

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

Pennsylvania Special Education Hearing Officer
Final Decision and Order

Closed Hearing

ODR File Number

22380-18-19

Child's Name

L.E.

Date of Birth

[redacted]

Parents

[redacted]

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Hearing Officer

Cathy A. Skidmore, Esquire

Date of Decision

1/31/2020

INTRODUCTION

The student (hereafter Student)¹ is a mid-teenaged student residing in the Methacton School District (District) who currently attends a private school² at the option of the Parents. There is no dispute that Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).³ In June 2019, Student's Parents filed a Due Process Complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA, Section 504 of the Rehabilitation Act of 1973,⁴ and the Americans with Disabilities Act (ADA),⁵ as well as the federal and state regulations implementing those statutes. The Complaint was amended in September 2019.

The case proceeded to a hearing⁶ at which the parties presented evidence in support of their respective positions. The Parent challenged various aspects of the District's programming, as offered and implemented, throughout the time period in question, seeking compensatory education and tuition

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

² Ax explained more fully below, the private school serves as an alternative education setting.

³ 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).

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

⁵ 42 U.S.C. §§ 12101-12213.

⁶ References to the record throughout this decision will be to the Notes of Testimony (N.T.), Parent Exhibits (P-) followed by the exhibit number, School District Exhibits (S-) followed by the exhibit number, and Hearing Officer Exhibits (HO-) followed by the exhibit number. The pages of P-24 explicitly referenced at the hearing (three of which were cited in the Parents' closing) have been extracted as HO-9, which is hereby admitted (see N.T. 1478-79). Citations to duplicative exhibits may not be to all. References to Parents in the plural will be made where it appears that one was acting on behalf of both.

reimbursement. The District maintained that its special education program, as offered and implemented, was appropriate for Student and that no relief was due.

Following careful review of the record in its entirety and for the reasons set forth below, the claims of the Parents cannot be sustained.

PROCEDURAL HISTORY

- A. The Parents originally filed their Complaint in June 2019 challenging the program implemented by the District throughout Student's tenure there⁷ in addition to its proposed program for the 2019-20 school year, seeking various forms of relief. Among the remedies sought was a pendency determination for the 2019-20 school year.
- B. A hearing session convened in August 2019 which, after a conference call, was limited to the issue of pendency. A ruling followed concluding that the pendent placement was the District's proposed program at its high school. (HO-5.)
- C. The Parents thereafter filed an Amended Complaint that sought the additional remedy of tuition reimbursement for a privately secured placement for the 2019-20 school year, and omitted the pendency claim.
- D. Various filings with respect to the scope of the claims culminated in a ruling that granted the District's Motion to Limit, thereby confining the time period at issue to the two-year period immediately preceding the date of the original Complaint and continuing through the 2019-20 school year. (HO-7.)

⁷ Student began attending school in the District in the fall of 2010. (S-1; S-2.)

- E. At the start of the second hearing session (following the pendency ruling), the Parents sought to raise new claims that were not in either Complaint, and the District objected. Some of those were withdrawn, but the new claims that were not withdrawn were not permitted to proceed based on 20 U.S.C. § 1415(f)(3)(B) and 34 C.F.R. § 300.511(d).⁸ (N.T. 164-83.)

ISSUES

1. Whether Student was denied FAPE by the District in any respect between June 2017 and April 2018;
2. If Student was denied FAPE by the District, is Student entitled to compensatory education;
3. Whether the District's proposed program for the 2019-20 school year was appropriate for Student; and
4. If the District's proposed program for the 2019-20 school year was not appropriate, should the Parents be awarded reimbursement for tuition and related expenses in connection with the privately secured placement?

⁸ Of particular concern was the attempt to challenge, eighteen months later, the manifestation determination from April 2018 that resulted in an executed agreement. (See, e.g., HO-5.) The IDEA provides for expedited hearing and decision timelines for challenges to manifestation determinations. 20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c). "The purpose of expediting the due process hearing related to a disciplinary decision is to ensure that the matter is resolved promptly and that the child's educational program is not adversely affected by undue delays." *Letter to Snyder*, 67 IDELR 96 (OSEP 2015). The Office for Special Education Programs has explained on more than one occasion that the expedited timelines are not subject to any exception or extension. See, e.g., *id.*; Questions and Answers on IDEA Part B Dispute Resolution Procedures at Question E-7 (OSEP 2013). The Parents have not, to this hearing officer's knowledge, filed a Complaint specifically challenging the April 2018 manifestation determination. In any event, the expedited hearing process is available to challenge a manifestation determination/placement decision on disciplinary grounds; here, the Parents expressly do not contest Student's placement in the alternative education setting, voluntarily maintaining that placement for the current school year.

FINDINGS OF FACT

1. Student is a mid-teenaged resident of the District. Student is eligible for special education on the basis of a Hearing Impairment and an Other Health Impairment. (S-30.)
2. Student's hearing impairment is due to a condition with which Student was born. Student has some hearing loss and uses hearing aids. (N.T. 865; S-1.)
3. Student also has hypotonia that may be caused by another congenital condition. (S-1.)
4. The Parents have historically had some concerns that Student exhibits developmental immaturity compared to peers, including in social situations. (N.T. 319-20, 329, 694; S-10 at 22; S-19 at 17-20; S-25 at 17-18; S-26 at 4-5; S-32 at 21.)
5. Student has presented with a relative weakness in processing speed on measures of cognitive ability throughout Student's school-age years. (S-6 at 13-17; S-12 at 4-6.)
6. Student has historically demonstrated difficulty with focusing on and maintaining attention to tasks. By the fall of 2014, rating scales reflected concerns with Attention Deficit Hyperactivity Disorder (ADHD) symptoms both at home and at school. Sensory processing and self-regulation difficulties are a significant contributing factor. (S-6 at 3, 14, 17, 19; S-12 at 8, 9, 11-12, 15, 16-19; S-12; S-13 at 13.)

