

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

DECISION

Child's Name: H. D.

Date of Birth: [redacted]

ODR File No. 18898-16-17/KE

OPEN HEARING

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
Radnor Township School District
135 S. Wayne Avenue
Wayne, PA 19087

Dates of Hearing:

Date of Decision:

Hearing Officer:

Representative:

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May 1, 2017; May 18, 2017;
June 28, 2017

July 24, 2017

Cathy A. Skidmore, M.Ed., J.D.
Certified Hearing Official

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a late pre-teenaged student who resides in the Radnor Township School District (District). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² based on a Specific Learning Disability in reading, written expression, and mathematics, and an Other Health Impairment. Student attended a private school (Private School) beginning in the fall of 2014 and continuing through the end of the 2015-16 school year with the agreement of, and funding by, the District. In the spring of 2016, pursuant to their agreement, Student was reevaluated by the District and the parties met to develop an Individualized Education Program (IEP) for the fall of the 2016-17 school year.

Student's Parents disapproved the placement proposed by the District for the fall of 2016, and filed a Due Process Complaint. The case proceeded to a due process hearing convening over three sessions with the parties presenting evidence in support of their respective positions. The decision due date was extended on party request for good cause shown, then adjusted forward when later hearing sessions were not needed.

At the hearing, the Parents asserted that the District's proposal for the 2016-17 school year with a return to the District did not offer Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes. They sought retrospective and

¹ In the interest of confidentiality and Student's privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision to the extent possible, despite the Parents' choice of an open hearing.

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

³ 29 U.S.C. § 794. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61.

prospective relief, in addition to reimbursement for certain expenditures. The District maintained that its special education program, as offered, was appropriate for Student, and that no relief was due.⁴

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

ISSUES

1. Whether Private School should be declared to be the last agreed-upon placement based on the District's proposed program in the spring of 2016;
2. Whether the District's proposed program in the spring of 2016 for the 2016-17 school year offered FAPE to Student both procedurally and substantively;
3. If the District's proposed program for the 2016-17 school year was not appropriate for Student, should the Parents be awarded reimbursement for tuition to Private School for the 2016-17 school year;
4. Whether the District should be ordered to provide a prospective placement at Private School for the 2017-18 school year;
5. If the District's proposed program for the 2016-17 school year was not appropriate for Student, and the District is ordered to fund Student's placement at Private School for the 2017-18 school year, whether the District should conduct an evaluation of Student in the spring of 2018; and
6. Whether the Parents should be reimbursed for one or more independent evaluations they obtained?

⁴ References to the record throughout this decision will be to the Notes of Testimony (N.T.) and Joint Exhibits (J-) followed by the exhibit number, although some exhibits were referenced as Parent exhibits at times during the hearing. The parties jointly moved for admission of J-1 through J-23 and J-25 through J-38, and anticipated also jointly including J-39 and J-40. J-39 was not ultimately provided to the hearing officer although J-40 was by agreement. As noted *infra* n. 7, a conference call was held with counsel for both parties several days before the decision was due, and they agreed that there was no Exhibit J-16 produced. This hearing officer acknowledges with appreciation that the parties and counsel provided a concise hearing record in addition to agreeing to participate in the electronic exhibits pilot program. References to Parents in the plural will be made where it appears that one was acting on behalf of both, and occasionally to the singular Parent to refer to Student's mother who was more actively involved in the educational program during the time period in question.

FINDINGS OF FACT

INTRODUCTION

1. Student is a late pre-teenaged student who resides within the boundaries of the District. Student is eligible for special education under the IDEA on the bases of a Specific Learning Disability in reading, writing, and mathematics, and an Other Health Impairment (OHI) due to Attention-Deficit/Hyperactivity Disorder (ADHD) – Combined Type. Student also qualifies for the protections under Section 504. (N.T. 36-37; J-4 pp. 5, 12-13)
2. The District is a recipient of federal funding assistance. (N.T. 37)

GENERAL BACKGROUND

3. Student attended a private parochial school for kindergarten and first grade before enrolling in the District during second grade (2013-14 school year). Student first received learning support after identification by the District as a student with a Specific Learning Disability in reading and written expression and an OHI due to ADHD. Student returned to the District for third grade until approximately November 2014 when Student enrolled in Private School. (N.T. 368, 600, 602, 633, 638, 647; J-2 p. 3, J-4 pp. 2-3)
4. In District assessment in the fall of 2014 before Student enrolled in Private School, Student was performing at approximately the second percentile in reading, and at approximately the thirteenth percentile in mathematics. (N.T. 614-15; J-36 p. 2)
5. Pursuant to a settlement agreement, Student attended Private School for the remainder of the 2014-15 school year and the entire 2015-16 school year at public expense. The parties agreed that the District would evaluate Student in the spring of 2016. (N.T. 312, 694-95; J-4 p. 1)
6. During the 2014-15 school year, Student reportedly made gains in many reading, writing, and speaking skills at Private School, with teachers in all subject areas reflecting developing to proficient ability and more of the latter by June 2015. Student attained a 1.2 instructional reading level by the end of the school year from a primer level; was at a first grade instructional level in writing over the course of the school year; and was at a third grade instructional level in mathematics over the course of the school year. (J-6 p. 11, J-9)
7. During the 2015-16 school year, Student reportedly made gains in reading (moving from an instructional level of 2.1 in the first trimester to a level of 2.2 in the third trimester). Student was at a second grade instructional level in writing over the course of the school year; and was at a fourth grade instructional level in mathematics over the course of the school year. Comments about Student's skills and abilities generally remained positive or improved across all subjects. (J-10)

SPRING 2016

DISTRICT EVALUATION

8. The District conducted an evaluation of Student in the spring of 2016 and issued an Evaluation Report (ER). (N.T. 313, 334, 385-86, 406; J-4)
9. The District school psychologist spoke with the Parents by telephone as part of the evaluation process and included their input, including concerns, in the ER. The Parents expressed satisfaction with Student's success at Private School, and concerns over reading, writing, spelling, and mathematics skills; a need for individualized attention and small class sizes; and Student's distractibility and lack of focus. (N.T. 406-07; J-4 pp. 1-2)
10. The District school psychologist observed Student at Private School and spoke with Student's teacher. Input from that teacher for the ER included a description of Student's strengths to include interpersonal relationships, organizational skills, and task completion, with improvement in self-advocacy skills. Her recommendations for Student were reading aloud to Student especially directions, frequent checks for understanding and attention, assistance organizing ideas and with note-taking, pre-teaching as needed, and writing support. (N.T. 386-87, 408-09; J-4 pp. 2, 6)
11. The ER summarized previous assessment results from its 2012 evaluation and a private evaluation obtained in 2014. (J-4 pp. 3-6)
12. Cognitive assessment for the ER (Kaufman Brief Intelligence Test – Second Edition) revealed average range scores (Composite IQ 93) with an above average Processing Speed Index score (119 (Wechsler Intelligence Scales for Children – Fifth Edition, WISC-V)) and an average Auditory Working Memory score (WISC-V). (J-4 p. 7)
13. Academic achievement assessment for the ER (subtests from the Wechsler Individual Achievement Test – Third Edition and Kaufman Test of Educational Achievement) reflected below average scores in Word Reading and Silent Reading Fluency, with notation that Student did not recognize letters and words with automaticity but had some phonics skills. Student similarly scored in the below average range on Math Problem Solving and lower end of the average range for Numerical Operations and Math Fluency, with noted weaknesses in multiplication with regrouping, division, and fractions. Writing skills scores were generally at the lower end of the average range, with a relative strength in Sentence Combining and below average scores in Sentence Building and Spelling. All other achievement scores were in the average range. (J-4 p. 8)
14. Assessment of Student's attention and executive functioning (subtests of the NEPSY-II, a neuropsychological assessment instrument) reflected average range results on a majority of the subtests with a below average range score on Inhibition-Switching. However, parent and teacher rating scales (Behavior Rating Inventory of Executive Function) yielded clinically significant concerns on the Inhibit and Task Monitor (Parent) and Working Memory Scales (Parent and teacher); at-risk concerns were noted on the

