

*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

Student's Name: N.H.

Date of Birth: [redacted]

ODR No. 16241-1415KE

### CLOSED HEARING

Parties to the Hearing:

Parent[s]

Norristown Area School District  
401 N. Whitehall Road  
Norristown, PA 19403

Representative:

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Dates of Hearing: 08/20/2015, 10/19/2015

Record Closed: 11/25/2015

Date of Decision: 12/14/2015

Hearing Officer: Brian Jason Ford

## Introduction

[Student's parents] (Parents) requested this special education due process hearing on behalf of their child (Student) against the Norristown Area School District (District). The Parents allege that the District violated the Student's rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and seek reimbursement for the cost of tuition at the private school that the Student currently attends.

For reasons detailed herein, I find that the Parents are not entitled to tuition reimbursement.

## Issue

Are the Parents entitled to tuition reimbursement?

## Findings of Fact

### I. Background and Chronology

1. The Student is a "child with a disability" as that term is defined by the IDEA. The District is the Student's local educational agency (LEA), as defined by the same.
2. A comprehensive overview of the Student's educational placements is detailed in a prior due process hearing between the parties. *N.H., Norristown*, ODR No. 3366 (Ford, 2013).
3. For context, the Student attended school in the District during the 2009-10 and 2010-11 school years (4th and 5th grade). The Student attended a private school during 2011-12 and 2012-13 school years following a disagreement between the Parents and the District concerning the Student's education. *See id.*
4. The private school did not use traditional grade nomenclature during the 2011-12 or 2012-13 school years. The Student was in 6th and 7th grade according to age during these years, but it is not correct to think of this time as 6th and 7th grade.
5. At the start of the 2012-13 school year, the Parents requested a due process hearing, seeking compensatory education for an alleged denial of a free appropriate public education (FAPE) during the 2010-11 school year (the Student's last year attending the District's schools) and tuition reimbursement for the 2011-12 and 2012-13 school years. That matter was, coincidentally, assigned to this Hearing Officer. The Parents prevailed in part in their detail of FAPE/compensatory education claims but did not prevail on their tuition reimbursement claim. *N.H., Norristown*, ODR No. 3366 (Ford, 2013).
6. After the last due process hearing, the Student remained in the private school for the entirety of the 2012-13 and 2013-14 school years. Again, by age, this corresponds to 7th and 8th grade, but it is not correct to think of this time as 7th and 8th grade.
7. On October 28, 2013, the District offered an individualized educational placement (IEP) for the Student, along with a notice of recommended educational placement (NOREP). J-12. The Parents rejected that IEP, choosing instead to keep the Student at the private school for the 2013-14 school year.

8. While the record does not reveal an exact date, sometime during the 2013-14 school year, the Parents began to believe that the Student had outgrown the first private school. See, e.g. NT at 48.
9. The Parents obtained an independent educational evaluation (IEE) for the Student; more specifically, a private neuropsychological evaluation. J-10. The Student was evaluated on March 25, 2014 and April 1, 2014. The report of the IEE is not dated, but the Parents received it sometime before the end of the 2013-14 school year.
10. On May 1, 2014, the Parents completed an application for the Student to attend a different private school. J-11. The Student was accepted into the different private school on June 9, 2014. NT at 525. The second private school placed the Student into 8th grade.<sup>1</sup> The Parents seek reimbursement for tuition at this, second private school. For simplicity, the second private school will be referred to as "Private School" for the remainder of this decision.
11. On July 2, 2014, the District sent a letter to the Parents, explaining that the IEP of October 28, 2013 was set to expire on October 27, 2014. The District was prepared to implement the 2013 IEP until its expiration date, but intended to draft a new IEP for the 2014-15 school year, should the Student return to the District for school. J-12.
12. In the same letter, the District asked the Parents to sign a release of records form, allowing the District to obtain records from the first private school. The District intended to use this information to draft a new IEP for the Student for the start of the 2014-15 school year. J-12.
13. The Parents and District met on September 9, 2014 at an IEP team meeting. Sometime prior to that meeting, the Parents provided consent for the District to obtain records from the first private school and gave the District a copy of the IEE.
14. On September 10, 2014, the District proposed an IEP and sent that with a NOREP to the Parents. J-15.
15. On September 19, 2014, the Parents rejected the NOREP. J-15. The Student remained in the Private School for the remainder of the 2014-15 school year.
16. The Parents filed a Complaint initiating these proceedings on May 5, 2015.<sup>2</sup>
17. After the Complaint was filed, but before the hearing convened, the parties met at an IEP team meeting and the District offered an IEP on July 30, 2015 with a NOREP. (J-20, J-21). That IEP was to be in place for the 2015-16 school year, should the Student attend the District's schools.