Early Educational History through 2016-17 School Year

7. Student was evaluated at a young age by the local Intermediate Unit and found to be eligible for early intervention services based on Student's hearing impairment and gross motor weaknesses.

When Student was in preschool, Student was also determined to have speech/language deficits. (S-1.)

8. Student was eligible for special education in the District upon enrollment in school-age programming, and was provided with services pursuant to Individualized Education Programs (IEPs) beginning in the fall of 2010 throughout the time period prior to the scope of the claims in this matter. Student was also evaluated by the District on several occasions during those years. (S-2; S-4; S-5; S-6; S-7; S-8; S-10; S-13; S-14; S-15; S-16; S-17.)
9. For a September 2014 Reevaluation Report (RR), the Parents reported that Student spent significant time on homework. They continued communicating with the District about homework challenges over the 2014-15 school year. (N.T. 871-72; S-12 at 2.)
10. An IEP was developed at a meeting in May 2017. At the time, Student reportedly needed to be reminded to bring Student's audio equipment⁹ to class and use it consistently. Needs identified in this IEP were for retention of mathematics concepts and skills, continued development of coping and self-advocacy skills, improved auditory comprehension skills, and timely completion of tasks. (N.T. 853-54; S-18.)
11. Annual goals in the May 2017 IEP addressed vocabulary and listening comprehension as well as self-advocacy and coping skills (including consistent use of the audio equipment). Program modifications and items of specially designed instruction were for: preferential seating near the teacher and away from noise; teacher and student use of the audio equipment and/or repetition of verbal discussion; monitoring of auditory comprehension; self-advocacy

⁹ This equipment is an FM system, not Student's hearing aids.

for hearing support; pre-teaching and review; vocabulary support and instruction; prompting and redirection as needed; extra time; notice of changes and transitions in the schedule; assignment accommodations (chunking, review, and checks for understanding); test accommodations (extra time and small group setting); a set of books and copies of notes and study guides; co-taught classes; and adaptive physical education with physical therapy consultation. Student's program was hearing and physical support at an itinerant level. (S-18.)

12. At the May 2017 IEP meeting, the Parents asked for a full reevaluation of Student for the transition to the intermediate school. They were disappointed that the reevaluation would not be completed until the fall. (N.T. 852-53, 854-55, 857-58; S-19 at 1.)

2017-18 School Year (Seventh Grade)

13. The District issued a request for consent to a reevaluation in late November 2017. The Parents promptly provided permission. (S-19 at 1-3.)
14. Student struggled with homework during the 2017-18 school year at home, with the Parents spending significant amounts of time assisting Student in completing it. The Parents had requested the reevaluation in May 2017 in part because of the time Student was spending so much time on homework. (N.T. 105, 856-57, 869, 871-72; P-24 at 477-78.)
15. Student's audio equipment was used by teachers during the 2017-18 school year when Student had it available, and sometimes by other students. Student did not have the audio equipment available in classes at all times. When it was not available, teachers used other means to ensure that Student had access to

- audio content including directions. (N.T. 288-89, 304-06, 311, 332, 354-55, 383-84, 487, 504, 520-21, 524, 544-45, 558-59, 1088, 1092, 1112-14, 1122.)
16. The hearing support teacher checked in regularly with Student's teachers during the 2017-18 school year, providing instruction on use of the audio equipment and observing some of Student's classes on an ongoing basis. She also checked in with Student and reminded Student about using the audio equipment. (N.T. 288-89, 302-04, 310-11, 321, 323-24, 354-56, 359-60, 364, 505-06, 510, 523, 545, 1028-29, 1078-79, 1094.)
 17. Student typically took tests and quizzes in the alternative small group setting during the 2017-18 school year. (N.T. 294.)
 18. Student would self-advocate during the course of the 2017-18 school year, more toward the end than the beginning. (N.T. 302.)
 19. Teachers at the intermediate school were grouped into teams that met almost daily during the 2017-18 school year to discuss any students about whom they had concerns. Student was discussed by Student's team from time to time, including the non-use of the audio equipment and falling grades on one occasion. The team did not determine that these circumstances rose to the level of concern of taking action. (N.T. 324-27, 378, 557-58, 615-16, 1081, 1118.)
 20. Student's seventh grade teachers did not observe Student to exhibit emotional or academic difficulties that were unusual for a student of that age. (N.T. 321-22, 326-27, 336-37, 368, 373-74, 376, 379-81, 509-11, 515-17, 559-62, 565, 1021-24, 1027-28, 1030-32, 1067, 1072-74, 1076-77, 1079-80, 1110-12, 1114-15, 1118, 1132.)

21. Student at times exhibited difficulty following directions in seventh grade, particularly with long term assignments. Student benefitted from chunking of those assignments and extra time. (N.T. 502-03, 508.)
22. Student had co-taught English and mathematics classes during the 2017-18 school year, with both a general and special education teacher in the classroom. Other classes had a full time instructional assistant. (N.T. 306, 498, 502-03, 513-14, 544, 548-49, 556-57, 1109-10, 1132-33.)
23. Student had a co-taught reading class during the 2017-18 school year with a special education teacher and a reading specialist. Student's instructional reading level that school year was not below expectations and was not a concern. (N.T. 1021, 1023-24, 1067, 1072-74, 1077-78.)
24. Student was provided Title I mathematics support during the 2017-18 school year. (N.T. 549.)
25. Student participated in an extracurricular activity during the 2017-18 school year that required practice on a daily basis after school for a two month period (January through March) and less frequent practice earlier in the school year. (N.T. 376-77, 983, 1031-34; S-35.)
26. The District has a policy that, in order to participate in extracurricular activities, students must not have a failing grade in any course. If a student does have a failing grade, he or she must make up work and earn a passing grade in order to participate. (N.T. 348, 379, 534.)

