

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer

Final Decision and Order

Closed Hearing

ODR No. 28243-22-23

Child's Name:

S.M.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent

Jessica Limbacher, Esq. and Nicole Reimann, Esq.
Batchis Nestle & Reimann LLC
7 Bala Ave., Suite 202
Bala Cynwyd, PA 19004

Local Education Agency:

Upper Darby School District
8201 Lansdowne Ave.
Upper Darby, PA 19082

Counsel for LEA

Michele Mintz, Esq.
Fox Rothschild, LLP
10 Sentry Parkway, Ste 200, PO Box 3001
Blue Bell, PA 19422-3001

Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

12/3/23

INFORMATION AND PROCEDURAL HISTORY

The Student is a [middle school-aged] resident of the District, in the [redacted] grade, unilaterally placed by the Parent in a private school (Private School). In 2021, the District determined the Student eligible for special education under the primary disability category of Specific Learning Disability (SLD). Through a settlement agreement (SA) with the District, the Student attended the Private School for the 2021-2022 and 2022-2023 school years.

After an August 2023 reevaluation determined the Student was no longer eligible for special education, the District issued a NOREP recommending the Student's exit from special education and placement in general education. The Parent filed a due process complaint to hold pendency under the Individuals with Disabilities Education Act (IDEA), Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act (Section 504). The Parent seeks a determination that the Student remains eligible for special education programming, that the District failed to offer a program or placement for the 2023-2024 school year, and tuition reimbursement is appropriate.¹ The District denies the Parent's claims and asserts it has fulfilled its legal obligations to the Student, and no relief is due.

Based on the evidence of record, the claims of the Parent are granted in part.

¹ 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). A related federal provision appears at Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and the applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15). Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213.

ISSUES

- 1) Was the District's May 2023 Reevaluation Report determining Student was no longer eligible for special education appropriate?
- 2) Where is the Student's pendent placement?
- 3) Was the District's program proposed for the Student during the 2023-2024 school year appropriate?
- 4) If the District's proposed programming was not appropriate for the Student, is the private program appropriate?
- 5) If the District's proposed program was not appropriate for the Student and the private program is appropriate, are there equitable factors that serve to reduce or deny reimbursement for tuition?

FINDING OF FACTS

2020-2021 School Year

1. During the 2020-2021 school year, the Student was enrolled in the [redacted] grade in the District. (P-8)
2. In December 2020, the District evaluated the Student and issued its report (ER) in January 2021. After administration of the WISC-V, the Student's overall cognitive functioning, FSIQ, was determined to be in the low average range (85), 16th percentile. (P-8, p. 9-10; N.T. 95)

2021 District Evaluation

3. For inclusion in the ER, the District assessed the Student's academic functioning through administration of the Kaufman Test of Educational Achievement – Third Edition (KTEA-3). On the KTEA-3, the Student's performance was determined to be below average (16th percentile) on the reading composite, below average (12th percentile) on the sound-symbol composite, average (25th percentile) on the decoding composite and below average (12th percentile) on the comprehension composite. The Student's performance on the math composite was determined to be below average (10th percentile). In writing, the Student received below-average spelling (10th percentile) and low writing fluency scores (3rd percentile). (P-22, p.2)
4. For inclusion in the ER, the District administered subtests of the Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2). On the CTOPP-2, the Student's composite phonological awareness skills were very poor (2nd percentile), phonological memory was very poor (1st percentile). Rapid naming was average (37th percentile). (P-22, p.3)
5. The 2021 ER concluded deficits in phonological processing were predictors of poor reading, which was the Student's greatest area of need from the information gathered from the CTOPP assessment. (P-8, p. 16)
6. The ER concluded the Student had a disability, needed specially designed instruction and was eligible for special education. In the determination of SLD, the ER concluded the Student exhibited a severe and unexpected discrepancy between grade placement and achievement in basic reading skills, mathematics problem-solving, and written expression. (P-8, p. 16-18; N.T. 48-49)

