

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: 19556 17 18

Child's Name: A. Z. **Date of Birth**U [redacted]

Dates of Hearing:
10/9/2017, 11/9/2017, 11/21/2017, and 12/8/2017

Parent:
[redacted]

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Hearing Officer: Cathy A. Skidmore, M.Ed., J.D. **Date of Decision:** 12/14/2017

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a mid-teenaged student residing in the Governor Mifflin School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student attended school in the District until the spring of 2015, after which time Student was enrolled in a private school for the 2015-16 and 2016-17 school years at District expense pursuant to a settlement agreement. The current dispute arose following the District's offer of a program with a return to its schools for the 2017-18 school year.

Student's guardians (hereafter Parents) filed a Due Process Complaint against the District under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ asserting that the program it offered for the 2017-18 school year was not appropriate. As remedies, the Parents sought reimbursement for tuition at the private school for that school year and other expenses. The District denied that its program was inappropriate for Student and contended that none of the Parents' claims warranted relief. The matter proceeded to a hearing convening over four sessions.⁴ Following review of the record including the parties' closing arguments, and for the reasons set forth below, the Parents' claims must be denied.

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

² 20 U.S.C. §§ 1400 – 1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).

³ 29 U.S.C. § 794.

⁴ The hearing officer acknowledges with appreciation the participation of the parties and their counsel in the Electronic Exhibit Pilot, and in the effective and efficient use of virtual hearing technology in two sessions. Citations to the record will be as follows: Notes of Testimony (N.T.); Parent Exhibits (P-) followed by the exhibit number; and School District Exhibits (S-) followed by the exhibit number. Citations to duplicative exhibits may not be to all. The term Parents is used in the plural when it appears that one or the other Parent was acting on behalf of both.

ISSUES

1. Whether the District's proposed program for the 2017-18 school year was appropriate for Student;
2. If the District's proposed program for the 2017-18 school year was not appropriate for Student, is the private school program appropriate;
3. If the District's proposed program for the 2017-18 school year was not appropriate and the private school program was and is appropriate, whether equitable considerations exist to reduce or deny tuition reimbursement; and
4. Whether the Parents are entitled to reimbursement for an Independent Educational Evaluation and for the testimony of their private evaluator at the hearing?

FINDINGS OF FACT

1. Student is a mid-teenaged resident of the District who is eligible for special education under the IDEA, and is a student with a disability under Section 504. (N.T. 35-36)
2. Student is attending a private school for the current 2017-18 school year, ninth grade. (N.T. 36)
3. Student has been diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) and is easily distracted and impulsive. Student also exhibits difficulty with some executive functioning skills. (N.T. 37-38, 58, 92-93, 155, 206)
4. Student does not exhibit auditory comprehension weaknesses. However, Student's attention deficit results in Student having difficulty with organizing information and responding to it. (N.T. 352, 417, 475; P-1, P-2, P-10, P-17, P-18 at 8)
5. Student needs to learn coping skills to succeed in environments that include distractions. (N.T. 394)
6. Student benefits from presentation of information both visually and auditorally. (P-1, P-10, P-20 at 17, 20 ¶ 1)
7. Student typically did not ask for help when attending the public school and resisted accommodations that caused Student to feel different from peers. Student lacked self-confidence and was concerned that Student was not capable of completing tasks on Student's own. (N.T. 52-54)

EARLY EDUCATIONAL HISTORY

8. Student began attending school in the District in kindergarten. The District evaluated Student in first grade (2009-10 school year) when concerns were raised about Student's inattention and level of activity in the classroom, and performance below grade level across all academic areas. Cognitive, achievement, and behavioral assessments were conducted. The District determined that Student was eligible for special education based on Other Health Impairment (OHI) due to characteristics consistent with ADHD. (N.T. 39, 349-50; P-1)
9. The Parents obtained a private neuropsychological evaluation in 2011. The results of that evaluation were consistent with that of the District's with respect to ADHD and that diagnosis was made. The private evaluator also diagnosed a Learning Disorder, Not Otherwise Specified associated with the ADHD symptoms, and recommended monitoring of Student's written expression skills and other areas of concern. (P-2)