27. The Parents had concerns about Student's withdrawn behavior that occurred in January and February 2018. They did not share those concerns with the District at the time. (N.T. 94-95, 863, 938-39.)
28. In February 2018 Student was involved in an incident wherein Student created a social media account [redacted] [involving] threats against other named students [redacted]. The incident was a violation of School Board Policy. The District learned in late March that Student was responsible for the account and the threat, and Student was suspended. (N.T. 110-11, 608; S-20 at 7, 54-56; S-40 at 63.)
29. By all accounts, all who knew Student were quite surprised that Student engaged in the behavior relating to the February 2018 incident. (N.T. *passim*.)

2018 Reevaluation

30. The District issued a reevaluation report (RR) on March 9, 2018. (N.T. 397; S-19.)
31. Parent input into the March 2018 RR reflected concerns with organization, maintaining attention to task, and need for repetition, as well as expressive language skills. (S-19 at 4-5, 7.)
32. The March 2018 RR summarized information from previous evaluations, classroom-based assessments, and state and local assessments. (S-19 at 8-9.)
33. Teacher input into the March 2018 RR reflected inconsistent performance especially on tests and quizzes across classes. Grades were generally below expectations and some concerns were noted with respect to attention, organization, effort, and following directions, but the IEP provisions were described as effective.

- Student had also either failed to provide, or expressed opposition to, the audio equipment in some classes. (S-19 at 9-13, 24, 26.)
34. Assessment of cognitive ability for the March 2018 RR (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) yielded scores in the average range¹⁰ on the Working Memory Index; in the low average range on the Verbal Comprehension and Fluid Reasoning Indices; and in the very low range on the Visual Spatial and Processing Speed Indices. The Full Scale IQ (78) was in the very low range. Overall, the WISC-V scores indicated uneven development of cognitive skills with variability across subtests. (S-19 at 17-20.)
 35. On an assessment of academic achievement (Wechsler Individual Achievement Test – Third Edition (WIAT-III)) for the March 2018 RR, Student earned average- to superior-range scores across subtests on all composites: listening comprehension, reading, written expression, and mathematics. Areas of relative weakness were indicated with respect to reading fluency and reading comprehension as well as mathematics problem solving. (S-19 at 21-23.)
 36. Student completed the Piers-Harris Children’s Self-Concept Scale for the March 2018 RR. Student’s results were generally positive and did not suggest concerns with self-concept. (S-19 at 23.)
 37. Student’s auditory functioning was also assessed for the March 2018 RR, with results reflecting difficulty understanding spoken language when background noise was evident. Although the use of the audio equipment improved that understanding, a conclusion with which Student agreed, Student appeared reluctant to the

¹⁰ The qualitative designations for the ranges are provided by the test publisher.

- hearing support teacher to use it more consistently. Other areas of weakness with audio input were identified (self-advocacy skills, vocabulary and language comprehension, listening comprehension). (S-19 at 24-26.)
38. Physical therapy evaluation for the March 2018 RR reflected continued need for adaptations and modifications to the curriculum to address concerns with safety including head injury that could impact hearing ability and hypotonia. (S-19 at 14-16.)
 39. The March 2018 RR reflected strengths and needs for Student, with the latter summarized as follows: organization, prompting to remain on task, repetition, use of assistive listening equipment, self-advocacy, vocabulary and language comprehension, following directions, and consistency with quiz and test scores, as well as effort and work completion. (S-19 at 27.)
 40. In the March 2018 RR, the District school psychologist recommended that Student be provided with more ongoing monitoring so that additional academic and organizational support, as needed, could be implemented. However, the District school psychologist did not conclude that Student met criteria as a student with Other Health Impairment or a Specific Learning Disability. (N.T. 402-03, 407, 410, 453-57, 459-60, 570-72; P-26 at 7; S-19 at 28-29.)
 41. Additional recommendations in the March 2018 RR were for continuation of special education services "in [Student's] current educational placement," assignment of a District case manager who would meet with Student "during eighth period," a decrease in physical therapy consultation, twice-weekly hearing support services, and parental encouragement of reading. (S-19 at 28-29.)

42. The District school psychologist explained the results of the March 2018 RR at a meeting on April 4, 2018. (N.T. 400.)

Manifestation Determination and Discipline

43. A manifestation determination review was conducted on April 4, 2018 with respect to the February 2018 incident. The team determined that the behavior in question was not a manifestation of Student's disability, but contemplated evaluation of social/emotional functioning to include a Functional Behavior Assessment (FBA). The Parents did not sign the manifestation determination worksheet as agreeing or disagreeing at the meeting. (N.T. 111, 121, 465, 613-14, 880, 1116-17, 1126-27; S-20 at 55-60.)
44. The parties executed a written agreement in April/May 2018 that included a concession that the February 2018 was a violation of the District's disciplinary code. The agreement also provided that Student would attend an alternative education setting (AES) for the remainder of the 2017-18 school year and the entire 2018-19 school year, and indicated a reevaluation by the District in the spring of 2019. That agreement further included a provision for pendency for the 2019-20 school year in the District, and not at the AES, if the parties could not agree on a program for the 2019-20 school year. (HO-5; S-20 at 8-13; S-21)
45. A new IEP was also developed on April 3, 2018. That IEP noted the recommendation for additional monitoring and support of Student and incorporated results of the March 2018 RR. Annual goals addressed vocabulary and language comprehension, listening comprehension, self-advocacy and coping skills (to include consistent use of the audio equipment), and monitoring of reading

- comprehension and mathematics computation. Program modifications and items of specially designed instruction were carried over from the previous IEP in May 2017, and some organizational and academic support was added. (S-20 at 70-105.)
46. Another meeting of the IEP team convened in early May at which time Student's successful transition to the AES was discussed. (S-22.)