7. Following the ER, the District proposed the Student receive special education services through itinerant learning support. (P-10, P-12)
8. On August 10, 2021, the Parent and the District entered a Confidential Settlement and Release Agreement (SA). Through the SA, the District agreed to fund the Student's tuition at a parent-procured placement for the 2021-2022 and 2022-2023 school years, including extended school year (ESY.) (P-18, S-1)
9. The SA indicated that by February 1, 2023, the District agreed to issue a permission to reevaluate (PTRE) to commence the evaluative process. The SA indicated if the Student was found eligible, the District would offer an IEP to the Student for the 2023-2024 school year in accordance with the IDEA and in the event of a dispute, pendency would be the program and placement offered by the District for the 2023-2024 school year. (P-18, p. 2; S-1, p. 2)

2021-2022 School Year

10. During the 2021-2022 school year, under the terms of the SA, the Student attended the Private School enrolled in the [redacted] grade. (P-22)
11. During the [redacted] grade at the Private School, the Student's instructional levels were 3.1 for reading, 2.5 for writing, and 4th/5th for math. The Student received a high level of support. (S-5 at 3-4; N.T. 306-307)

2022-2023 School Year

12. During the [redacted] grade, the Student was enrolled in reading, writing, speaking and listening, math, social studies, science, art, physical education, music and health classes. In the [redacted] grade, the Student's instructional level in reading and writing improved to fifth-sixth grade level. (P-26, S-5 at 3-4; N.T. 306-307)
13. On February 21, 2023, under the terms of the SA, the District issued consent to the Parent to reevaluate the Student. On March 14, 2023, the District emailed the Parent and provided consent to evaluate the Student, a Child & Adolescent History form, and procedural safeguards. On March 28, 2023, the District emailed the Parent again, indicating an attempt to contact by phone, but it was out of service. The District requested an alternate phone number and referenced previous attempts to contact the Parent. (S-7)
14. On March 29, 2023, via email, the Parent advised the District the evaluation paperwork would be sent to the District that day. The Parent did not provide an alternate phone number for contact. (S-7; N.T. 367-368)
15. On April 13, 2023, the District emailed the evaluation documentation to the Parent again. The Parent did not return the consent to evaluation or the social history form. The social history form sought to update current services or changes within the family, anecdotal information or parental concerns regarding the Student. The Parent did return the behavior questionnaire needed for the evaluation to the District. (P-22, S-7, p.2; N.T. 106-107)

District's May 2023 ER

16. On May 27, 2023, the District issued its reevaluation report. The RR included aptitude, achievement, social-emotional functioning assessments, [2021-2022 school year] and [2022-2023 school year] report card data with teacher input and recommendations, and observation details. The same District school psychologist performed the 2021 and 2023 evaluations of the Student. (P-8, P-22, S-4; N.T. 33, 44-46, 82-84, 108-109)
17. After administration of ten subtests of the (WISC-V), the Student received the following scores: Verbal Comprehension Index- 95, 37th percentile; Visual-Spatial Index- 86, 18th percentile; Fluid Reasoning Index equals- 82, 12th percentile; Working Memory Index- 100, 50th percentile; and Processing Speed Index-98, 45th percentile. The Student's full-scale IQ score was determined to be in the low average range, 85, 16th percentile. (P-22, P-31, S-4)
18. The Student's IQ score remained unchanged from the 2021 evaluation. (N.T. 46)
19. On the KTEA-3, the Student's performance was determined to be below average (18th percentile) on the reading composite, average (27th percentile) on the sound-symbol composite, and below average (18th percentile) on the decoding composite. The Student's performance on the math composite was determined to be below average (12th percentile). ²In writing, the Student received below-

² The District did not reassess the Student's math fluency in 2023.

average spelling (19th percentile) and low-average essay composition (23rd percentile). (P-22, p. 14, S-4)