2014-15 SCHOOL YEAR – SIXTH GRADE

10. During sixth grade, Student's last year attending school in the District, an IEP developed in December 2014 identified needs in the area of reading comprehension and for accommodations related to inattention and distractibility. Goals in the IEP related to reading comprehension of grade-level text and written expression. (P-9)
11. A number of program modifications and items of specially designed instruction were also included in the December 2014 IEP: direct, explicit, systematic instruction in reading and in writing; preferential seating; limited visual and other distractions; a highly structured environment with clear expectations; examples of expectations; clear and concise directions; frequent checks for comprehension; prompts for requesting clarification of directions; a self-monitoring checklist; presentation of information in a combined format (visual and auditory); positive reinforcement; and test and homework accommodations. (P-3)
12. The Parents approved the Notice of Recommended Educational Placement (NOREP) for itinerant learning support for reading and writing instruction based on that December 2014 IEP. (P-5)
13. A Functional Behavioral Assessment (FBA) in March 2015 identified two behaviors of concern: inattention to large group instruction and refusal of accommodations and other adult assistance. The hypothesis for the second behavior was to avoid negative peer attention. An updated Positive Behavior Support Plan (PBSP) addressed those two behaviors. (P-8, P-9)
14. The District evaluated Student again and issued a Reevaluation Report (RR) in March 2015. In addition to summarizing existing information, teacher input and current test performance was included. The Parents did not return the form for their input. (P-10)

15. Assessments were also conducted for the March 2015 RR.
 - a. The Woodcock-Johnson Tests of Cognitive Abilities – Fourth Edition reflected a General Intellectual Ability in the low average range (SS 84). That assessment revealed relative weaknesses in some fluid reasoning skills, short term working memory, auditory processing, and long-term retrieval; and a relative strength in cognitive processing speed. (P-10)
 - b. On the Woodcock-Johnson Tests of Oral Language – Fourth Edition, Student attained scores reflecting difficulties understanding directions and with sentence repetition and retrieval. (P-10)
 - c. On the Woodcock-Johnson Tests of Achievement – Fourth Edition (WJ-IV-ACH), Student earned scores in the average range on all subtests in the Reading Cluster; in the low to low average range on all subtests in the Writing Cluster; and in the low to low average range on all but one subtest in the Math Cluster (Number Matrices was in the average range). (P-10)
 - d. Assessment of neuropsychological development (NEPSY-II) yielded strengths and weaknesses, with deficits in attentional processing, shifting attention, and a number of executive functioning skills. (P-10)
 - e. On the Behavior Assessment System for Children – Second Edition (BASC-2), the Parents and three teachers completed rating scales. No clinically significant scores were revealed but at-risk concerns were noted for Anxiety (Parents), Attention Problems (one teacher), Learning Problems (one teacher), and Functional Communication (one teacher) as well as on the School Problems Composite (one teacher). (P-10)
 - f. Speech/language assessment did not reveal any concerns for intervention. (P-10)
16. The March 2015 RR concluded that Student remained eligible for special education with the primary classification of OHI and a secondary classification of Specific Learning Disability (SLD) in Mathematics Calculation. (P-10)
17. An Occupational Therapy (OT) evaluation obtained by the Parents in April 2015 provided a recommendation for increased sensory input to improve attention and a number of strategies to assist Student in the classroom. (P-11)
18. Student's IEP was revised in April 2015. That document identified needs for direct explicit instruction in reading comprehension, accommodations related to inattention and distractibility, and under-responsiveness to sensory input as revealed by the OT evaluation. Goals and short-term objectives in the IEP addressed reading comprehension of grade-level text, written expression, and mathematics problem solving. (P-12)
19. A number of program modifications and items of specially designed instruction were also included in the April 2015 IEP: direct, explicit, systematic instruction in reading, writing, and mathematics; preferential seating; limited visual and other distractions; a

highly structured environment with clear expectations; clear and concise directions; examples of expectations; frequent checks for comprehension; prompts for requesting clarification of directions, a self-monitoring checklist; presentation of information in a combined format (visual and auditory); models for multi-step problems; test and homework accommodations; use of a calculator except for computation assessments; use of an agenda book; graphic organizers and provision of complete notes; and a PBSP. In addition, the recommendations from the OT evaluation were also incorporated as program modifications/specially designed instruction: fidget items, bold visual cues, self-advocacy, repetition of directions, resistance activities, and the option to stand or use a dynamic seat. (P-12)

