with ten classrooms in close proximity along the same main hallway. There are common areas at each end of the hallway. (N.T. 156.)
70. Class sizes at the Private School range from eight to ten students with two teachers. Most academic instruction is provided in smaller groups rather than the class as a whole, permitting individualized support. All instruction is individualized. (N.T. 157, 166, 174.)
71. Student is provided instruction for language arts including reading, mathematics, social studies, and science in addition to social skills instruction. (N.T. 159-62.)
72. Student has group occupational therapy and group speech/language therapy at the Private School. (N.T. 162-63, 183-84.)
73. The behavior specialist provides consultation with Student's teachers and works with Student as needed at the Private School. (N.T. 178-79.)

⁶ The bulk of documentary evidence from the Private School were produced during the course of these proceedings pursuant to a subpoena.

74. All students at the Private School are provided instruction in social and coping skills. Staff assist all students in developing executive functioning skills. (N.T. 148-49, 171-72, 178.)
75. Classes at the Private School provide consistent expectations of students. (N.T. 150-51, 166, 170.)
76. The Private School staff consider that a student is making progress if he or she is not staying at the same level. Staff do not conduct progress monitoring such as that required by public schools but rather rely on curriculum-based measurements and observations. (N.T. 197, 200, 202-03, 220.)
77. Student has exhibited progress in academic skills, executive functioning skills, and success in school at the Private School over the 2018-19 and 2019-20 school years. (S-30; S-35.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. Before reviewing the claims, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case must rest with the Parents on their Complaint, and on the District in its Complaint. Nevertheless, application of this principle 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.

Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the

witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible in that they all testified to the facts to the best of their recollection; minor discrepancies in the testimony were not material to the issues to be determined and, in any event, were not deemed to be intentionally deceptive. The weight accorded the testimony, however, is not the same as its credibility. Some evidence, including testimony, was more persuasive and reliable with respect to the issues to be decided, discussed as necessary below.

In reviewing the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered in issuing this decision, as were the parties' comprehensive and well written 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 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. In other words, the crucial and primary focus of a child's IEP is to respond appropriately to the identified educational needs. 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). Rather, the law demands services are reasonable and appropriate in light of a child's unique circumstances, and not necessarily those that his or her "loving parents" might desire. *Endrew F.*, *supra*; *Ridley*, *supra*; see also *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). A proper assessment of whether a proposed IEP meets the above standard must be based on information "as of the time it was made." *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); see also *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same).

Substantive FAPE: Least Restrictive Environment

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

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.S. § 1412(a)(5)(A); see *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993).

In *Oberti*, the Third Circuit adopted a two-part test for determining whether a student has been placed into the LRE as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. *Id.*

In order to ensure compliance with LRE obligations, LEAs must have available a “continuum of alternative placements” to meet the service needs of children with disabilities. 34 C.F.R. § 300.115(a); see also 22 Pa. Code § 14.145. And, the “continuum” of placements in the law enumerates

settings that grow progressively more restrictive, beginning with regular education classes, moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115; see also 22 Pa. Code § 171.16(c)(specifying an order of priority for educational placements from the regular classroom in a public school when a private school is recommended).

Substantive FAPE: IDEA Evaluation Requirements

Substantively, an IEP follows and is based on an evaluation. The IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

Certain procedural requirements are set forth in the IDEA and its implementing regulations that are designed to ensure that all of the child’s individual needs are examined.

Conduct of evaluation. In conducting the evaluation, the local educational agency shall—

(A) 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—

- (i) whether the child is a child with a disability; and
- (ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) 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

(C) 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); *see also* 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3). Any evaluation or reevaluation must also include a review of existing data including that provided by the parents in addition to classroom-based, local, and state assessments and observations. 34 C.F.R. § 300.305(a). Reports of evaluations and reevaluations must be provided within sixty calendar days of consent (excluding summers) that must be sought promptly. 22 Pa. Code §§ 14.123(b), 14.124(b).

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).

Full participation in the IEP process does not mean, however, that LEAs must defer to parents’ wishes. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999)(noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives,” and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D. Md. 2002)(explaining that “parents who seek public funding for their child's special education possess no automatic veto over” an LEA’s decision). If the parties are not able to reach a consensus, it is the LEA that must make a determination, with parents afforded procedural safeguards if they do not agree. *Letter to Richards*, 55 IDELR 107 (OSEP 2010); *see also* 64 Fed. Reg. 12406, 12597 (1999)(same). Nevertheless, LEAs are required to ensure that eligible students have an IEP at the start of the school year, and the failure to do so may constitute a significant impediment to participation by the parents amounting to a denial of FAPE. 20 U.S.C. § 1414(d)(2)(A); *School District of Philadelphia v. Kirsch*, 722 Fed. App’x 215, 222-23 (3d Cir. 2018).