following Scales: Inhibit (teacher), Self-Monitor (teacher), Shift (Parent) Initiate (Parent and teacher), Plan/Organize (Parent and teacher), and Task Monitor (teacher). (J-4 pp. 9-10)

15. Social and emotional functioning were also assessed using rating scales (Behavior Assessment System for Children – Second Edition, BASC-2), reflecting clinically significant concerns with Attention Problems (Parent) and at-risk concerns with Hyperactivity (Parent), Anxiety (teacher), Somatization (Parent), Learning Problems (teacher), Withdrawal (Parent), and Functional Communication (Parent and teacher). (J-3 pp. 10-11)
16. The ER concluded with a determination that Student was eligible for special education on the bases of a Specific Learning Disability in reading (basic reading skills and reading fluency), writing, and mathematics, and an OHI (due to ADHD). (N.T. 411-14; J-4 p. 12)
17. Recommendations in the ER were for various accommodations (breaks as needed, chunking of assignments, reminders to check work, proofreading assistance, verbal and written directions, frequent checks for understanding and attention, text read aloud, assistance organizing ideas and with note-taking, pre-teaching as needed, extended time, modified assignment expectations, and word processing for writing tasks) and multi-sensory instruction. (J-4 pp. 12-13)
18. The District school psychologist spoke with the Parents by telephone to review the ER after it was complete. She also explained to the Parents that any decisions on placement would be made by the IEP team at the meeting, and that the Parents would have the opportunity to approve or disapprove the program after the meeting. (N.T. 392-93, 407, 438-39, 452, 454-60, 665-67, 728-29; J-31 pp. 19-22)
19. The Parents expected to make a decision on Private School for the 2016-17 school year by May 2016. (N.T. 670, 704; J-31 p. 22)

APRIL 2016 DRAFT IEP

20. The District's IEP software program automatically populates the field for the School Building on the first page of the IEP with the name of the school where the student currently attends based on information in a state database.⁵ If a NOREP recommends a different school, that school's name is automatically populated on the first page of the revised IEP. (N.T. 276-80, 285, 486-87, 488-89)

⁵ The database is the Pennsylvania Information Management System (PIMS), a statewide longitudinal data system. See <http://www.education.pa.gov/teachers%20-%20administrators/pims/pages/default.aspx#tab-1> (last visited July 22, 2017). It appears that the same auto-filled school building information is provided on subsequent pages of the IEP in Sections VII and VIII, but the required explanation of why the IEP would not be implemented in the neighborhood school is not completed (J-5).

21. The District elementary special education teacher who developed the April 2016 draft IEP does not typically provide a copy to parents before the IEP meeting unless requested by the parents or an administrator. (N.T. 487-88)
22. A draft IEP was developed and presented to the Parents at an April 22, 2016 meeting. The proposed IEP document did not have a “DRAFT” watermark or other similar notation, but the District representatives stated at the beginning of the meeting that it was a draft. Both Parents attended along with their advocate, as did Student. (N.T. 267, 269, 273-74, 275, 306-08, 489-90, 530-32, 549-50, 667-68, 697-98, 736-37; J-5, J-7 p. 4 ¶2, J-26 p. 1 ¶2)
23. Student read to the IEP team a three-paragraph letter that Student wrote to the Parents in March 2016. (N.T. 490-91; J-20 p. 9)
24. The April 2016 draft IEP summarized information from the ER, and indicated that Student did not exhibit behaviors that impeded his/her learning or that of others, but did have communication needs. Student’s academic, developmental, and functional needs repeated the recommendations from the ER. (J-5 pp. 5-9)
25. Goals in that draft IEP addressed decoding at a fifth grade level, reading comprehension of fifth grade materials, written expression (producing a five paragraph piece at a proficient level), and mathematics problem solving at a fifth grade level. (J-5 pp. 16-18)
26. Program modifications and items of specially designed instruction (SDI) provided for regular check-ins during instructional time and independent work to monitor understanding of directions, needs for text read aloud and writing support, note taking support, and individual assistance; teacher assessment of need for pre-teaching and re-teaching; direct, explicit, multisensory instruction in reading fluency and comprehension; co-taught mathematics class with assessment of needs for individualization, pre-teaching, and re-teaching; reading support (text to speech, pre-review, pacing, and visuals); encouragement to ask for help when needed; and morning check-ins. Student would also be provided with modeling and practice of listening skills and have access to an additional adult in all content area classes. (J-5 pp. 20-21)
27. Student was not deemed to be eligible for extended school year (ESY) services. (J-5 pp. 22-23)
28. The draft IEP proposed Student’s participation in the regular education environment with the exception of a one-hour daily supplemental reading program. The school building identified for the remainder of the 2015-16 and entire 2016-17 school years was Private School. (J-5 pp. 24-27)
29. The Parents were interested in Student returning to Private School for the 2016-17 school year but were not against the possibility of a District program if it were “as good [as], if not better than the program [at Private School.]” (N.T. 661-62)
30. The Parents expressed concerns about the size of the classrooms at the District as well as the extent to which Student might be provided Wilson Reading instruction. They also

had doubts that Student would be able to achieve the goals in the IEP. (N.T. 308, 491-92 552, 699-701)

31. The District has an Intervention and Extension period for fifty minutes each day in the elementary school. Students are able to get caught up on assignments or seek assistance from a teacher as needed, including pre-teaching or re-teaching. (N.T. 474-75, 559-60, 586-87, 601)
32. The District proposed the Wilson Reading Program, a multisensory program that addresses decoding and other foundational reading deficits, for approximately one hour per day during the Intervention and Extension period. Student's third grade teacher at the District had Wilson certification to provide that instruction, which could have been up to five days per week depending on the results of a pre-assessment. The pre-assessment would include three subtests of the Woodcock-Johnson Tests of Achievement (WJ-ACH) (Word Attack, Passage Comprehension, and Reading Fluency) and a Word Identification and Spelling Test (WIST). (N.T. 288-89, 607-10, 618-21)
33. The District intended to establish baselines for the IEP goals through its ESY program for Student or during the first two weeks of the 2016-17 school year. Its staff did not believe proper baselines could be determined in another environment. ESY services were also mentioned as a means for Student's transition back to the District. (N.T. 289-90, 291, 293, 294, 304-05, 494-95, 556)
34. Student could only attend ESY if enrolled in the District with an IEP specifying eligibility for ESY services. (N.T. 780-81)
35. At the April 22, 2016 IEP meeting, the District members of the team recommended that Student return to the District for the 2016-17 school year. That determination was not made before that IEP meeting. (N.T. 306-09, 496-98, 697, 702)