20. The District recommended a program of supplemental learning support in the April 2015 IEP for reading, writing, and mathematics, with consultative OT as a related service. (P-12; P-14)
21. By the time of the spring 2015 RR and IEP, the Parents were considering private schools for Student and toured them. They decided to send Student to the private school that Student attends today. (N.T. 74-75, 116)
22. In May and June 2015, the Parents and District executed a settlement agreement that provided for Student's attendance at a private school for the 2015-16 and 2016-17 school years at District expense. (N.T. 76, 112; P-16)
23. The settlement agreement also provided for the District to conduct a reevaluation of Student after January 1, 2017 (or upon Student's return to the District if before that date). (P-16)
24. The Parents believed that Student adjusted well to the private school and were pleased with Student's progress there over the 2015-16 and 2016-17 school years. (N.T. 78-83, 102-03, 108, 137, 173)

SPRING 2017

25. In January 2017, the Parents wrote a letter to the District administrator responsible for pupil services asking for a meeting to discuss options for Student for the 2017-18 school year. At the time, the Parents intended for, and conveyed their interest in, Student remaining at the private school. (N.T. 86-87, 118-19, 443; P-35 at 11)
26. The Parents also spoke with the District administrator responsible for pupil services, advising that they wanted Student to remain at the private school. The administrator explained the need to comply with the terms of the settlement agreement including conducting a reevaluation. (N.T. 88, 436-37, 446)
27. The District reevaluated Student in the spring of 2017 with the consent of the Parents, and issued another RR in May 2017. The RR included information from the Parents and teachers at the private school in addition to a comprehensive summary of educational records. (P-17; S-4)

28. Parent input into the May 2017 RR reflected their belief that Student had been very successful at the private school compared to exhibiting an inability to succeed in the public school setting. They also noted Student's dislike of school while at the District and opposite opinion attending the private school. (P-17 at 2)
29. For the May 2017 RR, Student's private school teachers reflected Student's good participation, positive attitude, and improvements in self-advocacy, but struggles with maintaining attention, impulsivity and distractibility, and following directions. Student benefitted from direct instruction, pre-teaching/rehearsal, regular review of materials, a multisensory approach to instruction especially using visual examples of information presented orally, structured supports such as for organization and notetaking, chunking of tasks and assessments, clear and repeated instructions, use of study guides and a calculator, audiobooks to support reading comprehension, use of checklists, and assistive technology. (N.T. 359-61; P-17 at 4-6)
30. The District school psychologist observed Student at the private school, and administered the assessments for the May 2017 RR on two other days. A speech/language assessment was conducted on yet another day. (N.T. 354-55, 361-62; P-17)
 - a. Administration of the Cognitive Assessment System – Second Edition (CAS-2) reflected a Full Scale Score of 85 at the 16th percentile at the low end of the average range. A relative strength on that measure was indicated for Attention but all scores were in the average range. The Reynolds Intellectual Assessment Scales – Second Edition yielded results that were interpreted with caution due to a significant discrepancy between verbal and nonverbal skill scores, but an average range Composite Intelligence Index (90) at the 25th percentile. (N.T. 362-71; P-17 at 8-13)
 - b. The Wechsler Individual Achievement Test – Third Edition was administered. Student attained scores in the average range on the Reading Composites and subtests with the exception of a high average score in Pseudoword Decoding and a low average score in Reading Comprehension. On the Written Expression Composite, Student's score was in the average range but with below average scores in Sentence Composition and Sentence Combining. The Oral Language Composite reflected scores in the below average (Oral Expression, Oral Word Fluency, and Sentence Repetition subtests) to average range on the various subtests with a low average score on the Composite. In Mathematics, Student's performance was in the average range on the Composite, but below average on the Mathematics Problem Solving, Math Fluency-Addition and Math Fluency-Subtraction subtests. Additional assessment using the KeyMath – Third Edition yielded below average scores on the Foundations of Problem Solving subtest. The RR summarized in detail Student's abilities and needs in Mathematics. (N.T. 371-77, 379-84; P-17 at 13-18)
 - c. Rating scales for the Third Edition of the BASC (BASC-3) completed by the Parents and four teachers at the private school reflected clinically significant concerns with Attention Problems (Parents) and at-risk concerns with Attention

(one teacher) and Anxiety (Parents). Some concerns with executive functioning were also noted by the Parents and all four teachers with variability across raters. (N.T. 384-86; P-17 at 20-22)