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<sup>1</sup> The District argues that the Student repeated 8th grade in the Private School during the 2014-15 school year. While there is some merit to this point, I respectfully disagree. It is not clear what grade, if any, applied to the Student during the 2013-14 school year. Regardless, the Private School determined that, academically, 8th grade was the best match for the Student at the start of the 2014-15 school year. While this may say something about the first private school, it does not speak to the appropriateness of the current Private School.

<sup>2</sup> A hearing was originally scheduled for June 19, 2015. Upon motion of the parties, it was continued to August 20, 2015. A second session then convened on October 19, 2015. I received closing briefs on November 25, 2015.

18. The Parents rejected the July 30, 2015 IEP via the NOREP on August 3, 2015, citing their pending due process complaint. J-21.
19. The Student remained in the Private School during the 2015-16 school year (9th grade, according to the Private School).

## **II. April 2014 IEE**

20. The April 2014 IEE included parental input, a clinical interview, input from teachers at the first private school via a questionnaire, and many normative and criterion based tests. Regarding the testing, in some cases only subtests of broader assessments were administered. J-10.
21. The results of cognitive tests prompted the evaluator to caution against using a full scale IQ score as a measure of the Student's intelligence, as there was significant discrepancy between the Student's sub-test scores. J-10. While verbal comprehension was "Average" nonverbal reasoning was "Borderline." Similarly, working memory was "Low Average" but processing speed was "Extremely Low." J-10.
22. Regarding the cognitive tests, the evaluator noted that the Student's performance "mirrored findings from multiple previous assessments, highlighting strengths in the verbal domain, and weaknesses in the nonverbal or perceptual reasoning domain." J-10
23. Consistent with the foregoing, the evaluator concluded that the Student's pattern of scores on learning tests "suggests [a] pronounced difficulty learning and encoding new visual information, as well as trouble retrieving this information from long-term memory." J-10. The Student's scores on visual, perceptual and motor skills tests similarly revealed a "pronounced difficulty with analyzing complex visual information, appreciating spatial arrangements and integrating visual knowledge while formulating a motor response." J-10.
24. Rating scales used to assess the Student's attention and self-regulation revealed a discrepancy between parent and teacher ratings. Parents reported difficulties with attention and self-regulation that were not seen by the teachers, indicating either a difference in perception, a difference in the Student's behaviors at home and school, or some of both. J-10.
25. In tests of executive functioning, the Student performed in the average range when the assessment either required or permitted the Student to use verbal skills. This discrepancy notwithstanding, executive functioning tests and reports from both teachers and parents led the evaluator to conclude that the Student has significant difficulty prioritizing work, planning ahead, and sustaining "goal-oriented behavior until a task is complete." J-10.
26. The IEE reported that the Student was found to be at the 7.1 grade level or 38th percentile in basic academic skills (word reading, math calculation, and spelling). In higher level reading, writing, and math problems, the Student was found to be at the 4.1 grade level or 8th percentile. J-10. However, unlike the more specific breakdowns below, it is not clear how the evaluator arrived at these broad numbers, or how they should be used to develop academic programming for the Student.
27. On tests or sub-tests that specifically assess reading, the Student was in the average range for Broad Reading, Word Recognition, and Decoding. The Student was in the high average

range for reading speed. However, the Student tested at the low end of the average range in reading comprehension tests. J-10.