2018-19 School Year (AES)

47. In July 2018, the District sought and the Parents provided consent to conduct another reevaluation to include assessment of social and emotional functioning. (S-24.)
48. Another RR issued in October 2018 to reflect the new social/emotional assessments. This RR reported the results of parent, teacher, and student forms of the Achenbach System of Empirically Based Assessments; the Beck Youth Inventories; and the Sentence Completion Test, in addition to observation by the District school psychologist and various sources of other input. No significant concerns with social/emotional functioning were revealed, although Student was possibly at-risk for difficulty with interpersonal relationships due to some aberrant behavior and lack of remorse. (S-25.)
49. An IEP meeting convened in December 2018. (S-27.)
50. Teacher input into the December 2018 IEP included the viewpoint of an AES teacher that a larger school environment would be concerning because Student would need more accommodations than at the AES and the possibility that Student would isolate self, something that Student was already doing in the AES. (S-27 at 13-14.)

51. Probes of reading comprehension and mathematics reported in the December 2018 IEP reflected that Student was not meeting expectations on seventh grade reading materials but was instructional at grade level in mathematics. (S-27 at 17-18.)
52. Needs identified in the December 2018 IEP were: quiet work environment; written communication skills; repetition; coping strategies and self-advocacy skills; vocabulary and language comprehension; listening comprehension across environments; following directions; extra time for processing and task completion; prompting for attention; and use of appropriate audio equipment. (S-27 at 27.)
53. Annual goals in the December 2018 addressed listening comprehension at grade level; reading comprehension at a seventh grade level; self-advocacy skills for hearing support; and coping skills. Program modifications and items of specially designed instruction were largely unchanged from the April 2018 IEP with the addition of counseling. Student's program was one of itinerant hearing support/ emotional support delivered at the AES. (S-27.)

Independent Educational Evaluation

54. The Parents obtained a private neuropsychological evaluation (referenced as an independent educational evaluation or IEE) in November 2018. The private neuropsychologist re-administered the WISC-V at that time, reflecting both Full Scale IQ and General Ability Index scores in the low average range (SS 85 and 89, respectively) while noting the possibility of practice effect impacting the scores. On the Test of Memory and Learning – Second Edition, Student scored in the average- to high average range across domains. (S-26 at 3-4, 9.)

55. The IEE also reported on Student's executive functioning and processing speed, with notable deficits on measures of processing speed on a variety of tasks assessed. The private neuropsychologist did not diagnose ADHD but suggested that ADHD nonetheless described Student's deficits. (S-26 at 4-5, 10.)
56. Assessment of fine motor speed for the IEE also revealed weaknesses. (S-26 at 4, 5, 10.)
57. Assessment of social/emotional/behavioral functioning for the IEE (Behavior Assessment System for Children – Second Edition) yielded no concerns by the Parents, teacher, or Student. (S-26 at 11-12.)
58. The IEE provided a number of educational recommendations for Student's programming: reading, writing, and mathematics support; hearing support; checks for understanding; repetition and review; multi-modal instruction; counseling; monitoring of attention; clear directions; and accommodations and modifications to expectations (including test and assignment accommodations, study guides and notes, preferential seating); check-ins; and occupational and physical therapy. She also recommended small class settings with individualized support to include review and re-teaching when needed, and a slow pace. (S-26 at 5-7.)
59. The Parents provided the IEE to the District in January 2019, and it promptly issued a request for the Parents' consent to a new reevaluation to consider that IEE. The Parents immediately provided permission. (S-29; S-30 at 5.)
60. The District issued a new RR in March 2019. (S-30.)
61. Following review of the IEE, the District school psychologist determined that Student met criteria for eligibility under the

classification Other Health Impairment because the private psychologist concluded that Student had ADHD symptoms that impacted learning. The recommendations in the March 2019 RR were not changed with the exception of one addition: IEP team discussion of suggestions in the IEE for learning and social-emotional development. (N.T. 472-73, 477-78; S-30.)

62. The March 2019 RR specifically included a recommendation for continued placement that was intended to reflect services, not location. The District school psychologist understood that the IEP team would determine placement. (N.T. 422, 433, 462-63; S-30.)

Proposed Program for 2019-20 School Year (Ninth Grade)

63. An IEP meeting convened in April 2019 and a new IEP was developed. At that time, the team discussed Student returning to the District high school in the fall of 2019, including strategies for the transition such as requiring Student to limit travel through the high school building. (N.T. 578, 589-91, 625-26, 628, 630, 803, 1404, 1407-08; S-31.)
64. Parent concerns at the April 2019 IEP meeting included the size of the high school, Student's class sizes, Student's readiness to return, physical education, and lunch. (S-31 at 5-8.)
65. Teacher input and other information were updated for the April 2019 IEP. Written communication was described anecdotally as "less robust" than verbal communication. (S-31 at 18.) Teacher recommendations at the time included small classes and access to a counselor. (S-31.)
66. Needs identified in the April 2019 IEP were: written communication skills; coping strategies and self-advocacy skills; vocabulary, language, and listening comprehension across

environments; following directions; reading comprehension; interpersonal skills; core strength; and use of appropriate equipment. (S-31 at 33.)