General IDEA Principles: Parental Placements

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)); *C.H. v. Cape Henlopen School District*, 606 F.3d 59 (3d Cir. 2010).; *Carter, supra*. A private placement also 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.*

The District's Claim

The District's Complaint seeks to establish that its evaluation of Student in the spring of 2018 met all requirements of the IDEA, and that the Parents are not entitled to an IEE at public expense or to reimbursement for the IEE they obtained.

When parents disagree with an LEA's educational evaluation, they may request an IEE at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b). Here, the Parents obtained the private evaluation on their own and now seek reimbursement. The evaluation standards above, however, still govern the issue in this context.

The District's final June 2018 ER was not provided within sixty calendar days, so there is a procedural flaw. Nevertheless, there can be no question that the ER required all assessments that were contemplated prior to finalization of that evaluation. Moreover, the delay was not significant and will be briefly addressed below.

The District's final June 2018 ER utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student, all relating to areas of suspected disability. Specifically, the District conducted assessment of Student's current cognitive ability and academic achievement; summarized available classroom- and curriculum-based assessment data; obtained and reported input from teachers; incorporated results of available information from previous evaluations; included the parental input provided; and provided a variety of rating scales to evaluate Student's social/emotional/behavioral functioning. The rating scales included assessment of autism-related characteristics and executive functioning. The District school psychologist responsible for administering the cognitive ability, academic achievement, and related assessments is qualified, trained, and experienced in administering the assessments selected. The District school psychologist conducted a classroom observation of Student that, in addition to the testing observations, provided concrete information about Student when presented with task demands.

With respect to related services, speech/language and occupational therapy needs were also assessed by qualified District professionals. Those assessments together with observations by this providers considered both formal and informal testing.

The District's June 2018 RR summarized and reviewed all data and available information that was gathered, and determined Student's eligibility for special education with a number of programming recommendations to address Student's identified needs. All of this evidence overwhelmingly supports the conclusion that the District's June 2018 RR was sufficiently comprehensive to identify Student's special education and related service needs in all areas related to suspected disability for purposes of informing the IEP team, and unquestionably met IDEA criteria.

It is true that the IEE provided additional information about and perspectives on Student's needs for purposes of educational programming. That the District could have conducted additional assessments or broadened its recommendations is not a basis for awarding an IEE at public expense. Here, while the Parents were free to and did obtain an IEE at their own expense, on this record they are not entitled to one at District expense.

The Parents' Claims

The Parents seek reimbursement for tuition and related expenses for the Private School, which requires analysis of the above three-part inquiry.

The first prong is whether the program proposed was appropriate for Student based on information known at the time it was made. Before turning to the merits, it bears mention that the District professionals involved are clearly qualified and competent to develop and implement the IEPs in question in compliance with all standards and practices. There can also be no contention that the District did not recognize its LRE obligations and attempt to comply with them.

Despite this confidence, however, this step requires a focus on whether the proposed programs are reasonably calculated to provide Student with meaningful educational benefit given Student's unique circumstances. Again, individualization is the core consideration.

Student presents with a history of very structured and individualized support in small group settings, but even then Student struggles with focusing on challenging demands. Student also has had ongoing difficulty managing transitions across environments, and requires consistent routines. The testimony of the Parent and their expert was quite persuasive on these needs that were known to the District, and the record is replete with evidence that Student continued to have these needs when the IEPs in question were developed.

For the 2018-19 school year, the proposed IEP addressed all of the needs identified by the June 2018 ER through annual goals, related services, and a comprehensive list of SDI. Some of the goals lacked present level information or baselines that would permit a reader, including a parent, to understand how the program would meaningfully target Student's specific abilities. Even overlooking that flaw, however, this hearing officer cannot conclude that the program proposed offered sufficient individualized support to meet Student's unique circumstance, particularly in light of the evidence that even one-on-one attention has at times been insufficient to permit Student to engage in tasks before Student shut down. The larger co-taught classrooms in particular would present major challenges to Student's success, and lacked adequate individualized and continual support. Moreover, even with a one-time summer tour and an assigned peer buddy, there was no real plan to assist Student in making a smooth and gradual transition from the small Private School to the very different large middle school environment. *See Drinker by Drinker v. Colonial School District*, 78 F.3d 859, 866 (3d Cir. 1996)(rejecting contention that placement and

transition to that placement are discrete concepts, and observing that, “[t]ransition periods and timing of placement are integral elements of any educational program.”) In addition, for transitions throughout the school day, the presence of adults in the vicinity where numerous students were present was at best overly optimistic that Student could navigate between classrooms and hallways or in the cafeteria. The provisions in the IEP that attempted to target these areas are not *per se* inappropriate and, in fact, would likely be beneficial outside of the middle school setting. In this particular case, however, the continuum of placements required consideration beyond the public school building to a setting where Student could reasonably be expected to be successful. Here, the record establishes preponderantly that Student could not, with supplementary aids and services, be educated successfully within the regular classroom, but rather continued to require specialized placement wholly outside of that environment. Based on the record as a whole, then, this hearing officer concludes that the June 2018 IEP did not meet the standard of an appropriate program for Student.