28. On tests of written language, the student was found to be in the average range overall. Spelling and the ability to write sentences in response to pictures were both average, while writing speed was in the low average range on this test. J-10
29. Math testing revealed that math is an area of weakness for the Student, with overall abilities in the borderline (6th percentile) range. The Student scored in the average range on math fluency tests, but relied on finger counting. Computation was low average while word problems were tested in the borderline (3rd percentile) range. Error analysis revealed problems with multi-step problem solving and “conceptually understating numerical and quantitative concepts.” J-10.
30. Based on all of the testing, the evaluator concluded that the Student met criteria as a student with a specific learning disability (SLD) in mathematics, a nonverbal learning disability (based on deficits in visual-spatial skills, motor coordination and executive functioning),<sup>3</sup> ADHD-C (attention deficit hyperactivity disorder - combined type), and generalized anxiety disorder.
31. The IEE included several recommendations, some directed to the Student’s family and others directed to school. Placement recommendations included:
  - a. Placement in a small, structured classroom with a low student-teacher ratio.
  - b. Clearly articulated goals with numbered instructions available at the Student’s desk.
  - c. Instruction about how to group information into “meaningful chunks” so that the Student could use active learning (as opposed to rote memorization).
  - d. Instruction presented in a way that will help the Student learn to identify main points, a “holistic understanding of concepts,” and how different topics relate to each other.
  - e. Class notes or an outline in advance of class (as the Student learns best by listening, and note-taking can be distracting).
  - f. Placement in classes with an emphasis on discussion (again to support the Student’s verbal learning).
  - g. Encouragement for the Student to ask for help.
  - h. Development of a homework plan.
32. In addition to the placement recommendations, the evaluator also recommended testing accommodations (extended time, quiet room, breaks) and a math program that uses a “stepwise, progressive” curriculum with “[p]ractice and repetition.” J-10.

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<sup>3</sup> The Student has a seizure disorder. The evaluator noted that the nonverbal learning disability may be connected to the seizure disorder, but drew no definite conclusions.

33. The evaluator also recommended coaching for planning, organizational and daily living skills, and therapies to address the Student's emotional state, but it is unclear if those recommendations applied to home, school or both. J-10.

### **III. September 2014 IEP**

34. The September 2014 IEP incorporated the results of the April 2014 IEE into its present education levels by reporting the bulk of numerical testing results. J-14.

35. The September 2014 IEP also reported the Student's most current academic assessments from school by reporting the Student's current grades and teacher comments from report cards and significant teacher commentary regarding the Student's academic progress during the 2013-14 school year. J-14.

36. The IEP also reported prior testing going back to 2009. J-14.

37. For statewide standardized testing (PSSAs), the IEP provided accommodations substantively the same as the accommodations recommended in the IEE. The same is true for local assessments. J-14.

38. The IEP included five annual goals. One for organizing and deriving the main idea from new information, one for organizing writing, one for math word problems involving time and money, one for improving "self-determination," and one for breaking down long term assignments. Some of these goals contemplated the provision of graphic organizers and other tools. J-14.

39. The IEP contemplated establishing baselines for goals within 30 school days. J-14.

40. The IEP included 13 program modifications and specially designed instruction (SDI). Notably, these included direct instruction in study skills (how to plan and break down assignments), provision of the numbered instructions called for in the IEE, "systematic instruction in the area of math for completion required work problems - using a math frame," explicit recognition of the Student's verbal learning style with the provision of outlines and an emphasis on discussion over note-taking, "wait time" to compensate for processing speed, and extended test time. J-14.

41. The IEP called for the Student to receive an itinerant level of learning support, at which 20% or less of the Student's instruction would be provided by special education personnel.<sup>4</sup> J-14.

### **IV. July 2015 IEP**

42. The July 2015 IEP substantively included all of the information in the September 2014 IEP, but added input from the Private School's report cards and testing. J-20. This included

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<sup>4</sup> The sections of the IEP saying exactly how much time the student would spend in regular education have errors. The errors are not substantive, and are best explained by the difference in the length of the middle school and high school days. Even so, I am reluctant to rely on this section of the IEP for fact-finding when part of it is in error.

teacher comments, class grades and some new academic testing – none of which reveal a significant change in the Student’s needs.<sup>5</sup> J-20.