67. The April 2019 IEP included post-secondary transition planning with Student's goals for attending a four-year college, obtaining competitive employment, and living independently. This section of the IEP provided for social/emotional skills training, organizational and reading comprehension support, and exploration of post-secondary areas of interest and independent living. (S-31 at 35-36.)
68. Annual goals in the April 2019 addressed listening comprehension at grade level with 90% accuracy; reading comprehension at a seventh grade level with 80% accuracy; written expression (scoring 3 or better on a rubric assessing five domains for a multiple paragraph writing with no baseline yet obtained); self-advocacy skills for hearing support (identifying a specified number of strategies to improve auditory comprehension); interpersonal skills including conflict resolution and identifying coping skills in counseling sessions at a specified level; and self-advocacy for specified needed accommodations (closed captioning, extra time on assignments and tests, and repetition of directions/instruction) with 85% accuracy. (S-31 at 42-47.)
69. Program modifications and items of specially designed instruction in the April 2019 were for: preferential seating near the teacher and away from noise; teachers facing Student and ensuring Student's attention during instruction; teacher and student use of the audio equipment and/or repetition of verbal discussions; monitoring of auditory comprehension; self-advocacy for hearing support; pre-teaching and review; vocabulary support and instruction; repetition

- of directions; closed captioning; direct instruction in reading comprehension; check-ins for organizational support with the case manager; prompting and redirection as needed including for written expression; counseling; extra time as test and assignment accommodations; copies of notes and study guides; limitation on physical activity; and adaptive physical education with physical therapy consultation. That section of the IEP also provided for a tour of the high school, a meeting with the high school team at the end of the 2018-19 school year, individual scheduling to limit distance between classes, and meeting with the counselor before the start of the 2019-20 school year. (S-31 at 48-52.)
70. Related services in the April 2019 IEP to begin in the fall of 2019 included weekly individual hearing support in addition to consultation, audiological services once per semester; counseling three times per week, physical and occupational therapy consultation. District staff support including significant consultation were also provided. (S-31 at 53-55.)
71. Student was determined to be eligible for extended school year services for the summer of 2019 in the April 2019 IEP, to address academic and social skills as well as counseling. (S-31 at 56.)
72. Student's program was identified as hearing and emotional support at an itinerant level in the April 2019 IEP. (S-31 at 57-58.)
73. The IEP team met again in late May 2019 and discussed Student's return to the District high school. The meeting was held at the high school so that a number of its staff could and did attend that meeting. (N.T. 99-101, 128-30, 594, 898-99, 1139-40, 1404, 1410; S-32.)

74. The May 2019 IEP revised the April 2019 IEP by adding a few new program modifications and items of specially designed instruction: extra sets of textbooks at home and in the classroom; modified science and social studies curricula; an online physical education course; and a team meeting at the start of the school year. Student's proposed program remained itinerant hearing and emotional support but Student would be in learning support English and mathematics classes. (S-32.)
75. An IEP meeting convened in August 2019 following the Parents' ten-day notice of their intention to seek tuition reimbursement for the AES for the 2019-20 school year. At that meeting, the team again discussed programming should Student return to the District high school, including the physical location of Student's classes, the majority of which were in close proximity (the same level of one wing of the building). (N.T. 635, 778-79, 1139-40, 1150-51, 1158, 1323-26, 1333-35, 1338, 1359, 1404; HO-6 at 11.)
76. At the August 2019, the team also discussed additional evaluations and suggestions for Student after returning to the District high school, including a SETT meeting¹¹ and physical and occupational therapy evaluations, given the Parents' concerns with Student's ability to acclimate to that environment. (N.T. 586, 802-04, 1175-76, 1200-01; S-39.)
77. At the August 2019 meeting, the team discussed preparing Student for questions about the February 2018 incident and where Student had been attending school. Restorative practices would be made available if necessary; and referral to the Student Assistance Program and the availability of behavioral health services were also

¹¹ SETT is a process for considering the Student, Environment, Tasks, and Tools to determine possible assistive technology services.

discussed as an option. (N.T. 1156-57, 1174-75, 1409, 1412-18, 1460-61, 1469-70; S-37.)

78. The August 2019 IEP specified that Student's classes in science, social studies, mathematics, and English would be co-taught. (S-36 at 15.)
79. The post-secondary transition section of the August 2019 IEP added provisions for quarterly meetings with the transition coordinator, and an introduction to District tools for exploring career and independent living options. The school counselor works with the transition coordinator. (N.T. 1315-18, 1342-43; S-36 at 41-43.)
80. The August 2019 IEP added the audio equipment to the list of self-advocacy accommodations. (S-36 at 54.)
81. The August 2019 IEP slightly revised some of the program modifications/items of specially designed instruction due to the timing of Student's non-attendance in the fall,¹² and to add the following: allow wait time for processing, gradual addition and chunking of homework since Student had not had homework at the AES; a meeting with the school counselor; a peer mentor; and explicit instruction in written expression, social skills, and organization and study skills. (S-36 at 55-61.)
82. The August 2019 IEP added a communication plan to identify the assistive devices and services offered to Student. (S-36 at 60-70.)
83. The proposed program in the August 2019 IEP was for itinerant hearing, emotional, and learning support. (S-36 at 65-66.)

¹² The August 2019 IEP also added a provision for immediately obtaining a baseline for the written expression goal.

84. Student would have had a special education algebra class with a class size of approximately ten students, all of whom had IEPs. In addition to the special education emotional support teacher, an instructional assistant (who is a special education teacher) is in the classroom. The class provides direct instruction in small groups based on skill levels, and the requirements for assignments are less demanding than in the regular classroom with most assignments completed in class. (N.T. 205-06, 208, 220, 240-41, 260, 602, 1183, 1185, 1205.)
85. Student would have had a daily study hall with the emotional support teacher (who would have been Student's case manager) to provide a check-in including any needed assistance with assignments as well as organization and planning. There is a full-time instructional assistant in the classroom. That teacher would also monitor Student's transition returning to the high school and would be available to Student at any time. N.T. 208, 212-13, 235-36, 238-40, 246-47, 250, 260-61.)
86. Student's case manager would have had daily regular communication with the mental health specialist and the school (guidance) counselor. A clinical team meeting occurs each week at the high school, with the emotional support teacher, school psychologist, school nurse, and others including the mental health therapist who communicates with all staff for those meetings. (N.T. 255-56, 258-60, 1153-54, 1229-33, 1240-42, 1290, 1313, 1326-27, 1421-22.)
87. Student would have had daily access to the mental health specialist who has had training in trauma-informed counseling. Student could meet with that person or the school counselor at any time. (N.T. 248-49, 275, 1152-53, 1225, 1230, 1241-46.)

88. Student would have had a “prep for success” class, a regular education structured study hall that focuses on organizational and study skills and provides an opportunity for check-ins with a teacher. The class meets every other day. (N.T. 250-52, 815, 1149-50, 1360-62.)
89. Student’s co-taught classes would have had a general education and a special education teacher. The classes generally have approximately sixteen students who participate in a variety of activities and instruction is differentiated. (N.T. 205, 214-17, 266-67, 611-12.)
90. Student would have participated in an online physical education class due to concerns of the Parents for injury to Student. (N.T. 588, 626-27, 1180-82, 1370-71.)
91. Student would have had options for lunch such as eating in the emotional support classroom rather than the cafeteria. (N.T. 273, 630-31.)
92. The Parents shared a variety of concerns at the August 2019 IEP meeting, and the team discussed them. The August 2019 IEP documented their concerns as for Student’s safety and well-being; and their desire that the IEP include the recommendations in the IEE, and also adhere to the recommendation of an AES counselor that Student remain in a small therapeutic setting. (N.T. 635-38, 798, 860-61, 1140-41, 1150-51, 1157-60, 1228, 1311-13, 1337-38; S-36 at 38-39, 83.)
93. The Parents provided a letter from Children’s Hospital of Philadelphia (CHOP) at the August 2019 meeting in addition to the IEE and the letter from a counselor at the AES. The letter from

CHOP recommended that those of the IEE evaluator be adopted. (N.T. 636-37, 817; S-36 at 83, 85.)

94. The August 2019 IEP included a suggestion for physical and occupational therapy evaluations of Student. (S-36 at 39; S-38.)
95. The District issued a Notice of Recommended Educational Placement for a return to the District high school for the 2019-20 school year, consistent with the August 2019 IEP. (S-36 at 89-93.)
96. The Parents' main concerns with the District's proposed program for the 2019-20 school year is the size of classes and Student's need for therapeutic services. (N.T. 888.)
97. Student has expressed concerns about returning to the District high school and seeing peers who were named in the February 2018 incident. The Parents share those concerns. (N.T. 862-63, 1410-11; P-19.)

The Alternative Program and Placement

98. The AES¹³ is intended for short-term placements for certain students with emotional and/or behavioral needs, and provides a therapeutic environment for its students. (N.T. 807-08, 1401-03, 1433-34.)
99. Student was successfully achieving all goals at the AES for the 2018-19 school year to permit a return to the District. (N.T. 1435.)
100. Approximately twenty-five students attended the AES during the fall of 2019, ranging from eighth through twelfth grades. (N.T. 665-66.)

¹³ The AES also serves as a program of alternative education for disruptive youth (AEDY) for some students. (N.T. 808, 1433.)

101. Students are provided daily instruction in core classes at the AES (reading/language arts, mathematics, social studies, and science). Some special and elective classes are also available, but not extra-curricular activities. (N.T. 668, 670.)
102. During the 2018-19 school year, students participated in group grade-based counseling for forty-five minutes twice daily, and Student also was provided individual counseling for thirty minutes per week at the AES. The AES provides only one session per day of group counseling during the 2019-20 school year. (N.T. 658, 669, 691, 1142-43, 1186-87.)
103. Student has not discussed in detail the February 2018 incident with a counselor at the AES. Student has avoided speaking about difficult subjects or feelings. (N.T. 688-89, 697, 701, 703, 705.)
104. Student has not discussed in detail the February 2018 incident with the Parents. (N.T. 862-63.)
105. Classes at the AES are small, generally between three and eight students. (N.T. 657-58.)
106. Student was successful at the AES during the 2018-19 school year. (N.T. 1405, 1408.)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

In general, the burden of proof has been viewed as comprising two discrete elements: the burden of production, and the burden of persuasion. In a case such as this, the burden of persuasion is placed on the party who files the complaint seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Thus, in this case, the burden of persuasion in this case lies with the Parents who

commenced this administrative hearing. Application of this principle, however, is determinative of which party prevails only in those rare cases where the evidence is evenly balanced, sometimes described as in “equipoise.” *Schaffer, supra*, 546 U.S. at 58.

In the review of the record, the testimony of all witnesses and the content of each admitted exhibit were thoroughly considered as were the parties’ comprehensive closing statements. Special education hearing officers, in the role of fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses who testified to be credible, testifying to the best of his or her recollection and without any intention to deceive. Moreover, there was little inconsistency in the testimony that was important to deciding the issues presented; any such variations are attributed to differences in perspective or memory. The weight given to individual witness’ testimony, however, was not equally assigned because some witnesses provided testimony that was more relevant to and probative of the issues. For example, the testimony of the District professionals who worked with Student and had direct experience with what occurred in the school setting is credited over those who testified based on something other than first-hand knowledge; while none of those witnesses are deemed incredible, the testimony of witnesses with first-hand knowledge had more persuasive value when compared to that of those who may have heard different accounts from others. Credibility and weight of the evidence will be discussed further below as necessary.

General IDEA Principles: Substantive FAPE

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

With respect to eligibility, local educational agencies (LEAs) are obligated under the IDEA to locate, identify, and evaluate children with disabilities who are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); see also 22 Pa. Code §§ 14.121-14.125. This principle is commonly referred to as “child find.” Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, students should be evaluated for special education services within a reasonable time after notice of characteristics or behaviors that suggests a disability under the law. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). State and local agencies are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

A “child with a disability” is defined by the statute to mean a child who has been evaluated and identified with one or more of a number of specific disability classifications, and “by reason thereof” needs to be provided with special education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8(a). The IDEA classifications or categories for purposes of this definition are “intellectual disabilities, hearing impairments (including

deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." 20 U.S.C.A. § 1401(3)(A); see also 34 C.F.R. § 300.8(a).