- d. Further assessment of executive functioning included consideration of the CAS-2 scores (all falling in the average range) and administration of the Behavior Rating Inventory of Executive Function (BRIEF) rating scales that indicated moderately to significantly elevated scores with respect to Inhibition, Shifting, Working Memory, Planning/Organizing, Monitoring, Initiating and Completing Tasks, and on the Global Executive Composite; elevated scores were reported for Behavioral Regulation and Metacognition Indices. (N.T. 386-87; P-17 at 10-11, 21-24)
 - e. Speech/language assessments reflected appropriate expressive and receptive language skills. (P-17 at 19-20, P-31)
31. The May 2017 RR concluded that Student remained eligible for special education based upon OHI and an SLD in reading comprehension, basic writing skills, and mathematics problem solving. (P-17 at 24-25)
 32. Needs identified in the May 2017 RR were for specific instruction in reading comprehension, basic writing skills, and mathematics problem solving; and accommodations to aid attention and level of activity. Additional suggestions were provided for the IEP team. (P-17 at 25-27)
 33. In June 2017, a meeting of Student's IEP team convened and the Parents participated in the discussion. The RR was reviewed at the start of the meeting and the Parents expressly disagreed with that evaluation. (N.T. 92, 477-79, 388-89, 491-92, 501, 511; S-9)
 34. Input from the Parents into the June 2017 IEP indicated that they were "nervous" to return Student to the District. During the meeting, they asked that Student return to the private school. (N.T. 491-92; P-18; S-11)
 35. A District high school special education teacher tested Student in order to provide baselines for the IEP goals. Student scored just below the 25th percentile on a high-school level reading fluency probe, and was instructional at the upper middle school level on a Qualitative Reading Inventory (QRI) word list. Student scored at the 25th percentile on a reading comprehension probe at Student's then-current grade level, eighth grade, and a QRI similarly reflected deficits in that area. In mathematics, Student demonstrated deficits in both computation and concepts and applications, particularly with respect to fractions. Student wrote a single run-on sentence independently without support. (N.T. 423-24, 464-75, 518, 521-22; P-18 at 6-8)
 36. There was no baseline for task initiation because a number of observations were necessary to obtain that baseline. (N.T. 476-77, 520, 533)
 37. The June 2017 IEP reflected input from Student with respect to post-secondary transition planning. (P-18, P-34 at 14-15; S-11)

38. Needs identified in the June 2017 IEP were for mathematics skills (fractions), reading comprehension, reading fluency, written expression (writing a paragraph independently), task initiation, testing accommodations, and attention/focus. (P-18; S-11)
39. The June 2017 IEP included transition services based on a post-secondary education goal of attending a four-year college and an employment goal of competitive employment. (P-18; S-11)
40. Annual goals in the June 2017 IEP addressed reading comprehension of grade level content materials, operations involving fractions, written expression (paragraph writing), and initiating academic tasks. The goals provided a means to measure Student's progress toward mastery. (P-18; S-11)
41. The June 2017 IEP provided for the following program modifications and items of specially designed instruction: test, assignment, and homework accommodations (including provision of study guides and examples for mathematics tests); direct instruction in reading, written expression, and mathematics, as well as task initiation; preferential seating; frequent checks for comprehension; prompts for requesting clarification of directions; opportunities for movement during class; prompts for attention; models or examples of expectations for work; repetition; check of Student's notes; preview of vocabulary; tools for highlighting information; provided notes; audio support; use of assistive technology for written assignments; graphic organizers and structured format for written assignments as well as supported editing; and co-taught Mathematics and English classes and a paraprofessional in the classroom for History and Science classes followed by a class period for review and completion of tests/assignments. There were also two provisions for Student to meet the teachers and tour the high school building before the start of school, and to consult with a technology instructor for District-supplied devices. (P-18; S-11)
42. The District proposed co-taught classes for mathematics, an Algebra class that is slower-paced than a regular Algebra class. That class would have two certified teachers, one a regular education teacher and one a special education teacher. (N.T. 95, 393-94, 402, 479-81, 522-25; P-18; S-11)
43. The District proposed co-taught classes for English with two certified teachers, one a regular education teacher and one a special education teacher. (N.T. 391-92, 394, 402, 485-87, 526-27; P-18; S-11)
44. The District proposed a paraprofessional in Student's history and science classes to monitor Student's attention, concentration, and focus, and to provide support in a study hall/review period. (N.T. 487-88; P-18; S-11)
45. There are approximately 350 students in the District's ninth grade. The ninth grade classes that Student would have attended in the District have approximately 25 students. (N.T. 96, 398, 460-61, 503-04, 526)
46. Student was not determined to be eligible for extended school year (ESY) services in the June 2017 IEP. (P-18; S-11)