REVISED APRIL 2016 IEP

36. The District revised the IEP after the April 2016 meeting. Changes included the removal of an indication for communication needs, and noted that the Parents believed Student needed one-on-one instruction in Language Arts and mathematics, with the District disagreeing and instead suggesting a combination of whole group, small group, and individual instruction. Additional input from Private School was also included in the revised IEP detailing Student's programming and progress there. (J-6)
37. The goals addressing reading comprehension and decoding were revised to substitute one grade level above fall 2016 baselines rather than fifth grade materials. All goals noted that baselines would be determined within two weeks of implementation of the IEP. New SDI were for transition to the District and access to sensory manipulatives; clarification was also made to reflect that a paraprofessional would be the additional adult in Science and Social Studies. (N.T. 310-11, 554-55; J-6)

38. Student was determined to be eligible for ESY services and the placement for the start of the 2016-17 school year was changed to a District elementary school with Itinerant Learning Support. Student would participate in the regular education environment except for the Intervention and Extension period when the supplemental Wilson Reading program would be provided. (J-6)
39. The District sent the Parents the revised IEP after the April 22, 2016 meeting with a NOREP proposing implementation of the IEP at a District elementary school at the start of the 2016-17 school year. The Parents did not agree and, by letter of May 11, 2016, asked the District to fund Student's tuition at Private School for the 2016-17 school year. They also requested, and the parties thereafter participated in, a mediation session that was not successful. (N.T. 314, 706; J-7, J-27)
40. The Parents did not ask to observe the classroom that Student would attend if returning to the District for the 2016-17 school year. (N.T. 702)
41. The Parents decided to continue Student's enrollment at Private School in approximately late May 2016. (N.T. 704-05)
42. Student did not attend ESY at the District in 2016. (N.T. 306, 703)
43. Had Student returned to the District for the 2016-17 school year, Student would have been in co-taught classrooms for Language Arts (ninety minutes) and Mathematics (sixty minutes) classes. Student would have gone to other classrooms for other classes: Social Studies or Science (sixty minutes) and special classes (fifty minutes). In all classes, the instructional time is varied and allows for individual and small group work. (N.T. 468-69, 475-76, 533-37, 558-62)
44. The Language Arts class provided instruction in Reading (focused on comprehension) and Writing. The instruction was integrated. (N.T. 594-98)
45. Student would have been provided the Wilson Reading instruction during the Intervention and Extension period possibly with some pull out of another class to total sixty minutes. (N.T. 628-29)
46. The District uses a Learning Ally program in elementary school by projecting reading materials to the class on a screen in the front of the room. The particular passage was highlighted for the students in the classroom. Although Learning Ally could be used individually by a student, the teachers would have no way of monitoring that student, and the student would also miss class discussions and other engagement on the materials. (N.T. 71-72, 76-77, 556-57)
47. A guidance counselor and reading specialist were assigned to the building Student would have attended for the 2016-17 school year. An inclusion coach and Board Certified Behavior Analyst were also employed by the District, as were reading specialists. (N.T. 265, 330-31, 418, 490, 494, 571, 592-93)

INDEPENDENT EDUCATIONAL EVALUATION

48. The Parents arranged for an independent private psychoeducational evaluation (IEE) in June 2016 to follow a September 2014 evaluation by the same neuropsychologist. She issued a report of the IEE in August 2016. (N.T. 707; J-2)
49. The IEE reported average range cognitive functioning in 2014 (Full Scale IQ 97 with a relative strength on the Perceptual Reasoning Index), which was not inconsistent with a District evaluation in 2013. (J-2 pp. 3-4)
50. Student demonstrated relative strengths and weaknesses in reading skills (WJ-ACH - Third Edition (WJ-III-ACH)). Phonological awareness was reportedly a strength while reading fluency, accuracy, and comprehension were relative weaknesses and well below expectations. (J-2 pp. 4, 9-10)
51. In the area of writing skills, Student exhibited significant weaknesses with spelling, sentence and paragraph construction (written expression), and writing fluency (WJ-III-ACH). (J-2 pp. 4, 9)
52. Parent rating scales (BASC-2) reflected clinically significant concerns in the following areas: attention problems, hyperactivity/impulsivity, and functional communication. No teacher rating scales were obtained at that time. (J-2 pp. 4, 10)
53. The IEE continued to conclude that Student met criteria for Specific Learning Disorders with Impairment in reading (Dyslexia) and written expression (Dysgraphia), in addition to ADHD.⁶ (J-2 p. 5)
54. The private neuropsychologist made a number of recommendations in the IEE for Student's educational program outside of Private School: intensive reading and writing instruction to include foundational skills and reinforcement throughout the school day; one-on-one support; assistance with maintaining attention and organizational skills; re-teaching as needed; numerous classroom accommodations and modifications (including preferential seating and sensory manipulatives, repetition and review, repeated directions; test and assignment accommodations and/or modifications; cues and prompts; copy of notes); strategies to encourage development of reading and writing skills throughout the day; monitoring of attention with redirection as needed; checks for understanding; simple directions; chunked instruction; active learning; opportunities for breaks including physical movement; and organizational support for assignments and projects as well as Student's environment. The private neuropsychologist recommended a multisensory approach to learning. (J-2 pp. 5-7)
55. The Parents, through counsel, provided the District with a copy of the August 8, 2016 IEE at the end of that month. That report was not provided prior to that communication. (N.T. 342-43; P-30)

⁶ These diagnoses were made under the Diagnostic and Statistical Manual – 5th Edition (DSM-5), not the IDEA.

FALL 2016

56. In December 2016, a second private psychologist retained by the Parents conducted an observation of the classroom that the District had proposed for Student. She also observed Student at Private School. (N.T. 41-42, 424-25)
57. The District identified a student in that classroom who was considered a close “match” for purposes of that evaluation based on educational and behavioral presentation. The other student was provided with daily individualized instruction in reading fluency and accuracy. (N.T. 42, 67, 401, 445-47, 567-68)
58. The second private psychologist determined that the other student was dissimilar from Student in several ways: the other student was successful reading higher level reading materials than would Student, and that other student also was not distracted to the degree in which Student is frequently distracted. (N.T. 64-65, 69, 73-75)
59. The second private psychologist authored a report of the observations that also included background information from the Parents and previous evaluations. (J-3)
60. The second private psychologist concluded that the large District co-taught classroom was not appropriate for Student primarily because of the size of the class, but also because the students used reading materials that were beyond Student’s level. She also found the District’s use of Learning Ally to the entire class to be not sufficiently supportive for Student. (N.T. 85, 98, 100-02; J-3 p. 13-15)
61. The second private psychologist agreed with recommendations in the IEE and concluded that the program at Private School was more “closely align[ed]” with Student’s needs. (J-3 pp. 14-15)