20. On the WIAT-4 used to assess writing, the Student performed just below the average range in the 23rd percentile. (P-22, p. 12)
21. A [2022-2023 school year] teacher and the Parent completed Behavior Assessment System for Children – Third Edition (BASC-3) to identify adaptive and maladaptive behaviors. The teacher's responses yielded average scores across all areas assessed, except for at-risk scores in functional communication. The Parent's responses yielded average scores across most areas assessed, except for anxiety and leadership. The teacher and Parent ratings were not clinically significant. (P-22, p. 12)
22. Because of an elevated score in functional communication, a speech therapist accompanied the school psychologist to the Private School and administered the Clinical Evaluation of Language Fundamentals (CELF) 5th Edition Screening Tool. On the CELF, the Student scored above the cut-off score for intervention, and further inquiry was determined to be unwarranted. (P-22; N.T. 110-112)
23. The school psychologist observed the Student during a group activity at the Private School. The Student presented as compliant, followed teacher directives, actively participated in the classroom activity, and appropriately interacted with peers. No challenging behaviors were observed. (S-4, p.7)
24. For inclusion in the RR, the Private School language arts teacher noted Student's strength in task completion, organizational skills, and working with others. The weaknesses noted were self-advocacy,

requesting clarification, and idea generation for writing. The Student's frequent absences, tardiness, and little parent communication were noted as concerns. (S-4, p.7)

25. For inclusion in the RR, the Private School math teacher indicated the Student did not exhibit negative behavior, had an overall grade of 97%, and noted no concerns with the Student. (S-4, p. 7)
26. The Private School's progress reports include information on the level of support a student requires. "L," or low level of support, means that the student is almost ready to do a task on their own; "M," or moderate level of support, means they sometimes need teacher support; "H," or high level of support means that the student needs support across the board in the subject. (P-26, p.5-6; N.T. 340-342)
27. The Private School progress report card for the 2022-2023 school year indicated the Student required a high level of support in reading, writing, social studies, science classes and a moderate level of support in math. (S-5, p. 9-11; N.T. at 306-307, 342-343)
28. The RR concluded that the Student no longer met the criteria for special education services under the classification category of Specific Learning Disability (SLD) and determined academic performance was commensurate with ability. The RR recommended monitoring through the multi-tiered systems of support (MTSS) within the general education setting. (P-22, p. 15-16, S-4, p. 15-16; N.T. 113)
29. After administering the assessments and reviewing the collected data, the school psychologist compared the District's 2021 and 2023 evaluation results. The District psychologist reviewed and calculated the growth value scores along with other data and determined the

Student was functioning on or close to grade level and had made two years of academic progress from 2021 to 2023. (N.T. 114-117, 148-150, 159)

30. Although it acknowledged that a meeting with a Parent after the completion of an evaluation is the "best practice," the District did not request or invite the Parent to a meeting after completing the RR. (N.T. 80, 262-264, 270-271, 273)
31. On May 27, 2023, the District emailed the completed RR and a NOREP to the Parent that recommended the Student's exit from special education. (P-23, S-3, S-7, p. 3-4; N.T. 262-263, 271, 273-274, 369)
32. The telephone number for the Parent listed in the RR was incorrect. (P-22, S-7; N.T. 358)
33. On May 31, 2023, the Parent requested mediation. The District declined to participate in mediation. (P-24)
34. On June 23, 2023, the Parent filed a due process complaint. (P-27)
35. On July 28, 2023, the Parent signed an enrollment contract for Student's attendance at the Private School for the 2023-2024 school year. (P-29, S-5, p. 42; N.T. 363)

August 2023 Private Evaluation

36. On August 11, 2023, at the request of the Parent, a Pennsylvania licensed psychologist and board-certified neuropsychologist commenced an evaluation of the Student.³ The private evaluation report was issued on August 22, 2023. (P-13, P-32; N.T. 171-172, 174, 176-177)
37. The private evaluator administered assessments to the Student, reviewed educational records and interviewed the Parent and Grandmother. The private evaluator did not observe the Student at the private school or speak with the teachers. (N.T. 183-185, 247-248)
38. The neuropsychologist administered the Beck Youth Inventories – Second Edition (BYI-2), California Verbal Learning Test for Children (CVLT-C), Delis-Kaplan Executive Functioning System (DKEFS) – Selected Subtests, Integrated Visual and Auditory Continuous Performance Test – Second Edition (IVA-2), Rey Complex Figure Test and Recognition Trial (RCFT), Wechsler Intelligence Scale for Children - Fifth Edition (WISC-V), selected subtests, Wechsler Individual Achievement Test – Fourth Edition (WIAT-4), and the Wisconsin Card Sorting Test (WCST). (P-31, p. 4; N.T. 205-207)
39. The independent evaluator readministered the figure weights subtest of the WISC-V. The Student performed within the average range (25th percentile) on this subtest. On the readministered comprehension subtest, the Student's performance was average (63rd

³ The Parent's witness was qualified as an expert in psychology and neuropsychology. (N.T. 182)

percentile) and consistent with other measures of verbal intellectual ability. (P-31; N.T. 207-208)

40. The private evaluator assessed the Student's academic functioning through the administration of the WIAT-4. On the WIAT, the Student's performance was determined to be low average for the reading composite (18th percentile), below average for reading fluency (4th percentile), low average for the decoding composite (9th percentile), and below average (6thth percentile), for orthographic processing. The Student's performance on the math composite was determined to be low average (13th percentile) below average (4th percentile) in math fluency. On the written expression composite, the Student's performance was in the low average range (14th percentile). (P-31, p. 11-12; N.T. 212-213)
41. The Parent's expert neuropsychologist used grade-based norms instead of age-based norms to interpret the WIAT-3 scores because the Student is the youngest or one of the youngest in the [redacted] grade. (N.T. 120-121, 126-127, 208-210, 242-243)
42. The private evaluator concluded that the Student's evaluation results reflected a clear and significant discrepancy between many grade-level achievement scores when compared to scores for verbal intellectual abilities, abstract reasoning abilities, general learning and memory skills, and processing speed abilities. (P-31, p. 9; N.T. 214-216)

43. The expert evaluator concluded the Student's lower scores on measures of academic achievement could be explained by deficits in higher-level reasoning abilities, general learning, or slow processing speed, which were not reflected in the current cognitive profile with difficulties specifically related to processes involved in reading, mathematics, and writing. (P-31, p. 9; N.T. 214-216)
44. The private evaluator concluded the Student had a learning disability based on the discrepancy between verbal skills and the achievement scores related to verbal processing. The Students' grade-level scores in basic word reading skills, reading fluency, decoding skills, spelling skills, and the dyslexia index all fell at or below the 10th percentile, with math fluency also below expectations. (P-31, p. 9; N.T. 214-216)
45. The private evaluator determined there was no significant change in the Student's intellectual functioning, and academic achievement scores did not reflect any significant changes in scores for reading composite, decoding composite, letter-word recognition, or reading comprehension. (P-31; N.T. 193-195, 199-200)
46. Although the sound symbol composite improved, along with phonological processing and silent reading fluency, there was a decrease in the nonsense word decoding score. There were no significant improvements in math or writing skills compared to prior testing results, and math and writing fluency, which were significant weaknesses in 2021, were not re-assessed during the evaluation in 2023. (P-31, p. 9; N.T. 193-194)

47. The private evaluator concluded the Student met the DSM criteria for a child with a Specific Learning Disability (SLD) with impairment in reading, math and written expression and still needed accommodations and specially designed instruction (SDI). (P-31, p.9; N.T. 218-219)
48. The Parent's private evaluator criticized the District's reliance on growth scale value scores to support its determination that the Student no longer had a disability. The private evaluator indicated growth value scores are useful to understand whether additional interventions are needed or are producing benefit. (N.T. 199-200)
49. The private evaluator explained that growth scale value scores compare a student's progress from one point to another but do not compare the student to age or grade level demands. Moreover, three-time frames instead of two (2021 and 2023) are preferred to determine a trend. (N.T. 199-203)
50. On August 17, 2023, the District contacted the Parent and asked that the Student be present for benchmark testing the next day. The Parent advised the Student would attend the Private School for the 2023-2024 school year. (P-23, P-30, S-7, p. 4; N.T. 274, 359-360)
51. The District contacted the Parent again about the "refusal" of testing. The Parent advised the family was vacationing and agreed to produce the Student for testing on August 28, 2023. (S-7, p. 6-8)

52. The private evaluator issued the evaluation report on August 22, 2023. The District reviewed the private report. (P-13, P-32; N.T. 118, 171-172, 174-176-177)

53. On August 23, 2023, the District issued a class schedule for the Student. Based on the results of the District's RR, no special education programming was offered to the Student. (S-6)

2023-2024 School Year

54. During the 2023-2024 school year, the Student is enrolled in the [redacted] grade in the Private School. (P-31)

55. August 28, 2023, was the first day of school in the District. (N.T. 281)

56. On August 28, 2023, the District administered a math and reading MAP screener to Student. Under the District's scoring rubric, reading scores of 200 or more do not require intervention. For students entering [Student's] grade, math scores of 202 or lower require intervention. (S-8; N.T. 392)

57. In reading, the Student received a RIT score of 223, indicating intervention was unnecessary. In math, the Student received a score of 200. After testing, the District changed the Student's schedule and added a general education math intervention class. (P-33, P-34, S-7, p. 6, S-8; N.T. 283, 387-388)

The Private School

58. The Private School serves students in first through eighth grade, enrollment of 176 students and 37 teachers and a department of psychologists, social workers, and school counselors. (N.T. 303-305)
59. The [Student's] grade has a total of thirty-five students in the [redacted] grade with two teachers. Other classes are small, with ten to thirteen students and two teachers. (N.T. 303-305)
60. At the Private School, the Student receives direct instruction in math and reading and is taught strategies to improve focus and organization. The Private school offers academic resources and tools, including audiobooks, extra time, and preferential seating. (P-26; N.T. 303-305)
61. The Private School issues progress reports every trimester with detailed information on a student's progress, strengths, needs, classroom observations, and an assessment of the application of time management and organizational strategies. (P-26)
62. Since enrollment in the Private School, the Student has made measurable academic progress. (S-5, p. 3-4, 9-11; N.T. 306-307, 342-343)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Burden of Proof

The burden of proof essentially consists of two elements: the burden of production and the burden of persuasion. 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 who filed the Complaint that led to this administrative hearing. 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

Credibility Determinations

Special education hearing officers, in the role of fact-finders, are responsible for 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).

The following witnesses testified: The District's evaluating school psychologist, the Parent's privately retained neuro-psychologist, the Supervisor of Special Education, the Parent, the Assistant Head of School for Academics at the Private School, and the District's Director of Secondary Education. This Hearing Officer found each of the witnesses to be generally credible as to the facts. Any conflicting testimony between the witnesses can be attributed to poor recall and differing perspectives. The weight accorded the evidence, however, was not equally placed. Although both of the evaluating professionals were credible, the testimony of the Parent's privately retained neuropsychologist was accorded significant weight with explanations of the various evaluations conducted and the rationale for the

change in eligibility under the IDEA. That testimony stood in stark contrast to the supervisor of special education, who sometimes appeared uncomfortable with the questioning. This demeanor may have been in recognition that although procedures were technically correct, they were not the best practice to facilitate and maintain a necessary, respectful and courteous home and school relationship.

The findings of fact were made as pertinent to resolving 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 provision of a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to assist a child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase free appropriate public education (FAPE) to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). As the U.S. Supreme Court has confirmed, an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, 580 U.S. 386, 399, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). IEP

development, of course, must follow and be based on an evaluation and also be monitored and updated by changes indicating a need for revision. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320-300.324.

To be eligible for special education services under IDEA, the student must (1) meet the requirements of one or more of the disability categories identified in the regulation and (2) require specially designed instruction to benefit from that instruction. A disability does not automatically mean that a child is eligible since it is a two-part test. With respect to the second prong of IDEA eligibility, "special education" means specially designed instruction which is designed to meet the child's individual learning needs. 34 C.F.R. § 300.39(a)(b)(3).

Evaluation Requirements

Substantively, 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 appropriately 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;

(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[.]" 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). Upon completion of all appropriate assessments, "[a] group of qualified professionals and the parent of the child determines whether the child is a child with a disability ... and the educational needs of the child[.]" 34 C.F.R. § 300.306(a)(1).

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. This critical concept extends to placement decisions. 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.116(b), 300.501(b). 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); *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 565 (3d Cir. 2010).

General IDEA Principles: Parental Placements

A Parent who believes 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). This 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., supra*, 575 F.3d at 242. Equitable principles are also relevant in deciding whether tuition reimbursement is warranted. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009); *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.*

Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). "Major life activities" include learning. 34 C.F.R. §

104.3(j)(2)(ii). The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995); *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Further, the substantive standards for evaluating claims under Section 504 and the ADA are essentially identical. *See, e.g., Ridley School District v. M.R.*, 680 F.3d 260, 282-283 (3d Cir. 2012). Courts have long recognized the similarity between claims made under those two statutes, particularly when considered together with claims under the IDEA. *See, e.g., Swope v. Central York School District*, 796 F. Supp. 2d 592 (M.D. Pa. 2011); *Taylor v. Altoona Area School District*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Derrick F. v. Red Lion Area School District*, 586 F. Supp. 2d 282 (M.D. Pa. 2008). Thus, in this case, the coextensive Section 504 and ADA claims that challenge FAPE obligation on the same grounds as the issues under the IDEA claim will be addressed together.

Parent's Claims

In the due process Complaint, the Parent contended the District reached the inaccurate conclusion that the Student was no longer eligible for special education, that meaningful parental participation in this decision was denied, that the Student's pendent placement is the Private School attended for the last two school years, and that tuition reimbursement for the 2023-2024 is owed to the family. Based on the evidence adduced through this due process hearing, the Parent has sustained the necessary burden of proof for most of these claims.

The first issue for consideration is whether the District's May 2023 reevaluation of the Student was appropriate. On the surface, the District's reevaluation of the Student appeared IDEA compliant. It summarized and reviewed data and available information, assessed areas of need, and then determined Student's ineligibility for special education. However, on this

hearing record, several flaws occurred, resulting in a denial of FAPE. During testimony, although the school psychologist was credible regarding the procedures followed and assessments administered, no persuasive explanation was provided about the factors that could be responsible for an SLD no longer existing but originally found by this same evaluator in 2021. Although many of the assessment results were identical to the findings of 2021, this time, the District relied on the Student's "growth value scores", not mentioned or referenced in the RR with an explanation occurring during testimony. After calculating those scores, the District concluded that the Student made significant progress from 2021 to 2023 and was functioning on grade level to support its determination that the Student no longer had a disability. However, the Parent's expert, a licensed psychologist and board-certified neuropsychologist, was more credible than the District. The Parent's private evaluator opined that analyses of growth value scores were not properly utilized, in this instance, to determine whether this Student still had a learning disability because it did not provide reliable data about performance compared to expectations for age or grade. The Parent's expert also took issue with the District's comparison of two evaluation time frames (2021 and 2023) instead of three in support of its conclusion of a trend. Furthermore, the District did not gather sufficient information about the Student's functioning at the Private School, relying primarily on progress report comments. The District's RR did not fully consider the high level of support the Student required and received across the school day and its impact on the achievement observed.

The Parent introduced evidence from a privately retained neuropsychological evaluation to contradict the District's evaluative conclusions. Although that report was thorough, the District criticized the private evaluator's comparison of grade instead of age norms from the Student's WIAT-4 results. Although both evaluation professionals agreed this

non-standard practice is appropriate in extenuating circumstances, the justification provided by the Parent's expert was sufficient. Although the private evaluation report reached an opposite conclusion than the District, the expert's testimony recognized the Student's phonological processing score increase as statistically significant and reflective of improvement in reading principles. The evidence and testimony presented by the Parent's expert were weightier than the conclusions reached by the District. Based on the assessments administered by the Private evaluator, the record evidence was clear. This Student continued to show a severe discrepancy in cognitive functioning versus achievement, establishing a specific learning disability in reading, math and written expression. Overall and affording appropriate weight to the testimony of both evaluating professionals, along with the questionable applied methodology, the record evidence was more than preponderant in this particular case that the District's RR was insufficient and failed to identify Student's special education and related service needs in all areas of suspected disability. In challenging an evaluation, courts have found that a parent "cannot simply argue that the evaluation was inappropriate because they disagree with its findings. The key is in the methodology. The conclusions, or lack thereof, cannot be inadequate unless the methodology is inadequate because that is the only provision in the law." *L.S. ex rel. K.S. v. Abington Sch. Dist.*, No. 06-5172, 2007 U.S. Dist. LEXIS 73047, 2007 WL 2851268, at *12 (E.D. Pa. Sept. 28, 2007) Based on the evidence of this hearing record, the District's methodology was inadequate.

Next, the Parent contends that the District denied Student a FAPE because the decision to exit the Student from special education was made without the Parent, denying meaningful participation. In support of this claim, the Parent alleged if the District assembled "the group of qualified professionals and the parent" as the law required, an understanding of the level of support the Student received at the Private School would have

influenced the decision regarding eligibility for special education. I disagree. The RR compiled information about the Student's functioning at the Private School. However, in gathering that information, the District failed to adequately consider the influence of the embedded supports on the Student's achievement as documented by the Private School. It is unlikely that the Parent could have added to this data in any meaningful fashion.⁴ Notably, the District made multiple attempts to engage the Parent for necessary input in the RR but received only partial cooperation. Despite the District's repeated attempts for engagement, the Parent's participation in the evaluative process was inconsistent with contact between the parties reliant on email communication because the District lacked a working phone number for the Parent. Not only did the Parent not sign and return the consent to evaluate, but other requested input necessary for the reevaluation was not returned. The Parent was provided with adequate opportunity to participate. Although the District acknowledged it did not use the best practice in communicating after the evaluation, the Parent has failed to introduce any legal authority that the IDEA requires a post-evaluation meeting with the Parent under the factual circumstances present in this matter. Once the RR was completed and received, the Parent did not contact the District to question or discuss the results. The District's method of communicating the Student's ineligibility to the Parent were contrary to facilitating an open and collaborative relationship between educators and the family, but they were not violative of the IDEA.

Finally, the Parent contended that Student's pendent placement is the Private School attended for the last two years. Despite the Parent's assertion to the contrary, the terms of the jointly executed and undisputed settlement agreement settle this issue. The Student's pendent placement during the

⁴ The Student's frequent absences, tardiness, and parent communication were noted as concerns by a Private School teacher. (FF. 24)

resolution of this dispute was placement offered by the District in regular education at the middle school.

A consideration of the legal elements applicable to a claim for tuition must now occur. Having found that the District did not offer FAPE to the Student for the 2023-2024 school year, the appropriateness of the Private School must be assessed. The Private School serves first through eighth grade students, with a total enrollment of 176 students and 37 teachers. A department of psychologists, social workers, and school counselors also provide services. At the Private School, the Student is enrolled in an array of academic classes and receives either a high level, moderate level or low level of support, depending on needs. In addition to academic classes, the Student receives strategies to improve focus and organization. Since enrollment in the Private School the Student has made measurable academic progress. The Private School is appropriate. Furthermore, this placement was reasonably calculated to provide the Student with educational benefit.

Finally, a consideration of equities that would serve to deny or reduce tuition reimbursement to the Parent must occur. Where private placement is appropriate and reimbursement is otherwise due, the IDEA permits the equitable reduction or elimination of tuition reimbursement under certain circumstances. *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 67 (3d Cir. 2010). Additionally, a hearing officer can deny tuition reimbursement upon a finding of unreasonableness with respect to actions taken by the parents. 20 U.S.C. § 1412(a)(10)(C)(iii)(III). Unreasonableness on the part of the parents can result in the reduction or denial of tuition reimbursement even where the school district fails to offer a FAPE and private placement is appropriate. *C.H.*, 606 F.3d at 71. Based on this hearing record, the Parent's actions and failure to fully cooperate with the reevaluation merit a twenty-percent (20%) reduction in the award of tuition reimbursement. The District

pointed to other examples of the Parent's behavior that may not have evinced a spirit of collaboration, but they do not merit a further reduction.

ORDER

AND NOW, this 3rd day of December 2023, in accordance with the foregoing findings of fact and conclusions of law, the District is ordered to reimburse the Parent for eighty percent (80%) of the Student's actual cost of tuition at the Private School for the 2023-2024 school year.

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, and financial aid and scholarships awarded from the Private School for Student for the 2023-2024 school year.

Within thirty calendar days of the date of receipt of such documentation, the District shall reimburse the Parents for eighty-percent (80%) of the Parent's actual cost of tuition at the Private School for the 2023-2024 school year. The Parent's actual cost of tuition is the tuition charged by the Private School, including base tuition costs and mandatory fees, less any discounts, scholarship, or financial aid.

No other remedy is due.

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. Jurisdiction is RELINQUISHED.

Joy Waters Fleming, Esquire
Hearing Officer