47. The District recommended a program of itinerant learning support for reading comprehension, writing, and mathematics, as well as instruction in executive functioning skills in the June 2017 IEP and accompanying NOREP. The Parents responded by requesting another meeting. (P-18 at 29-30, P-19; S-12)

INDEPENDENT EDUCATIONAL EVALUATION

48. The Parents obtained an Independent Educational Evaluation (IEE) in June 2017. Input from the Parents and teachers at the private school was obtained and reported in the IEE, and all testing of Student was completed in a single day. (N.T. 99, 193, 240; P-20, P-21, P-22, P-23, P-24, P-25)
- f. Cognitive assessment in the IEE (Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V)) yielded a Full Scale IQ of 88 (21st percentile, low average range) and a General Ability Index score of 92 (30th percentile, average range) that was considered to be the better estimate of overall potential. The WISC-V results revealed patterns of strengths/weaknesses that were consistent compared to previous evaluations. (N.T. 202-03; P-20)
 - g. Academic achievement (WJ-IV-ACH) results for the IEE were consistent with previous assessments. Specifically, Student earned scores in the average range on all subtests in the Reading Cluster (with the exception of the Passage Comprehension score of 89, the upper end of the low average range); in the low to low average range on all subtests in the Writing Cluster with the exception of Spelling (average range) and Sentence Writing Fluency (very low range); and in the low to low average range on all but one subtest in the Math Cluster (Applied Problems was in the average range). (N.T. 204; P-20)
 - h. The IEE included information on Student’s varied post-secondary transition interests. (P-20)
 - i. Assessment of receptive and expressive vocabulary in the IEE resulted in low average range scores. (P-20)
 - j. Additional assessments of written expression skills reflected Student’s difficulty with conventions and overall writing skills. (P-20)
 - k. Attention and executive functioning assessed in the IEE revealed consistent concerns with attention and learning problems. (P-20)
 - l. Specific weaknesses as revealed by the IEE were for separating relevant from not relevant information; comprehending main ideas; maintaining concentration and attention; working memory; slow processing; written expression tasks; and organization. The conclusions in the IEE included special education eligibility based on OHI and SLD for reading comprehension and written expression. (P-20)

- m. The IEE provided a number of recommendations for specially designed instruction to address, among other things, working memory (provide “wait time”); reading comprehension (suggesting several programs and strategies); spelling and written expression (suggesting several programs/strategies); and assistive technology. (P-20)
 - n. The results of IEE testing overall was consistent with Student’s educational history and the District’s May 2017 RR. (N.T. 206, 214; P-20 at 26)
49. The private psychologist has not observed the District’s high school for over a year. Neither she nor anyone working for her observed Student at the private school in conducting the IEE. (N.T. 235-36, 250)
50. The IEE evaluator specifically recommended Student’s continued placement at the private school where Student has been successful. (P-20 at 37)

FINAL IEP

51. A second meeting convened in July 2017 after the Parents’ request in the June NOREP. The team also reviewed the IEE that the District had been provided. (N.T. 440, 492-94)
52. Revisions were made to the IEP at the July 2017 meeting based on recommendations in the IEE and discussion by the team. The Parents again asked that Student return to the private school. (N.T. 493-98; P-26; S-13)
53. New program modifications/items of specially designed instruction in the July 2017 IEP were weekly communications between home and school, “front loading” of Student’s schedule (major academics at the start of the school day), a reduced number of questions on tests, and a daily structured study hall staffed by special education teachers; direct instruction in written expression was also expanded to include exploration of technology to provide assistance with writing tasks. Student was determined to be eligible for ESY services in the form of twenty hours of tutoring for reading comprehension and written expression during the summer of 2018. (N.T. 158, 395-97, 496-97, 501-02, 527, 531; P-26; S-13, S-42)
54. The District proposed remediation in reading, writing, and mathematics skills as well as task initiation and study skills in the structured study hall at the end of the day. (N.T. 161-62, 429, 481-82, 488-91; S-42)
55. The revisions in the July 2017 IEP increased special education support to a supplemental level of learning support. The Parents rejected the NOREP accompanying the July 2017 IEP and indicated their request for a due process hearing. (P-26, P-27; S-13, S-14)

THE PRIVATE SCHOOL

56. The Parents enrolled Student in the private school for the 2017-18 school year. Student is in ninth grade, the first year of high school. (N.T. 36, 107, 340, 341; P-41)

57. The Parents transport Student to the private school for the 2017-18 school year. The mileage is approximately 41.5 miles one way by the fastest route. (N.T. 108, 110; P-42)
58. The private school specializes in educating children described as having learning differences in a college-preparatory curriculum. The focus is on the students learning about their own specific learning abilities and weaknesses and to advocate for their learning needs. (N.T. 291-92; P-36)
59. The teaching methodology at the private school is based on Orton-Gillingham and is a diagnostic-prescriptive approach that is multi-sensory. Instruction is systematic and includes pre-teaching and review, and provides positive reinforcement. (N.T. 293-94, 324; P-36)
60. The private school provides small class sizes (approximately eight to ten students) and 90-minute class periods. (N.T. 292-94, 298; P-36)
61. All teachers at the private school have been trained in the Orton-Gillingham methodology. (N.T. 295)
62. The teachers and administrators at the private school communicate regularly about students. (N.T. 295, 297-98, 303-04, 315-16, 332)
63. There is an advisory period each day at the private school where a student can go to the teachers of any classes where he or she has questions or needs extra help. (N.T. 320; P-38 at 1)
64. During the 2015-16 school year, Student earned final grades of B- or better in all classes: Earth and Space Science, Mathematics, English, Social Studies, Language Arts, and several special classes. Teachers reported on Student's improvement over the course of the school year with respect to focus and attention, class participation, and organizational skills, although Student continued to need prompting especially for attention and initiating tasks. (P-37)
65. During the 2016-17 school year, Student earned grades of B- or better in all classes: English, Health, Language Arts, Mathematics, Science, and Social Studies. Explicit instruction and a number of supports (such as directions provided orally and in writing, checks for understanding, multisensory instruction, planning/organization support, and review and repetition) were provided to Student throughout all classes. Some teachers reported on improvements with respect to self-confidence, written expression skills, class participation, and work completion, while others noted continued difficulties with focus and attention, collaborating with peers, and remaining on task. (P-38)
66. During the 2017-18 (current) school year, Student has classes in Language Arts, Philosophy, Art History, Physics, and Algebra. (P-40)

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. Nevertheless, application of this 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 a preponderance of the evidence in light of the applicable law.

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 recollection and/or expertise. The testimony of the District’s school psychologist was accorded significant weight, particularly with respect to Student’s lack of auditory comprehension deficits. The testimony of the Parents’ private psychologist, while certainly credible and knowledgeable with respect to the IEE, was accorded limited weight with respect to the issues presented in large part because she did not observe Student at the private school and had limited understanding of the District’s high school. Credibility is further discussed as necessary to address the issues below.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision. It should also be noted that, just prior to the oral closing arguments, counsel for the Parents provided two documents that had been referenced during the testimony. The documents had not been marked as exhibits nor offered for admission. The District's objection to those documents was taken under advisement and is hereby overruled for several reasons. First, again, the two documents were referenced during testimony. Second, the documents do help in understanding some of the Parents' concerns with the District's offered program. Third, both documents are available on the internet to the public.⁵ In any event, the documents were of little persuasive value as they represented nothing more than policy statements and/or personal beliefs that were not otherwise substantiated by research, and at least one was apparently controversial; moreover, these materials did not provide insight into Student's unique learning needs.

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 to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA.

⁵ See <http://www.nea.org/home/36073.htm> and <https://www.edweek.org/search.html> (last visited December 12, 2017).

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 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 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.” *Id.*, 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.” *Id.*, 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.

As *Andrew*, *Rowley*, 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 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); *Andrew*, *supra*. 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).

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).

Parents who believe that a public school is not providing or offering 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*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Id.*

GENERAL SECTION 504 PRINCIPLES

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood*, *supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005).

THE DISTRICT’S PROPOSED PROGRAM

The first issue is whether the District’s program was appropriate for Student. The IEP developed and finalized in July 2017 followed a comprehensive RR as well as consideration of the IEE. The July 2017 IEP contained annual goals that addressed Student’s needs for reading comprehension of grade level materials, mathematics operations involving fractions, written

expression (writing of paragraphs independently), and initiating academic tasks, with expectations for mastery. While perhaps the objective measurement of progress toward those goals could have been more detailed in the July IEP, they are appropriately ambitious aims in light of Student's unique learning profile and abilities as of July 2017 as well as Student's goals for the future.