JANUARY – MAY 2017

62. The District requested that the Parents attend an IEP meeting to review the IEE report. The meeting was scheduled for November 2016, then rescheduled for January 2017 so that a second private psychologist could conduct an observation of Private School and District classroom that had been proposed for Student. (N.T. 316-17, 358-59, 715-16; J-21)
63. The IEP team met in January 2017. A day or so before that meeting, the Parents provided the District with the recent report of the second private psychologist. (N.T. 317, 715; J-8)
64. Minor revisions were made to Student’s IEP as a result of the January 2017 meeting. One paragraph was added stating that the team reviewed and considered the IEE, and that the District members of the team found that its proposed IEP was consistent with the recommendations of the IEE and the second private psychologist’s report. The Parent Input section was also revised to add their current concerns for Student: check-ins

throughout the day, class sizes, the experience of the Wilson-certified teacher at the elementary school, and Student's reading levels. (J-29 pp. 7, 10)

65. The District did not update its evaluation of Student following receipt of the Parents' private evaluations. (N.T. 390)
66. In April 2017, the District asked the Parents to attend a meeting to discuss Student's transition to the middle school in the fall of 2017. A visit to the classroom was part of that transition plan, as was an IEP meeting at the start of the 2017-18 school year. (N.T. 318-19, 325-27; J-28, J-31 pp. 6-7)
67. An IEP meeting convened in mid-May 2017 attended by both Parents and Student. The focus of that meeting was to provide for Student's successful transition to the middle school. (N.T. 394-95, 510-12, 686-88, 718, 721-22, 736, 749-50; J-28)
68. The IEP was revised to remove the input of the parents (to be gathered at the meeting) and a significant portion of the information from Private School, and to add as needs for Student goals in decoding/phonics, comprehension, writing, and mathematics. The goals themselves were slightly revised to reflect one grade level above the September 2017 baseline. (J-34)
69. Program modifications and SDI were also revised in the May 2017 IEP to reflect small group intensive mathematics instruction to replace that co-taught class; additional reading support (audio presentation including Learning Ally and vocabulary word banks); participation in basic writing skills classes, a reading comprehension program for days per eight-day cycle; participation in a structured study hall two days per eight-day cycle; an instructional aide in Language Arts and mathematics classes in addition to Social Studies and Science; modified assessments and assignments; organization checks; morning check-ins; and various transition activities including ESY services. The middle school was identified as the proposed placement for the 2017-18 school year with an itinerant level of learning support. (J-34)
70. The District proposed Wilson Reading for the 2017-18 school year for one hour four times each eight-day cycle (every other day). That instruction would be individual or with one other student. (N.T. 324-25, 689-91, 785-86)
71. One of the Language Arts teachers at the middle school is certified in the Wilson Reading Program, as is a reading specialist in that building. (N.T. 747-49, 781)
72. The District produced a sample schedule based on class periods of 46-47 minutes in length. Based on that schedule, Student would have two or three periods of Language Arts instruction; Mathematics Enrichment (two days per cycle) or a Writing class (three days per cycle) or the structured study hall (the remaining days per cycle); a Mathematics class (one period daily); Science class (one period daily); and a period of Wilson Reading instruction (four days per cycle) or a special such as art (four days per cycle). (N.T. 321-23, 760-63, 788-90, 792-94; J-35)

73. It would be possible for Student to be provided Wilson Reading instruction at the middle school for one period per day depending on the Parents' elections for other Language Arts programming. (N.T. 788-90)
74. Student would have access to a classroom paraprofessional in content area classes (Science and Social Studies) for the 2017-18 school year. (N.T. 325, 507-08)
75. The District did not suggest completion of a Functional Behavioral Assessment (FBA) of Student at Private School because the environment is a significant factor in the data that is collected. The District also did not find Student to exhibit the types of behaviors that warranted an FBA but rather were manifestations of executive functioning skill deficits. (N.T. 352, 360-61, 398-99, 437, 449-50)
76. The District again suggested that baseline data could be collected during ESY over the summer of 2017 as part of Student's transition to its middle school. (N.T. 511, 548, 750-53, 758, 783-84)
77. Students in sixth grade typically remain on one floor of the building for most of the school day, compared to seventh and eighth graders who do not. (N.T. 327)
78. Students at the middle school have an extra period of each content area class on two days of each eight-day cycle. They also have an academic structured study hall period on certain days. (N.T. 760-62; J-35)

PRIVATE SCHOOL - 2016-17 SCHOOL YEAR

79. Student is easily distracted by noises and other stimuli in an environment. Student requires frequent redirection, and can become anxious at times. (N.T. 50, 52, 74, 77-78, 126-27)
80. Student requires intensive reading and writing support. (N.T. 54)
81. There were forty two students in Private School building that Student attended during the 2016-17 school year serving grades one through five. Ten teachers were responsible for four classrooms, and most teachers are reading specialists. Student's class had eleven students. (N.T. 119, 121, 192, 206, 248)
82. Student had several Language Arts classes (word identification/decoding and spelling (thirty minutes); reading comprehension (forty minutes); independent reading work (thirty minutes); and writing instruction (thirty minutes)). Reading fluency was addressed daily and monitored weekly. Student also had Science, Social Studies, Health, Physical Education, and special classes. (N.T. 126-34, 158-59, 189; J-11, J-12)
83. Reading instruction was provided in very small groups of two to four students. (N.T. 149)
84. The school day was structured with the same schedule each day. (N.T. 148)

85. Teachers redirected Student as necessary when Student became distracted and clarified directions as needed. All students had assignment notebooks that were monitored by teachers for completeness and accuracy. (N.T. 148-50, 153-54)
86. At Private School, each student including Student had access to the Learning Ally program on his or her iPad. Students listened (through earbuds) to text read aloud by the Learning Ally program which also highlighted the words or phrases as they were presented audibly. Students were able to adjust the pace of the text, font size, and other settings in the Learning Ally program. (N.T. 48-49, 76-77 140-41, 142-44, 251)
87. Students had access to sound-cancelling headphones, and Student regularly used those to minimize audio distractions. (N.T. 139-40, 249-50)
88. Students were required to read at home for thirty minutes each day. Books at the student's independent level were available in the library for days that there was no assigned reading. (N.T. 130-32)
89. Private School provided research-based instruction in Language Arts, including reading and writing, but does not adhere to any one particular program for those subjects. (N.T. 193-95)
90. Students were provided Chromebooks for in class work, including writing assignments. Student was provided with structured prompts for writing activities and checklists for making revisions. Student was able to have text read aloud using the Chromebook, which assisted with Student's writing assignments. (N.T. 141-42, 144-45)
91. Students were able to meet as needed with the school psychologist, who also interacted with the students on a weekly basis and held occasional small group sessions to address peer relationships, self-advocacy, and similar topics. (N.T. 151-52)
92. At Private School, Student had access to the support classroom and other quiet areas as needed. As of the end of the 2016-17 school year, Student was demonstrating self-advocacy skills such as asking to move to a quiet area to minimize distractions or requesting clarification. Student also exhibited more self-confidence. (N.T. 78-79, 138-39, 153, 168-69, 214, 223, 249, 657)
93. Standardized testing and benchmark assessments are conducted by Private School in Reading and Mathematics. (N.T. 155-58; J-10 pp. 1-8; J-11 pp. 5-9)
94. Private School student progress reports included quantification of the level of support (high, moderate, or low) a student has needed in the class for the relevant time period. That quantification was subjective and was based on teacher observation, with moderate support being the norm for its students. (N.T. 181-82; J-11)
95. As of the end of the 2016-17 school year, Student was at an instructional reading level of 3.1 from a 2.2 level in the fall. Student's fluency rate was below expectations at that grade level, but Student exhibited some improvement in demonstrating several reading skills consistently. (N.T. 122-23, 128, 167; J-11 pp. 10-11, 16-18, 23)