Merely having an identified disability, however, does not automatically mean that a child is eligible for special education, since that is merely one prong of the two-part test. The other step to IDEA eligibility is a determination that the child is in need of special education because of that disability. The term "special education" refers to specially designed instruction which is devised to meet the child's individual learning needs. 34 C.F.R. § 300.39(a).

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

The state, through its LEAs, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP which is "reasonably calculated" to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.' " *P.P. v. West Chester Area School District*, 585 F.3d 727, 729-30 (3d Cir. 2009)(citations omitted). Fairly recently, the U.S. Supreme Court observed that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew*

F. v. Douglas County School District RE-1, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). "A focus on the particular child is at the core of the IDEA." *Id.*, ___ U.S. at ___, 137 S. Ct. at 999, 197 L.Ed.2d at 349-50 (2017)(citing *Rowley* at 206-09)(other citations omitted).

Individualization is the central consideration for purposes of the IDEA. In other words, the crucial and primary focus of a child's IEP is to respond appropriately to the identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, an LEA is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). Rather, the law demands services are reasonable and appropriate in light of a child's unique circumstances, and not necessarily those that his or her "loving parents" might desire. *Andrew F.*, *supra*; *Ridley*, *supra*; *see also Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). In this case, it is also necessary to recognize that a proper assessment of whether a proposed IEP meets the above standard must be based on information "as of the time it was made." *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *see also Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993)(same). However, issues surrounding implementation of an existing program involve ongoing monitoring of the student's individual responsiveness to the IEP, including progress toward IEP goals, in order to make appropriate revisions as may be necessary. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320, 324.

Evaluation Requirements

Substantively, an IEP follows and is based on an evaluation. The IDEA sets forth two purposes of a special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to

“determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i).

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

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

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

(i) whether the child is a child with a disability; and

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

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

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

20 U.S.C. § 1414(b)(2); *see also* 34 C.F.R. §§ 300.303(a), 304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and

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

Least Restrictive Environment

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

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

20 U.S.C.S. § 1412(a)(5)(A); see *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1215 (3d Cir. 1993). The federal Office of Special Education Programs has explained this principle as requiring “first consideration” of the regular education classroom with supplementary aids and services. *Letter to Cohen*, 25 IDELR 516 (OSEP August 6, 1996).

In *Oberti, supra*, 995 F.2d 1204, the Third Circuit adopted a two-part test for determining whether a student has been placed into the LRE as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, be educated successfully within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the child has been included with non-exceptional children to the maximum extent possible. *Id.* Importantly, LRE principles “do not contemplate an all-or-nothing educational system” of regular education versus special education. *Oberti, supra*, 995 F.2d at 1218 (quoting *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1050 (5th Cir. 1989)).

In order to ensure compliance with LRE obligations, LEAs must have available a “continuum of alternative placements” to meet the service needs of children with disabilities. 34 C.F.R. § 300.115(a); see also 22 Pa. Code § 14.145. And, the “continuum” of placements in the law enumerates settings that grow progressively more restrictive, beginning with regular education classes, moving first toward special classes and then toward special schools and beyond. 34 C.F.R. § 300.115; see also 22 Pa. Code § 171.16(c)(specifying an order of priority for educational placements from the regular classroom in a public school when a private school is recommended). However, as noted, the LRE mandate does not contemplate a mere comparison of lesser and more restrictive settings; rather, it begins with the

premise that a child can be educated in the regular education classroom with appropriate supplementary aids and services.

General IDEA Principles: Procedural FAPE

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

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).

Full participation in the IEP process does not mean, however, that LEAs must defer to parents' wishes. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999)(noting that IDEA “does not require school districts simply to accede to parents' demands without considering any suitable alternatives,” and that failure to agree on placement does not constitute a procedural violation of the IDEA); *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002)(explaining that “parents who seek public funding for their

child's special education possess no automatic veto over" an LEA's decision). If the parties are not able to reach a consensus, it is the LEA that must make a determination, with parents afforded procedural safeguards if they do not agree. *Letter to Richards*, 55 IDELR 107 (OSEP 2010); see also 64 Fed. Reg. 12406, 12597 (1999)(same).

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).

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 the obligation to provide FAPE on the same grounds as the issues under the IDEA will be addressed together.

The Parents' Claims

The 2017-18 School Year

The Parents first contend that the District committed significant errors that amounted to a denial of FAPE when it did not identify Student as a disability due to ADHD that was related to processing speed deficits, as well as some weak academic skills. The record does not support a conclusion that a substantive denial of FAPE resulted from these challenges.

It is true that the District committed a procedural error when the reevaluation requested by the Parents was not completed within the sixty day timeline after they requested it, nor did it promptly seek their written permission for that reevaluation. The March 2018 RR should have been completed no later than early November 2017. However, this procedural violation did not significantly impede the Parents' ability to participate in educational decision-making or operate to deny Student FAPE.

Substantively, the Parents contend that the March 2018 RR was not sufficiently comprehensive to develop an appropriate IEP. Here, the record reflects preponderantly that the March 2018 RR met all evaluation requirements, having utilized a variety of assessment tools, strategies, and instruments to gather relevant functional, developmental, and academic information about Student in all areas of suspected disability. Specifically, the District conducted assessment of Student's current cognitive ability and academic achievement; summarized existing assessment data; obtained and reported input from teachers and the Parents; and utilized a self-concept scale completed by Student. Needs were identified in the March 2018 RR to include teacher observations of difficulties with organization and attention/focus, which were consistent with the processing speed scores. Recommendations were made for the IEP team including the addition of a case manager to meet with Student daily. The IEP that followed addressed

all of these needs with increased organizational and academic support. While the timing of the March 2018 RR and subsequent IEP do suggest that completion of the RR earlier in the school year may have resulted in earlier IEP revisions, the March 2018 RR did not yield materially different needs that were not addressed by the May 2017 IEP. In addition, the credible testimony of Student's teachers did not reveal any emotional or academic difficulties throughout the 2017-18 school year, or needs beyond those in the IEP that was implemented, that indicated the presence of additional special education needs.