The program proposed for the 2019-20 school year was similarly deficient in essentially the same ways with Student’s needs remaining virtually unchanged. Even setting aside the timing of the September 2019 IEP meeting, which unfortunately occurred after the school year started, the program itself was largely similar to that for the prior school year. Thus, for all of the same reasons, that program was similarly not appropriate for Student based on information known. Moreover, the District’s failure to issue an invitation and convene the IEP meeting until after the school year started is also fatal here.

Finally on this first prong, the District presented an argument that the appropriateness of 2020-21 proposed program should be considered for purposes of a remedy. This hearing officer declines to do so for two reasons.

First, with limited exception, a due process hearing may address only issues raised in a Complaint. See 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d). The 2020-21 IEP was not raised in either party's Complaint, and the Parents objected to including it as an issue. Second, the Third Circuit has considered the requirement for LEAs to maintain private placements following a decision at the administrative level, and has expressly concluded that a hearing officer's decision amounts to an agreement on pendent placement that survives appeals. *M.R. v. Ridley School District*, 744 F.3d 112, 128 (3d Cir. 2014). Accordingly, there has been no determination in this decision on whether the proposed 2020 IEP is appropriate for Student.

The next prong of the tuition reimbursement analysis is whether the Private School is appropriate for Student. As noted, the Private School need not satisfy the obligations that an LEA has. Here, the Private School provides individualized instruction and supports in small class sizes, a small navigable environment, instruction in core academics, related services, and instruction geared toward Student's unique needs. Student has demonstrated progress at the Private School that, based on Student's unique presentation, this hearing officer considers to be meaningful. For these reasons, the Parents have established this step of the test.

The last prong is equitable considerations. Despite the timing of the 2018 ER and the September 2019 IEP meeting, the Parents demonstrated an openness to considering the District's proposals. Even with concerns about whether a public school setting could meet Student's needs, they did not exhibit an unwillingness to meaningfully consider the IEPs at issue. They also provided notice of their intention to seek tuition reimbursement for both school years, the first of which occurred after the ER was due for completion and prior to each of the respective IEP meetings. Nevertheless, the fact that they did not provide the District with any new medical records during the time periods in question is quite troubling, particularly since Student's

medical history impacts Student's cognitive and emotional functioning. For these reasons, an equitable reduction of the cost of tuition and related expenses shall be imposed in the amount of 10%.

The District also contends that the Parents' receipt of financial assistance should be considered in any award. The attached order accounts for such benefits to the extent that they remain available following this decision.

CONCLUSION

The District's evaluation of Student in June 2018 met the requirements in the IDEA. The District's proposed programs for the 2018-19 and 2019-20 school year were not appropriate for Student's unique needs under the applicable standards. The Parents are entitled to reimbursement for tuition and related expenses at the Private School for the 2018-19 and 2019-20 school years.

ORDER

AND NOW, this 28th day of June, 2020, in accordance with the foregoing findings of fact, and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's June 2018 evaluation met the standards for an IDEA evaluation and reimbursement for the IEE is not warranted.
2. The program proposed by the District for the 2018-19 school year was not substantively appropriate under the applicable law.
3. The program proposed by the District for the 2019-20 school year was not substantively or procedurally appropriate under the applicable law.

4. The Parents are entitled to reimbursement for actual tuition and related expenses that they incurred for the Private School for the 2018-19 and 2019-20 school years, less a reduction of 10% of those total costs.
5. Within fifteen calendar days of the date of this decision, the Parents shall provide new documentation to the District of all current invoices and receipts for tuition and related expenses for Student for the 2018-19 and 2019-20 school years.
6. Within fifteen calendar days of the date of this decision, the District shall reimburse the Parents for 90% of the full amount of invoices and receipts provided pursuant to ¶¶ 4 and 5 herein.
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.

Cathy A. Skidmore

Cathy A. Skidmore, M.Ed., J.D.

Hearing Officer

ODR File Nos. 23334-19-20 and 23394-19-20