96. As of the end of the 2016-17 school year, Student was at a third grade level in writing skills. Student's spelling skills were below a third grade level, but Student exhibited a steady level to a slight improvement in demonstrating writing skills consistently. (N.T. 123, 168; J-11 pp. 10-11, 16-18, 23)
97. Student demonstrated general improvement, with some variability, in skill areas in all other subject areas by the end of the second trimester of the 2016-17 school year. Student was at a fifth grade instructional level in mathematics. (J-11 pp. 12-16, 19-23)
98. Private School has a transition team who works with students and their families as students move on to middle school serving grades six through eight. (N.T. 172-73, 207)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who filed the Complaint and requested this hearing. Nevertheless, application of the *Schaffer* principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as 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 to be credible, testifying to the best of his or her recollection based on his

or her perspective. Any discrepancies in the testimony are most likely attributable to understandable memory lapses rather than deception. None of the witness testimony was accorded significantly more or less weight; however, it merits mention that while the testimony of the Parent was generally persuasive, her belief that the District mailed a copy of the April 2016 draft IEP prior to the April 22 meeting was not credited because it was contradicted by a letter the Parents wrote to the District shortly after the meeting (J-7 p, 4), and further was uncorroborated by any other evidence including the special education teacher's routine practice.

Parents who believe that a local education agency (LEA) has failed to comply with its obligations under the IDEA may file a Due Process Complaint wherein they may “present a complaint [] with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to [a] child.” 20 U.S.C. § 1415(b)(6)(A). An administrative hearing will be held on the issues presented. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.511, 30.512, 300.515; 22 Pa. Code § 14.162. In this matter, the Parents filed such a Complaint and challenged the District's proposed program for the 2016-17 and 2017-18 school years. In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' comprehensive closing arguments.⁷

⁷ Several days before this decision was due, the District sought leave to add an additional document to the record, namely a copy of the parties' 2014 settlement agreement, or at a minimum its provision regarding pendency. The Parents opposed that request. In a conference call on July 21, 2017, the District proffered what appeared to this hearing officer to be valid reasons for the late request; however, she did not find that any settlement agreement provisions would be relevant to the issues presented, and further noted that any request to submit additional evidence even pursuant to agreement of the parties must be evaluated in the context of the decision due date, which neither party sought to extend. In any event, as the District also noted, this hearing officer lacks authority to enforce settlement agreements. *J.K. v. Council Rock School District*, 833 F. Supp. 2d 436, 448-49 (E.D. Pa. 2011); *see also West Chester Area School District v. A.M.*, ___ Pa. Commw. ___, 2017 Pa. Commw. LEXIS 378 (June 19, 2017); *Lyons v. Lower Merion School District*, 2010 U.S. Dist. LEXIS 142268, 2010 WL 8913276 (E.D. Pa. Dec. 14, 2010). Following issuance of this decision, as this hearing officer explained to counsel during the conference call, the District's proposed submission and the Parents' detailed response, both made on July 20, 2017 via email, will be

IDEA PRINCIPLES

The IDEA and state and federal regulations obligate local education agencies (LEAs) to provide a “free appropriate public education” (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” 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). LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the U.S. Supreme Court considered anew the application of the *Rowley* standard, observing 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).

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed

compiled into a single excluded exhibit marked as HO-1, and will be provided to both parties as well as made part of the official record as an unadmitted exhibit in the event of an appeal.

not only by the expertise of school officials, but also by the input of the child's parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA[.] * * * A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. * * * As we observed in *Rowley*, the IDEA "requires participating States to educate a wide spectrum of handicapped children," and "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."

Endrew F., ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017) (italics in original)(citing *Rowley* at 206-09)(other citations omitted). The Court explained that, "an educational program must be appropriately ambitious in light of [the child's] circumstances... [and] every child should have the chance to meet challenging objectives." 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not "fully integrated into the regular classroom." *Id.* The Court thus concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit.⁸

As *Rowley*, *Endrew*, and the IDEA make clear, the IEP must be responsive to the child's identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, the

⁸ At least two federal District Courts in Pennsylvania have recently opined that the *Endrew* decision did not change Third Circuit jurisprudence regarding the standards for judging whether a special education program is appropriate. *E.D. v. Colonial School District*, No. 09-4837, 2017 U.S. Dist. LEXIS 50173, at *36 (E.D. Pa. Mar. 31, 2017); *Brandywine Heights Area School District. v. B.M.*, 2017 U.S. Dist. LEXIS 47550, at *29 n. 25 (E.D. Pa. Mar. 28, 2017).

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).

The IEP is developed by a team, and a child’s educational placement must be determined by the IEP team based upon the child’s IEP, as well as other relevant factors. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.116. Parents play “a significant role in the IEP process.” *Schaffer, supra*, at 53. Indeed, 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).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA’s procedures but also in the substantive formulation of their child’s educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any “concerns” parents have “for enhancing the education of their child” when it formulates the IEP.

Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007).

Critically, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same).

GENERAL SECTION 504 AND ADA 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). In Pennsylvania, Parents may

request an administrative hearing under Section 504 and Chapter 15 to challenge an LEA's identification, evaluation, or programming for a protected handicapped student. 22 Pa. Code § 15.8. The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005).

DISTRICT'S PROPOSED PROGRAM FOR 2016-17 - PENDENCY

The first issue is whether principles of pendency render any FAPE considerations moot.

With regard to stay put or pendency, the IDEA expressly provides that

during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child[.]

20 U.S.C. § 1415(j). *See also* 34 C.F.R. § 300.518(a). This language is “unequivocal” and is “an absolute rule in favor of the status quo.” *Drinker v. Colonial School District*, 78 F.3d 859, 864 (3d Cir. 1996)(citations omitted). “The stay-put provision’s protective purpose means that ‘it is often invoked by a child’s parents in order to maintain a placement where the parents disagree with a change proposed by the school district.’” *M.R. v. Ridley School District*, 744 F.3d 112, 124 (3d Cir. 2014) (quoting *Susquenita School District v. Raelee S.*, 96 F.3d 78, 83 (3d Cir. 1996)).