The IEP further contained a host of program modifications and items of specially designed instruction that were directly responsive to Student's identified deficits in academic (reading comprehension, reading fluency, written expression, mathematics problems solving with fractions, and testing accommodations) and behavioral (inattention, distractibility, and task initiation) skills, with due consideration to recommendations in the IEE, to include homework accommodations; preferential seating; prompts for attention; checks for comprehension and understanding directions; opportunities for movement; models or examples of expectations; organizational support; and use of assistive technology and writing supports. Student was to be in co-taught classes in English and Mathematics, two areas in which Student exhibited academic weaknesses, where both a regular education and special education teacher would work together supporting a classroom of approximately 25 students. In two content area classes, a paraprofessional would be present to provide necessary support. Student would have a study hall period each day in addition to a period of structured remediation in reading, writing, mathematics, and study skills, areas where Student needed explicit instruction. A supplemental level of learning support was thus proposed.

The July 2017 IEP included present levels of academic achievement and functional performance that served to provide baselines, or starting points, for the annual goals, with the exception of the task initiation goal. Although the Parents contend that a goal limited to

fractions fails to address an Algebra curriculum, there is no requirement in the law, nor evidence in this record, that Student requires specially designed instruction in all aspects of Algebra; rather, Student requires specially designed instruction in order to master fractions. And, unlike in *Methacton School District v. D.W.*, 2017 U.S. Dist. LEXIS 166716 (E. D. Pa. October 6, 2017), on which the Parents rely, the District did not ignore Student's present levels and defer collection of all baseline data until Student returned to the District. In addition, the reasons proffered by the District for not having a baseline for one particular goal were logical and reasonable, and might require an FBA or similar tool to fully understand that need in the District environment. The July 2017 IEP further included transition programming that was based on Student's interests in attending a four-year college following graduation and obtaining competitive employment. In sum, the District's proposed July 2017 IEP was reasonably calculated to yield meaningful benefit to Student in light of Student's unique circumstances, and was therefore appropriate for Student.

THE PARENTS' ADDITIONAL CONCERNS

The Parents were clearly in favor of Student remaining at the private school when they contacted the District in January 2017, and are very disappointed that the District did not agree to maintain that placement beyond the terms of the parties' settlement agreement. Implicit in this concern is that their viewpoints were not seriously considered; and, they also emphasize one administrator's concession that he mentioned his global responsibility to the District in January 2017 that may have included a reference to fiscal considerations. However, he and the other District witnesses also testified, very forthrightly and persuasively, that they did not predetermine Student's return to the District. Just as importantly, the parties had agreed, and any special education professional could expect, that Student should be reevaluated prior to any

decisions for programming for the 2017-18 school year to allow for an understanding of Student's then-current abilities and needs to inform that decision. That is precisely what happened here.

While development of an IEP is expected to be a collaborative process, 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 cogently 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 very crucial is the IDEA obligation for eligible students to be educated in the "least restrictive environment" (LRE) that permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *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). 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 the LRE factor, “[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 deliberate on placement in a regular education setting before proceeding to consider more restrictive environments, including the private school that Student attended. The record evidence is also preponderant that the Parents were full participants in the process of developing an educational program for Student for the 2017-18 school year, and that the IEP team met its various obligations in determining placement. Accordingly, the District committed no procedural FAPE violation.

The Parents did also appear to be concerned about the amount of time Student would spend in special education during the 2017-18 school year in the District (N.T. 527-28, 534). However, the percentage calculated for PennData statistical reporting purposes does not necessarily equate to the level of support provided to a student. Special education can take countless forms and be provided in a variety of settings, including push-in support, and such services often cannot be captured by the PennData page of the IEP. As PDE explains on its model annotated IEP form, “Educational environment reporting is not an indication of the amount of special education service a student with a disability receives.”⁶ Thus, the information on the PennData page of Student’s IEPs is not controlling.

⁶ As PDE explains on its annotated IEP form, “Educational environment reporting is not an indication of the amount of special education service a student with a disability receives.” Individualized Education Program (IEP) School Age Annotated at 47, available at http://www.pattan.net/category/Legal/Forms/Browse/Single/?id=53566e428b03327c2a8b4569&bor=ag=School%20Age**l=English (last visited December 12, 2017).