Subsequent reevaluations and the IEE later reflected the District's agreement with the private neuropsychologist that Student exhibited ADHD symptoms that required intervention. The IEPs that were based on those new reports were replete with provisions for addressing Student's identified needs including attentional and processing speed weaknesses. It should be noted that special education programming must be based upon needs that are identified or should have been identified, and not based on label. And, again, these symptoms were addressed by the prior IEP with its effective related provisions, and did not cause undue concerns by or alarm to Student's teachers when Student was enrolled during the 2017-18 school year. There was no denial of FAPE on this basis.

Next, the Parents challenge the District's implementation of the May 2017 IEP, in large part because Student's audio equipment was not always used. This fact was included in the May 2017 IEP and was well known to the parties. However, the hearing support teacher monitored this trend and provided reminders about its use; and Student's self-advocacy skills improved over the course of the school year. Moreover, the persuasive and collectively consistent testimony of Student's teachers was that they were aware of this circumstance and were able to successfully compensate

through other strategies and provisions in the IEP to ensure that Student was not missing audible content when the audio equipment was not present. Finally, with respect to the Parents' concerns with Student's academic skills, these were largely focused on grade level equivalency scores on specific school-based instruments rather than on actual performance. Grade equivalencies are derived scores that, while useful at times, must be interpreted with caution; they do not mean that a student is performing at the grade level specified.¹⁴ Moreover, and although Student (like all students) exhibited strengths and weaknesses in academic skills at times, the results of standardized assessments of Student's achievement for the time period in question did not support these concerns. The preponderant evidence does not establish a denial of FAPE on procedural or substantive grounds during the 2017-18 school year.

The 2019-20 School Year

The District's proposed program for the 2019-20 school year, as finalized in August, must be evaluated based on information known to it at the time. By then, there were numerous RRs in addition to the IEE that identified weaknesses and needs and made recommendations. Taken as a whole, and without reiterating the entire content of the August 2019 IEP document, the 2019-20 proposed program clearly incorporated all available information and unquestionably was reasonably calculated to provide meaningful educational benefit in the least restrictive environment. Moreover, virtually every recommendation of the private neuropsychologist was included in the August 2019 IEP proposal, through annual goals and/or program modifications/items of specially designed instruction, with the exception of occupational and physical therapy for which permission to evaluate was

¹⁴ See, e.g., 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.

sought. Student would be in all co-taught content-area classes that permitted a lower student to teacher ratio, with ongoing counseling for, and monitoring of, emotional and mental health needs at a level comparable to that at the AES. Student would have hearing, emotional, and learning support with goals and related services to address all of Student's needs along with a host of program modifications and items of specially designed instruction, as well as individualized post-secondary transition planning.

Significantly, the provisions designed to enable Student to successfully transition back to the high school were comprehensive, detailed, and reflective of careful consideration of the Parents' and Student's concerns. The Parents' apprehensions with that return were palpable at the hearing and, in this hearing officer's view, were genuine and quite understandable from their perspective. Nevertheless, their subjective concerns cannot overcome the contrasting evidence in the record. In particular, the testimony of the experienced District professionals on the anticipated limited impact on peers of Student's return (*see, e.g.*, N.T. 133-35, 1292, 1409, 1411) was logical and quite convincing, and confirmed the appropriateness of the proposed IEP provisions that were the result of thoughtful planning and reflection by the team to address such apprehension. The evidence in this case simply does not establish that Student requires the extremely small setting that the AES provides, nor does it preponderantly defeat the District's August 2019 proposed program at its high school with the level and breadth of support explicitly offered.

The Parents point out that the August 2019 IEP lacked a baseline for the written expression goal. That IEP did add a provision for immediately obtaining a baseline since information on that one skill was not yet available; here, it is also important to consider that Student had been in an AES for more than a full school year that was focused on therapeutic intervention. In this case, with improvement in written expression an uncontested

weakness to be considered in light of Student's post-secondary transition goals, but not a documented deficit based on standardized testing, the absence of more precise measures of Student's performance in that single area simply cannot, standing alone, render the proposed IEP that is otherwise substantively appropriate fatally flawed. Similarly, the Parents' perceived faults with other IEP goals, that were unquestionably designed to address Student's known needs and, in this hearing officer's view, do so appropriately and adequately even without the mathematical precision that might equate to an ideal program, cannot be sustained.

Remedies

Compensatory Education

As a remedy for the claimed FAPE denial during the relevant time period while Student attended school in the District, the Parents seek compensatory education. Such is an appropriate form of relief where an LEA knows, or should know, that a child's special education program is not appropriate or that he or she is receiving only trivial educational benefit, and nonetheless fails to take steps to remedy deficiencies in the program. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). However, compensatory education is not appropriate where, as here, there was no denial of FAPE while Student was enrolled in the District during the relevant time period.

Tuition Reimbursement

The IDEA permits parents to unilaterally place their child in a private school and thereafter seek reimbursement for tuition from the LEA as a remedy. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). The test for this form of relief requires a determination both that the program offered by the LEA did not propose FAPE and that the parents' selected private program is

appropriate for the child. *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. Here, though, the District's proposed program for the 2019-20 school year was appropriate and this claim fails based on the first prong of the test, so there is no need to evaluate the remaining considerations pursuant to *Carter* and *Burlington*.

CONCLUSION

The District did not deny Student FAPE for the time period between June 2017 and April 2018; and, its proposed program for the 2019-20 school year was appropriate for Student. No remedy is warranted.

ORDER

AND NOW, this 31st day of January, 2020, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not deny Student FAPE during the 2017-18 school year.
2. The District's proposed program for Student for the 2019-20 school year was appropriate and did not deny Student FAPE.

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

Cathy A. Skidmore

Cathy A. Skidmore, M.Ed., J.D.
HEARING OFFICER
ODR File No. 22380-1819AS