As courts have recognized, often “[t]he relevant inquiry ... becomes the identification of the ‘then current educational placement.’” *Drinker, supra*, at 865 (citation omitted); *see also Susquenita, supra*. The Third Circuit has explained that “the dispositive factor in deciding a child’s ‘current educational placement’ should be the Individualized Education Program ... actually functioning when ‘stay put’ is invoked.” *Drinker, supra*, at 867 (citations omitted). In other words, the critical question is what is “the operative placement actually functioning at the

time the dispute first arises.” *Id.* (quoting *Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 625-26 (6th Cir. 1990) (emphasis added). “The operative placement is [] determined by ... the date the dispute between the parents and the school district ‘first arises’ *and proceedings conducted pursuant to the IDEA begin.*” *M.R., supra*, at 124 (emphasis added).

The Parents strenuously argued that the April 22, 2016 draft IEP that identified Private School as the location for the fall 2016 constituted the District’s and Parents’ agreement that Private School was pendent. This hearing officer has carefully reviewed the record and the applicable law, and cannot agree. Before turning to the events in April 2016, it is important to recall that Student was attending Private School during the 2014-15 and 2015-16 school years pursuant to a settlement agreement, and not in conformity with an IEP and NOREP from the District placing Student at Private School.

There can be no doubt that the Parents were informed, and were well aware, that the composition of the spring 2016 IEP including the placement decision for the 2016-17 school year would follow the ER and be made by the IEP team. The preponderant evidence is that they received the April 22, 2016 draft IEP at the start of that meeting, were advised at the very beginning of the meeting that the document was a draft, and that programming and placement decisions would be considered and ultimately made together by the team. Revisions were discussed and incorporated into a revised IEP following that meeting; and, the District’s recommendation during and after the meeting was for a return to the District, not continuation at Private School. The mention of Private School in an IEP known to all to be merely a draft, and not accompanied by a NOREP to be approved or disapproved by the Parents, did not transform

into a program that was “actually functioning” at any point in time.⁹ Furthermore, there was no proceeding under the IDEA that might trigger pendency. For all of these reasons, the Parents’ pendency argument must be rejected.

DISTRICT’S PROPOSED PROGRAM FOR 2016-17 – FAPE

The next issue is whether the District’s revised IEP in April 2016 was appropriate for Student both procedurally and substantively. First, with respect to procedural FAPE, the Parents contend that they were deprived of the opportunity to fully participate in the placement decision.

It is clear the Parents and District members of the IEP did not agree on whether Student’s IEP could be implemented at a District elementary school. Nevertheless, while development of an IEP are expected to be collaborative processes, an LEA’s issuance of a NOREP does not require either complete agreement of the IEP team or acquiescence to a parent’s preferences. As the U.S. Department of Education logically explained in 2010,

[t]he IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

Letter to Richards, 55 IDELR 107 (OSEP 2010). Moreover, also crucial is the IDEA obligation for eligible students to be educated in the “least restrictive environment” (LRE) which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood*

⁹ Even assuming, for the sake of argument, that the Parents were provided that draft IEP in advance of the April 22, 2016 meeting, their receipt of a document does not, in and of itself, equate to an agreed upon or then-current program for the same reasons. Student never attended Private School pursuant to a NOREP from the District.

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). All LEAs are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa. Code 14.145. And, FAPE and LRE are related, but separate, concepts. *A.G. v. Wissahickon School District*, 374 Fed. App’x 330 (3d Cir. 2010) (citing *T.R.*, *supra*, at 575, 578); *see also L.G. v. Fair Lawn Board of Education*, 486 Fed. Appx. 967, 973 (3d Cir. 2012).

As is relevant here, in examining an LRE issue, “[i]f the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act’s mainstreaming directive.” *Oberti*, *supra*, at 1216. A private school is certainly on the more restrictive end of the LRE continuum when compared to the neighborhood school. Here, the team was required to give serious consideration to the regular education classroom before proceeding to consider more restrictive placements. Accordingly, whether or not the District IEP team members may have believed Private School to be an appropriate program for Student, that factor is not dispositive, and the Parents’ contention that the District did not provide sufficient reasons for rejecting Private School as the placement proposed with the April 2016 NOREP¹⁰ is unavailing.

In sum, the record evidence is preponderant that the District committed no procedural FAPE violation. The Parents were full participants in the process of discussing and revising the April 2016 draft IEP that was ultimately proposed for the 2016-17 school year. That the other members of the IEP team did not agree with their preference for a restrictive private school

¹⁰ *See, e.g.*, Parents’ Closing at 21, 23.

placement does not mean, and this hearing officer does not find, that they were denied the opportunity to be involved in the decision-making process regarding Student's program for the 2016-17 school year. They were also able to, and did, exercise their right to challenge the District's substantive proposal, which is the next issue for discussion.

Turning to the question of whether the District offered FAPE in the spring of 2016, this hearing officer is compelled to conclude that the IEP that was proposed with an accompanying NOREP after the April 2016 meeting did not sufficiently reflect "careful consideration of the child's present levels of achievement, disability, and potential for growth" and, therefore, was not substantively appropriate. *Andrew, supra*, 137 S.Ct. at 999, 197 L.Ed.2d at 350.

The revised April IEP was not without appropriate aspects, of course. It incorporated all of the recommendations in the District's ER, which included input from teachers at Private School, such as regular check-ins, monitoring understanding of directions, text read aloud, writing and note taking support, and individual assistance, as well as pre-teaching and re-teaching and direct, explicit, multisensory instruction in reading fluency and comprehension. There is also no reason to suspect that the District professionals would have been unable to implement the April 2016 revised IEP including the various items of SDI, including providing Wilson Reading instruction for sixty minutes on a daily basis by a certified teacher, in addition to providing good general teaching practices. (*See, e.g.*, N.T. 492-94, 560-70) This hearing officer also cannot agree with the Parents that the absence of specific time allotments for certain SDI such as pre-teaching and check-ins is fatal;¹¹ certainly Student's needs for additional supports

¹¹ Parents' Closing at 13. The Parents also challenged the District's omission of the size of the group of students who would receive Wilson Reading Instruction. Parents' Closing at 12. It is unclear why such information would be critical, particularly given the very few students who were to be provided that program at the fifth and sixth grade levels and the absence of evidence that Student cannot learn in groups. In addition, the District certainly could not predict whether other students with similar needs might move into or out of the District at any given point in time. Once again, there is no reason to question the ability of the District's professionals to gauge the needs of its students, including Student.

such as those would vary from day to day and class to class, as was also noted to be the case at Private School. The District's professionals are certainly qualified (J-33), and one must expect that they would use their education and experience to make educational judgments throughout the school day as they interact with the students for whom they are responsible. In addition, other support and services such as counseling are available at the District should Student demonstrate a need in the future.

Nevertheless, there are significant fatal flaws in the April 2016 revised IEP based on information that was known, or should have been ascertained, by the team at the time of the NOREP. Specifically, the document does not reflect the *Andrew* expectation that the IEP be developed based on thorough consideration of Student's present levels and potential for growth. The annual goals that appeared in the draft IEP specified reading decoding and comprehension, written expression, and mathematics problem solving at a fifth grade level, which was clearly unrealistic. At the time, Student was demonstrating significant weaknesses with corresponding slow progress in each of those areas, but there was no effort to ascertain even a ballpark estimate of Student's actual skill development in those areas of need or expectation for gains over the duration of the IEP. The revised April 2016 IEP attempted to correct those flaws by changing the goals to one year above baseline grade level, suggesting that Student would be expected to attain one year's growth on each of the goal areas at a specified accuracy level, but without regard to any consideration of Student's ability to meet or exceed those expectations and Student's historically slower rate of progress. That type of rote expectation falls far short of the requisite individualized consideration of Student's current level and potential described by the *Andrew* Court and inherent in the IDEA. Further, although the District proffered reasons for its failure to provide baselines for the goals, and even with a plan to obtain those during ESY or the

start of the 2016-17 school year, a complete lack of any concrete understanding of Student's then-current unique present levels renders it impossible to gauge whether that the IEP was reasonably calculated to address Student's educational needs in light of Student's disability and potential. Furthermore, in order for Student to attend ESY and have the opportunity to be evaluated for present levels and baselines prior to the start of the 2016-17 school year, the Parents were required to approve the April 2016 NOREP and enroll Student in the District. It is simply untenable to place the Parents in that position.

Accordingly, this hearing officer concludes that the April 2016 revised IEP was not sufficiently individualized so as to be appropriate for Student's needs. A remedy for that denial of FAPE shall therefore be awarded.

REMEDIES

2016-17 SCHOOL YEAR: TUITION REIMBURSEMENT

Parents who believe that a public school is not providing FAPE to their child may unilaterally place him or her in a private school and thereafter seek reimbursement for tuition. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). Tuition reimbursement 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 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); *Carter, supra*. In considering the three

prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not controlling in evaluating a parent's unilateral placement. *Ridgewood, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*.

Having concluded that that April 2016 IEP was not reasonably calculated to provide Student with an appropriate education, the next question is whether Private School was appropriate. Student was in a small class of eleven students where instruction was provided to small groups of two to four students. Student had classes in Language Arts, Science, Social Studies, Health, Physical Education, and specials; each day was structured and the students had the same schedule each day. Student had access to software and other tools and technology to support Student's reading and writing needs. Student made modest progress in reading and writing skills, and continued to work on mastery of mathematics fluency and problem solving. Additionally, Student's tendencies toward distraction and inattention were recognized by Private School staff and addressed as needed. Under the standards for evaluating a parentally-selected placement that do not require adherence to LRE principles, the preponderant evidence supports a conclusion that Private School was appropriate for Student.

The last prong to consider is the equities. The evidence reflects that, while the Parents clearly preferred to have Student remain in Private School for the 2016-17 school year, they were not opposed to consideration of a return to the District. It is true that the Parents sought a public program that was at least as good as the private program, and of course LEAs are not obligated to meet such a standard. Nonetheless, the evidence establishes that they remained open and willing to the District's April 2016 proposal, and they promptly notified the District of their intentions for the 2016-17 school year after it issued a NOREP. Taken as a whole, the equities

do not warrant a reduction in the remedy for Private School, and reimbursement for its tuition and related expenses for the 2016-17 school year will be ordered.

2017-18 SCHOOL YEAR: PROSPECTIVE PLACEMENT

The Parents seek a further declaration that Private School should be ordered to be the prospective placement for the 2017-18 school year.¹² While prospective placement is a rather unusual remedy reserved for only limited situations, hearing officers do have broad discretion to fashion an appropriate remedy under the IDEA. *See, e.g., Forest Grove*, *supra*, at 240 n. 11 (2009); *Burlington*, *supra*, at 370 (1985); *Draper*, *supra* at 1285-86; *Ridgewood*, *supra*, at 248-49.

Although the tuition reimbursement test may not be directly applicable to a prospective placement remedy, its prongs do provide concrete guidance for evaluating this type of claim. Critically, however, the record must, in this hearing officer's estimation, support a conclusion that the LEA is not in a position to make timely and reasonable revisions to its special education program in order to offer and provide FAPE. *See, e.g., Burlington*, *supra*, at 369 (explaining that private placement at public expense is warranted where an appropriate public school program is not possible). This does not mean that the Parents must establish that the LEA cannot "in theory" provide an appropriate program, *Draper*, *supra*, at 1285 (quoting *Ridgewood*, *supra*, at 248-49), but the equitable nature of the requested remedy logically demands something more than a past denial of FAPE.

This hearing officer has seriously considered ordering the parties to meet again to develop a new IEP for Student for the 2017-18 school year in light of all available information,

¹² To the extent that the Parents make their pendency argument to extend to the 2017-18 school year, it is rejected on the same grounds described with respect to the 2016-17 school year.

particularly since it is not clear that the spring 2017 program development process was as thorough as might be expected had a due process hearing not been proceeding. Moreover, the record does not even begin to support a conclusion that the District is not in a position to provide an appropriate program for Student. Nevertheless, there is little time before the start of the 2017-18 school year, and the parties' respective and opposing positions reflect little likelihood that they would be able to set aside their differences and meet collaboratively to reach a consensus in advance of the upcoming 2017-18 school year. In addition, such a directive could result in a new due process complaint and ensuing hearing sessions with continued uncertainty for Student and the parties. Therefore, as a practical matter, sending the parties back to the drawing board, so to speak, does not appear to be a realistic option for the fall of 2017.

Accordingly, evaluation of the Parents' claim for public funding for placement at Private School for the 2017-18 school year requires a review of the May 2017 IEP.¹³ Unfortunately, there can be no question that the May 2017 IEP suffers from the same flaws as the very similar April 2016 revised IEP, and it must be considered to not offer FAPE for the very same reasons and under the same analysis. In addition, it is quite telling that the IEP offered more than one year after the April 2016 revision contained only limited substantive changes and instead focused on helping Student make the transition to the middle school.

The District contends that there was no need to revise or update the IEP because little had changed in Student's abilities and functioning, particularly in the areas of learning disability, and that neither of the private evaluations provided information that warranted any revision.¹⁴ However, Student was one year older and had completed a full year of educational programming at Private School. It is insupportable to assume that Student's needs remained the same one year

¹³ The District did make argument on whether that IEP was appropriate. (District's Closing at 21-24)

¹⁴ District's Closing at 9.

later, particularly since insufficient consideration had been given to Student's present levels and potential for growth. Moreover, while the District did make efforts to attempt to provide a sample schedule and incorporate the Wilson Reading Instruction that it recommended, its proposal was for only half of the instruction that was included in the SDI unless the Parents opted for some other unknown class scheduling. Longstanding case law has recognized that "a child's entitlement to special education should not depend upon the vigilance of the parents." *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). It follows that, in this case, one cannot require the Parents to make programming decisions that would ensure provision of Student's necessary special education programming.

The Parents have expressed a willingness to have Student return to the District. (N.T. 735) Even without that acquiescence, this hearing officer agrees that it is crucial for Student to be reevaluated by the District again in the spring of 2018 and for the IEP team to develop a program for the 2018-19 school year, particularly in light of the parties' mutual interest in returning Student to public school. The attached Order will include specific direction to the District to conduct an evaluation to inform the IEP team that shall thereafter meet to consider programming for the following school year. That directive also is made in recognition of the fact that Student will require careful planning to transition back to the District and that developmentally such should ideally be accomplished sooner rather than later (*see, e.g.*, N.T. 326-29, 442-43).

For all of these reasons, the District shall be ordered to reimburse Parents for, or directly provide, tuition to Private School for the 2017-18 school year.

IEE REIMBURSEMENT

The final issue is whether the Parents should be reimbursed for the IEE and the second

private psychologist's report detailing her observations at Private School and the District in December 2016. When parents disagree with a school district'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). Ordinarily, following a parental request for an IEE, the LEA must either file a request for a due process hearing to establish that its evaluation was appropriate, or ensure that an IEE is provided at public expense. 34 C.F.R. § 300.502(b)(2). Here, the Parents did not make any such request of the District, but rather obtained the private evaluations and sought reimbursement after the fact. In this circumstance, the analysis of the appropriateness of the District's evaluation is essentially the same. However, one element in considering whether a parent is entitled to an IEE at public expense is his or her disagreement with a school evaluation.

In conducting the evaluation, the law imposes certain requirements on LEAs to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

- (i) Whether the child is a child with a disability under § 300.8; and
- (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. §§ 300.304(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). 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).

This hearing officer concludes that the District’s ER met all requisite criteria, including, *inter alia*, using a variety of assessments of all areas of suspected disability to comprehensively provide relevant information about Student. It must also be noted that there is no evidence of record suggesting that the Parents had, or expressed, any disagreement with the District’s ER. While they accurately note that disagreement is not necessarily a requirement in all cases,¹⁵ here, there is nothing in the IEE to suggest that the private neuropsychologist was provided with the District’s ER; on the contrary, the IEE did not include any information from the District or even from Private School, much less contradict the ER’s conclusions. In addition, the BASC-2 rating scales were only obtained from the Parents, and the only mention of previous evaluations was to one in 2009 by the local Intermediate Unit in addition to the private neuropsychologist’s own from 2014. Furthermore, the results, conclusions, and recommendations in the IEE, including

¹⁵ Parents’ Closing at 30 (citing *Warren G. v. Cumberland County School District*, 190 F.3d 80 (3d Cir. 1999)).

Student's underlying disabilities, are not inconsistent with those in the ER.

With respect to the Parents' contention that the IEE provided information on Student's grade level performance that should have been incorporated into the goals in the 2017 IEP, this hearing officer cannot agree; grade equivalencies derived from standard scores on an achievement test may yield useful information, but do not identify the grade level on which a student is actually performing.¹⁶ Finally, the IEE report was not shared with the District as part of the process of its development of an IEP for Student, but rather was obtained well after the Parents decided that Student would remain at Private School for the 2016-17 school year. *See L.M. ex rel. M.M. v. Downingtown Area School District*, 2015 U.S. Dist. LEXIS 49336 *75, 2015 WL 1725091 (E.D. Pa. 2015) (denying reimbursement of an IEE that was not pursued as part of the collaborative IEP process). While the IEE warranted consideration by the IEP team, the law does not support reimbursement for its cost.

During the hearing, the Parents did challenge the District's failure to conduct an FBA when completing its ER. Simply put, the evidence does not support a conclusion that such an assessment was necessary. Student was not attending school in the District, and there is no indication that anyone at Private School, or even the Parents' private psychologists, recommended an FBA in any environment. While Student certainly exhibited manifestations of Student's disabilities, particularly ADHD, the evidence is not preponderant that an FBA was necessary as part of its April 2016 ER.

Next, the report of the second private psychologist is not a true special education

¹⁶ *See* Parents' Closing at 14-15, 19. Grade-level scores are a type of developmental score that must be interpreted cautiously and carefully, as they can be misleading for many reasons. Salvia, J., Ysseldyke, J., & Bolt, S., *Assessment in Special and Inclusive Education* (11th ed. 2010) at 40-41; Sattler, J. M., *Assessment of Children: Cognitive Applications* (5th ed. 2008) at 104-106.

evaluation within the meaning of the regulations permitting an IEE at public expense. The report itself notes that no assessments were conducted, and that it was limited to “feedback about the[] abilities [of the District and Private School] to accommodate [Student’s] needs” based on her observations of the classroom in each building. (J-3 p. 1) While her testimony about those two observations and resulting report provided some objective insight into both placements,¹⁷ such as in contrasting the use of Learning Ally in each, this hearing officer cannot conclude that, in this case, the report of those observations is the type of independent evaluation for which a parent may be reimbursed under the IDEA.

Finally on this issue, the Parents contend that the District’s failure to incorporate their private evaluations into an evaluation report or IEP reflects a refusal to consider those reports.¹⁸ The IDEA only requires consideration of privately obtained evaluations, however, and not adoption of any conclusions or recommendations set forth therein. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(c). The District did just that, noting same in the February 2017 IEP. In any event, certainly the IEP team that convenes in the spring of 2018 should consider all evaluations by both private and District professionals in developing a program for Student for the [2018-19] school year.

As a final matter, the Parents’ claims having been fully discussed under the IDEA, and the same conclusions are reached under Section 504 with no further discussion necessary.

¹⁷ The FAPE conclusions were reached for the reasons set forth in the Discussion section of this decision. The evidence regarding the match student, including concerns about whether that student was sufficiently similar in presentation and abilities to Student, was of limited value, since every child is different and it would be speculative to glean an adequate understanding of how the District would have implemented Student’s special education program from that single observation.

¹⁸ Parents’ Closing at 23.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did not offer FAPE for the 2016-17 or 2017-18 school years; and that the Parents must be awarded reimbursement for tuition to Private School for both school years. The Parents will not be awarded reimbursement for the private evaluations they obtained. Finally, the parties will be directed to cooperate in conducting an evaluation of Student in the spring of 2018 and development of a program for the 2018-19 school year.

ORDER

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

1. Private School was not the pendent placement as of the time of the April 2016 draft IEP or at any time prior to the end of the 2016-17 school year.
2. The Parents are entitled to, and the District is ordered to provide, reimbursement for Student's tuition for Private School for the 2016-17 school year. Within thirty calendar days of receipt of an itemized invoice(s) for those expenses, the District shall issue reimbursement in full to the Parents.
3. The Parents are entitled to, and the District is ordered to provide, reimbursement for or direct payment of Student's tuition for Private School for the 2017-18 school year. Within thirty calendar days of receipt of an itemized invoice(s) for those expenses, the District shall issue reimbursement in full to the Parents or direct payment to Private School.
4. The Parents are not entitled to reimbursement for their private evaluations, specifically the 2016 IEE and second private psychologist's report, and the District is not required to take any further action with respect to those expenses.
5. The parties are directed to cooperate in a reevaluation of Student at the start of the District's second semester of the 2017-18 school year, and subsequent development of a special education program for Student for the fall of the 2018-19 school year no later than April 15, 2018.
6. Nothing in this decision and order should be read to prevent the parties from mutually agreeing to alter any of the terms of this decision and Order.

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
HEARING OFFICER
ODR File No. 18898-1617KE