43. Given the Student’s age, the July 2015 IEP includes a post-secondary transition goal, which notes the Student’s post-secondary preferences. J-20.
44. The July 2015 IEP includes five annual goals. These are the same as in the September 2014 IEP.<sup>6</sup> J-20
45. The SDIs and modifications in the July 2015 IEP are broken down and phrased somewhat differently than in the April 2014 IEP. However, the two IEPs are similar for the most part. The July 2015 SDIs and modifications still call for notes and study guides, and still emphasize the Student’s verbal learning style. The particular Math SDI is replaced with similar programming that applies in several content areas (repetition, study guides, and chunking are still explicitly included). The numbered instructions called for in the April 2014 IEE are also carried over.<sup>7</sup> J-20.
46. The most notable change from the April 2014 IEP to the July 2015 IEP is an increase of time in Learning Support. The July 2015 IEP calls for a supplemental level of learning support, at which 20% to 80% of the Student’s instruction would be presented by special education personnel. J-20.
47. The change from itinerant to supplemental learning support reflects the District’s proposal to place the Student in Learning Support classes for Math, English, Science and History. J-24.

## **Legal Principles**

### ***The 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 particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

### ***Tuition Reimbursement***

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<sup>5</sup> It is noteworthy that the Student received passing grades (C+ to B+ in different marking periods) in Pre-Algebra. The IEP notes that these grades were obtained with testing accommodations. J-20. The Parents also argue that this is indicative of the success fostered by the Private School’s overall learning model and system of instruction and accommodation.

<sup>6</sup> One goal in the July 2015 IEP is hand-written. The exhibit was presented jointly, and no questions were raised about the document’s authenticity.

<sup>7</sup> As with the goals, some of the SDIs are hand-written. The exhibit was presented jointly, and no questions were raised about the document’s authenticity.

To determine whether parents are entitled to tuition reimbursement from their school district, a three-part test is applied. The test is derived from the Supreme Court's decisions in *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 often 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 counsel against reimbursement or affect the amount thereof. *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.

### ***IEP Requirements***

The IDEA establishes the fundamental components of IEPs. IEPs must include, *inter alia*:

1. A statement of the child's present levels of academic achievement and functional performance;
2. A statement of measurable annual goals, including academic and functional goals;
3. A description of how the student's progress towards goals will be measured and reported;
4. A statement of what SDIs and modifications will be provided so that the child will be able to meet the goals.<sup>8</sup>

An IEP that includes these fundamental components (and the other structural elements detailed in the statute) is appropriate if it is reasonably calculated to confer a meaningful educational benefit to the student, while placing the student in the least restrictive environment that is appropriate for the student. *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982).

The Third Circuit articulated its position that a meaningful educational benefit both goes beyond academics and is something more than a trivial or *de minimis* benefit. *M.C. v. Central Regional S. D.*, 81 F.3d 389 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996). Meaningful educational benefit is also viewed relative to the child's potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

The time at which an IEP is offered is also an important part of any analysis. The appropriateness of an IEP must be determined as of the time it was created, judged only on the basis of the evidence known to the school at the time the offer was made. *D.S. v. Bayonne Board of Education*, 602 F.3d 533, 564-65 (3d Cir. 2010). Hindsight evidence and "Monday morning quarterbacking" are not appropriate when making this analysis. *Furhman v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

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<sup>8</sup> Goals, SDIs, and modifications must also factor involvement in the regular education curriculum and, for SDIs, must be research based to the extent practicable.



## Discussion

During the hearing and in its closing brief, the District highlighted that, in its view, it did not have an opportunity to implement either of the IEPs in question. Properly, this fact is not truly presented as a defense. The Supreme Court has upheld tuition reimbursement awards to students who have never been educated in public schools. *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230 (U.S. 2009). If the IEPs were inappropriate, the Parents were justified in rejecting them and seeking reimbursement. The IDEA does not require Students to endure an inappropriate IEP in order for tuition reimbursement to become an available remedy.

The *Burlington-Carter* test is applied to determine the appropriateness of each IEP in question. For each of the school years in question, the initial inquiry is whether the District offered an IEP that was reasonably calculated to confer a meaningful educational benefit to the Student. I find that both IEPs were so calculated.