The Parents further expressed worry that the 2017-18 proposed program is essentially the same as that for sixth grade that they considered to be ineffective. As described above, however, the District's proposed IEP for the 2017-18 school year was directly and appropriately responsive to Student's needs. In addition, a comparison of the 2014-15 and 2017-18 IEPs reveal numerous significant programming differences. Moreover, despite the Parents' perception that the proposed and implemented sixth grade programs were inappropriate for Student, the issue of whether the District provided FAPE to Student during the 2014-15 school year was not presented in this case. Importantly, the mere fact that the parties entered into a settlement agreement at the conclusion of that school year does not, in and of itself, prove anything about the program implemented or proposed during that 2014-15 school year.

The Parents additionally appeared to challenge the District's development and presentation of a draft IEP at the meetings they attended in June and July 2017. The IDEA and its implementing regulations do not preclude development of a draft IEP. The Parents do not assert that they were prevented from providing input into and participating in the development of the finalized IEP, or engaging in discussions regarding its content or the location of services. There is also no suggestion that the draft IEP presented to them in June 2017 prematurely included a recommendation for the placement of the child, a decision that is specifically granted to the entire IEP team including the Parents.

The overarching theme of the Parents' claims is their belief Student has been successful at the private school and they do not want to tamper with what they consider to be working. They point to the small class sizes at the private school as necessary to ensure Student's attention, focus, and concentration, and positive comments by teachers on gains that Student has been making. Their heartfelt and undeniably genuine wish for Student to continue in a

placement where Student has apparently made some progress is wholly understandable. As noted above, however, a school district is not required to provide the “best” program, but only one that is appropriate in light of a child’s unique circumstances. *Andrew F., supra; Ridley, supra; Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989) (observing that the law demands “provision of an education that is ‘appropriate,’ not one that provides everything that might be thought desirable by “loving parents.”)(Citations omitted.) It is also very evident that Student continues to demonstrate not insignificant difficulties with attention and concentration in the small classes at the private school (P-21, P-22, P-23, P-24, P-25), strongly suggesting that limiting Student to educational environments with only a few peers has not necessarily been effective. Thus, the Parents’ reliance on *J.C. v. Katonah-Lewisboro School District*, 690 Fed. App’x 53 (2d Cir. 2017), is unavailing.

In sum, this hearing officer is compelled to conclude that the preponderance of the evidence favors the District, and that its proposed program as of July 2017 met the standards for FAPE for Student under both the IDEA and Section 504. As such, there is no need to discuss whether the private school is appropriate or any equitable considerations.

IEE REIMBURSEMENT

The next issue is whether the Parents should be reimbursed for the IEE they obtained in the summer of 2017. 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 District denied the IEE on the basis of the terms of settlement agreement, so the Parents sought reimbursement after the fact in this

hearing. In such a circumstance, the analysis of the appropriateness of the District’s evaluation is essentially the same. 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 May 2017 RR 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 to enable the IEP team to understand Students’ needs and develop a program to address them. In addition, the results of the IEE were wholly consistent with other evaluations over time, including the District’s May 2017 RR, even according to the private psychologist who conducted the IEE (N.T. 202, 204, 206, 209, 214). Furthermore, the IEE did not include an observation of Student at the private school in support of its recommendation for Student to remain there, and it therefore lacked sufficient evidentiary support for that conclusion. Simply put, there is no basis to order reimbursement to the Parents for that private evaluation.

The final issue is the Parents’ request for reimbursement for the fees incurred by them for their private psychologist, who was qualified as an expert, to testify at the hearing. However, the basis for this requested remedy is Section 504, which provides in relevant part that, “*the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs.*” 42 U.S.C. § 2000e-5(k)(emphasis added). Similar language in the IDEA has been construed as not applying to administrative hearing officers. *B. ex rel. M.B. v. East Granby Board of Education*, 201 Fed. Appx. 834, 837, 2006 U.S. App. LEXIS 27014, *6 (2d Cir. 2006)(concluding that an attorney fee award “is a district court function” under 20 U.S.C. § 1415(i)(3)(B), which provides district courts with discretion to “award reasonable attorneys’ fees as part of the costs to the parents of a child with a disability who is the prevailing party”). Accordingly, this hearing officer declines to order that remedy.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District's proposed program for the 2017-18 school year was appropriate for Student, and that the Parents have not established a basis for their claims for relief.

ORDER

AND NOW, this 14th day of December, 2017 in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's proposed program for the 2017-18 school year met its obligations to offer a free, appropriate public education to Student.
2. The Parents are not entitled to reimbursement for the IEE or expert witness fees.
3. The District is not ordered to take any action.

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
19556-1718AS