In making this determination, I am not insensitive to the Parents' arguments. They claim, generally, that the IEPs are vague and insufficient. In making this claim, the Parents urge me to compare the April 2014 IEE first with the September 2014 IEP and then the July 2015 IEP. I agree that this is the proper lens through which to view the IEPs, but I reach a different result.

The Parents contend that the September 2014 IEP insufficiently addresses the Student's anxiety, social skills deficits, and executive functioning skills. I disagree. Regarding anxiety and, to a lesser extent, social skills, the April 2014 IEE notes a discrepancy between what Parents and teachers report. Beyond counseling, the IEE makes no school-based recommendations in this regard – and it is not clear that the recommendation is for school-based counseling. In short, the record does not reveal any necessary accommodation, modification, instruction or goal to address anxiety or social skills that is not contained in the September 2014 IEP.

The Parents' argument regarding executive functioning also fails, but for different reasons. The IEE clearly notes executive functioning deficits as an area of need for the Student, and makes school-based recommendations to address that concern. The District adopted these recommendations, sometimes literally, and offered in substance what the IEE calls for. I find that the September 2014 IEP was reasonably calculated to meaningfully address the Student's executive functioning deficits.

The Parents' most vigorous argument about the September 2014 IEP, however, concerns the amount of support and structure offered through that document. The Parents attribute what progress the Student has made since leaving the District to the small, structured environment of the private schools the Student has attended. The Parents truly believe that the Student would not be able to make progress in a larger public school with larger class enrollments without a level of support much higher than what the September 2014 IEP provides. The best evidence in support of this position is the IEE's recommendation for small, structured classes. But that evidence, by itself, is not sufficient to render the September 2014 IEP inappropriate.<sup>9</sup>

For clarity, the Parents do not argue that the Student can only be educated in a small, private school. Instead, they argue that the Student requires significant accommodations in order to

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<sup>9</sup> The Parents present no strong argument about the appropriateness of the math program offered by the District in either the September 2014 IEP or the July 2015 IEP. To the extent that argument is presented, I find that the Parents have failed to demonstrate by preponderant evidence that the math programs and accommodations offered by the District are inappropriate.

derive a meaningful benefit from public school education. To make this argument, the Parents must point to the April 2014 IEE. The District substantively adopted that IEE's recommendations, thereby offering the accommodations suggested by the evidence available when the IEP was drafted. I do not doubt the sincerity of the Parents' concerns or beliefs, but the evidence preponderantly demonstrates that the September 2014 IEP was reasonably calculated to confer a meaningful educational benefit at the time it was offered.

The Parents' arguments concerning the July 2015 IEP are essentially the same. They argue that the July 2105 IEP does not address the same areas of concern, and that the level of support is insufficient. They note that the Student is making progress at the Private School with a high level of support. Yet the July 2015 IEP also offers a higher level of support by moving the Student from an itinerant to a supplemental level of Learning Support while continuing to offer the same SDIs and modifications that were offered in the April 2014 IEP. Again, these track the recommendations from the IEE. This, combined with the fact that the data obtained regarding the Student's progress during the 2014-15 school year demonstrates that the Student still has the same needs (even if progress was made), renders the July 2015 IEP appropriate.

Again, the Parents do not argue that the Student cannot be educated in the District's schools. Rather, they argue that the District must make its classes like those in the Private School. Evidence suggests that the Student likely learns better in the Private School's classes, but no evidence suggests that the Student cannot derive a meaningful educational benefit in the District's schools with the offered IEPs in place. The IDEA does not require the District to maximize the Student's educational benefit, and the evidence preponderantly demonstrates that the July 2015 IEP was reasonably calculated to confer a meaningful educational benefit at the time it was offered.

Both the September 2014 and July 2015 IEPs were appropriate when they were offered, and so the Parents have not prevailed in the first part of the *Burlington-Carter* analysis. Consequently, the second two prongs of the test will not be considered. The Parents are not entitled to tuition reimbursement.

#### **ORDER**

Now, December 14, 2015, it is hereby **ORDERED** that the Parents are not entitled to tuition reimbursement for the 2014-15 or 2015-16 school years. It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER